



REPLY TO:
 2535 Capitol Oaks Dr., Suite 450
 Sacramento, CA 95833
 Tel. 916-963-9965

July 7, 2026

VIA HAND DELIVERY & EMAIL

City Clerk of the City of Hayward
 777 B Street, First Floor
 Hayward, CA 94541-5007
cityclerk@hayward-ca.gov
Miriam.Lens@hayward-ca.gov

Derek Pham, PE
Derek.Pham@hayward-ca.gov

RE: BID PROTEST by SubTerra Construction, Inc.
 City of Hayward - FY24 Sewer Line Replacement Project
 Project No. 07789

To Whom It May Concern:

This office was retained to represent SubTerra Construction, Inc., (hereinafter “SubTerra”) in its Protest of the award of Project No. 07789 to JDB & Sons Construction, Inc., CSLB Number 876159 (hereinafter “JDB”) because JDB’s bid was not timely submitted in conformity with the Notice to Contractors (NTC). **(Exhibit A)**

SubTerra is a contractor that submitted a timely, responsive, and responsible bid to the City of Hayward for work on the above-referenced Project. SubTerra was informed that it is the second lowest bidder behind JDB who submitted a late bid package as will be set forth below.

SubTerra requests that its bid protest be affirmed and that JDB’s bid be found non-responsive and untimely pursuant to Public Contract Code § 4104.5(a). Once JDB’s bid is found non-responsive, SubTerra requests that its bid be accepted as the lowest responsible and responsive bid for this project.

I. STATEMENT OF FACTS

The NTC requires that “SEALED proposals will be received at the office of the City Clerk, First Floor, 777 “B” Street, Hayward, California 94541-5007, **until 2:00 p.m. on TUESDAY, June 30, 2026**, at which time they will be publicly opened and read aloud in the Rotunda, First Floor, of said building, for construction in accordance with the project plans and specifications to which special reference is made ...” (emphasis added)

The language “**until 2:00 pm**” means the action must be completed before 2:00:00 p.m., or it is legally late. (Black’s Law Dictionary, Fifth Edition 1979, p. 1380 [Up to time of. A word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is to fix some occurrence of which what precedes will cease to exist.]) In other words, the phrase “until” excludes the exact time mentioned in the document, unless the clear intention

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SAN FRANCISCO OFFICE
 1990 N. California Blvd., Suite 800
 Walnut Creek, CA 94596
 Tel. 650-844-5200

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of the parties indicates otherwise. Here, the deadline was 2:00 p.m., and anything submitted after that exact time is late.

If the term was “**by** 2:00 pm”, that means before 2:01 p.m.. In legal terms, “by” incorporates the time specified. If a bid is received at 2:01 p.m., it is considered late and will likely be dismissed as untimely.

SubTerra personnel, including the undersigned Andrew Chung, were present at the bid opening on June 30, 2026.

At 2:00 p.m., the City Clerk announced that it was “now 2:00 p.m.” By announcing that it was 2:00 p.m., the City Clerk effectively stated that bidding is now closed because 2:00 p.m., was reached. But then the City Clerk decided to wait to accept bids even though the strict deadline in the NTC was reached.

JDB & Sons Construction, Inc., which ultimately had the lowest bid, hand delivered its bid package approximately 40 seconds after the City Clerk announced that it was “now 2:00 p.m.”

Instead of returning JDB’s bid unopened as required by Public Contract Code § 4104.5(a), the City Clerk added it to the rest of the bids and read the contents for the bid price last (in the order it was received). This happened at approximately 2:05 p.m.

The bid results for the project were as follows (contractor names have been shortened):

JDB & Sons Construction, Inc.	\$10,229,360
SubTerra Construction, inc.	\$10,876,289
Cratus, Inc.	\$11,241,389
Glossage Engineering, Inc.	\$11,752,917
KJ Woods Construction, Inc.	\$12,238,000
Ranger Pipelines, inc.	\$13,867,015
Precision Engineering	\$19,912,000

Had the City Clerk returned JDB’s bid package as required by Public Contract Code § 4104.5(a), SubTerra would have been the lowest responsible bidder entitled to be awarded the Contract.

As a result of the activities at the bid opening, SubTerra was the second lowest bidder due to the City’s acceptance of JDB’s late bid package.

II. ARGUMENTS

A. Responsible Bidders, and Responsive Bids

There typically are two general grounds for protesting a bid: (1) The bidder is not a “responsible” contractor, and (2) The bid is not “responsive” to the Invitation for Bids or Instructions to Bidders, or the job specifications.

Let’s clarify the terms responsive and responsible. California courts provide a good definition of the difference between responsive and responsible. The court stated, “a bid is

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‘responsive’ if it promises to do what the bidding instructions demand; a bidder is ‘responsible’ if it can perform the contract as promised.” (emphasis added) (*Taylor Bus Services, Inc. v. San Diego Board of Education* (1987) 195 Cal.App.3d 1331)

A bid is “non-responsive”, for example, when the bid form is not completely filled out and signed, as required by the Instructions to Bidders, or where there are other errors or omissions on the Bid Forms, such as timely submission.

A responsible bidder is defined as a bidder who has demonstrated the attributes of trustworthiness as well as quality, fitness, capacity, and experience to satisfactorily perform a public works project. (Public Contract Code § 1103)

The issues in this protest relate to the responsiveness of JDB’s bid that requires delivery by a specific time, not whether JDB is a responsible bidder. To be responsive, the bid must follow the NTC **exactly**.

Nothing is shown that SubTerra’s bid was not responsive or not responsible. SubTerra is a proper party to Protest. Here, however, JDB’s bid was not responsive because it was submitted late.

B. The JDB Bid Was Not Responsive Because it was Untimely

The most common grounds for a protest, and the easiest to demonstrate, is a defect in a bid that makes it non-responsive. A simple comparison of the bid to the requirements in the bidding documents demonstrates most responsiveness problems. Here, JDB’s bid was not submitted by the bid deadline. The City should have returned JDB’s bid unopened.

In California, construction bids must be submitted strictly on time to be considered valid. The legislature has declared some bid defects to be fatal flaws. For example, statutes barring agencies from even opening late bids necessarily make tardiness a fatal flaw. (Public Contract Code § 4104.5 [Subsection a – “**Any bids received after the time specified in the notice** or any extension due to material changes **shall be returned unopened.**”])

Accepting a late bid violates the fundamental purpose of public competitive bidding, which is to ensure a level playing field, guard against favoritism, and prevent fraud. (See generally Public Contract Code § 100)

The City has the discretion to reject the low bidder if they find the bid non-responsive, or the contractor not responsible. (*Raymond v. Fresno City Unified Sch. District* (1954) 123 Cal.App.2d 626) A late bid (not already barred by a statute) is an example that usually meets both tests. Subcontractors and suppliers typically submit price cuts until seconds before the bid deadline (*Saliba-Kringlen Corp v. Allen Engineering Co.* (1971) 15 Cal. App. 3d 95, 99). Tardiness in submitting a bid allows a bidder to receive and use later last-minute cuts; that gives the bidder an advantage not allowed to bidders who timely submitted their bids. Using those late cuts also likely affects the amount of the bid.

Here, JDB submitted its bid approximately 40 seconds late, after the City Clerk already announced that it was “now 2:00 p.m.” The City Clerk effectively stated that bidding period is closed because 2:00 p.m., was reached.

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The NTC is very specific that bidding is open “**until 2:00 p.m.**” on TUESDAY, June 30, 2026. “Until 2:00 PM” means up to the specific hour of 14:00 (2:00 post meridiem). In short, that activity, condition, or deadline remains in effect or valid continuously from a prior point in time up until exactly 2:00 PM.

Accepting JDB’s bid after 2:00 p.m., was improper and a material violation of the competitive bidding process. Thus, even though the City opened JDB’s bid, by it being late, it was “non-responsive,” meaning the City lacks the authority to legally award JDB the contract.

The City should find that JDB’s bid is non-responsive because it was not submitted by the exact 2:00 p.m., deadline.

III. CONCLUSION

Based on the foregoing, SubTerra requests that its bid protest be affirmed and that JDB’s bid be found non-responsive and untimely. Once JDB’s bid is found non-responsive, SubTerra requests that its bid be accepted as the lowest responsible and responsive bid for this project.

Sincerely,



RONALD L. CARELLO

cc: SubTerra Construction, Inc. (Attn: Andrew Chung) (achung@subterraconstruction.com)
JDB & Sons Construction, Inc. (Attn: James Anthony Burke) (admin@jdb-construction.com; info@jdb-construction.com)

Enclosures as noted.

RLC:jp

VERIFICATION

I, Andrew Chung, am an authorized representative for SubTerra Construction, Inc. I have read the foregoing Bid Protest and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe them to be true.



ANDREW CHUNG, Chief Financial Officer

EXHIBIT A

CITY OF HAYWARD
DEPARTMENT OF PUBLIC WORKS

NOTICE TO CONTRACTORS

SEALED proposals will be received at the office of the City Clerk, First Floor, 777 "B" Street, Hayward, California 94541-5007, until 2:00 p.m. on **TUESDAY, June 30, 2026**, at which time they will be publicly opened and read aloud in the Rotunda, First Floor, of said building, for construction in accordance with the project plans and specifications to which special reference is made, as follows:

Title: FY24 Sewer Line Replacement Project

Project No. 07789

Project Description:

The work includes, in general, the furnishing of labor, materials, and equipment for the construction of new sanitary sewer lines in the City, including, but not limited to replacing existing sewer pipes with approximately 10,837 linear feet of new pipes by open cut; approximately 4,236 linear feet new pipes by pipe bursting; and rehabilitating approximately 9,668 linear feet of existing pipes by cured in place pipe (CIPP); restoring and reconnecting all affected sanitary sewer service lines (laterals); installing new, abandoning, modifying, and replacing sewer manholes.

The work also includes cleaning and video inspection of sanitary sewer pipes, wastewater flow control and bypass pumping, dewatering, shoring, traffic control, utility locating, potholing, public notification, restoration of public and private surface improvements (including but not limited to pavement, sidewalk, curb and gutter, fences, and landscaping), and all incidental items not mentioned above, but are required by the Contract Drawings, Standard Specifications, Technical Specifications, or these Special Provisions.

The Engineer's estimated cost of construction is **\$14,530,000**.

The work is to be completed within **TWO HUNDRED AND SIXTY (260)** working days.

The Contractor shall pay to the City of Hayward the sum of **\$1,000.00** per day in excess of the number of working days prescribed above, for each and every calendar day's delay in finishing the work. See details in the Special Provisions.

At the time this contract is awarded, the Contractor shall possess either a **Class A or C-34 license**.

When the Engineer's estimated cost of construction is greater than \$1,000,000, the contract is subject to the Community Workforce Agreement approved by the Hayward City Council on June 24, 2025. The successful bidder and all subcontractors, at any tier, will be required to sign an Agreement to be Bound which can be found in Exhibit F in the Special Provisions as a condition precedent to entering into any contract for this project.

Pursuant to Section 1770 of the Labor Code, the Director of the Department of Industrial Relations has ascertained the general prevailing rate of per diem wages applicable to the work to be performed, which rates are filed in the office of the Engineer, and copies of which are available to any interested parties on request.

In accordance with Labor Code Section 1771.1, a contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, or engage in the performance of any contract for public work unless currently registered with the State Department of Industrial Relations and qualified to perform public work pursuant to Labor Code Section 1725.5. Section 1771.1 applies to any bid proposal submitted on or after March 1, 2015 and/or any contract for public work entered into on or after April 1, 2015.

Job Site Notices. Contractor shall post a Job Site Notice for this project pursuant to Title 8 California Code of Regulations Section 16451.

A bid submitted by any Contractor who is not licensed to engage in business or act in the capacity of a Contractor shall be considered non-responsive and shall be rejected, except for those exceptions governed by Section 7028.15 of the Business and Professions Code.

The City of Hayward hereby notifies all bidders that bidders will not be discriminated against on the grounds of race, color, religion, national origin, ancestry, place of birth, sex, sexual orientation, age, or disability in consideration for an award.

A pre-bid conference will be held on **Thursday, June 04, 2026 at 10:00 A.M.** via Microsoft Teams Meeting (visit BidNet Direct at www.bidnetdirect.com for meeting link or call-in phone number). The purpose of this conference is to answer Contractor's questions regarding the project requirements. Attending this conference is not a condition of submitting a bid, but prospective bidders are encouraged to attend.

Prior to and as a condition of submitting a Bid, Bidder must carefully examine the nature, extent, and location(s) of Work to be performed, verify actual conditions and as-built conditions. Failure for Bidder to conduct a site visit prior to submitting a bid will not be considered in change orders or claims. Bidders are required to submit any questions online via BidNet Direct no later than **June 22, 2026 BY 4:00 P.M.** Only written inquiries will be permitted. Only questions answered by Addenda will be binding. Oral and other interpretations or clarifications will be without legal effect.

Each bid must be accompanied by certified or cashier's check, or bidder's bond duly executed by a responsible corporate surety authorized to issue such bonds in the State of California, made payable to the City of Hayward for an amount equal to at least ten (10) percent of the amount bid.

The successful bidder shall furnish a Labor and Materials Bond and a Faithful Performance Bond. Each bond shall be for 110% of the bid amount.

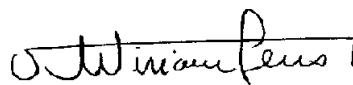
Bidder's attention is directed to Section 6-1, "City of Hayward Non-Discriminatory Employment Practices Provision," of the Special Provisions.

The Contractor may elect to receive 100 percent of payments due under the contract from time to time, without retention of any portion of the payment by the City, by depositing securities of equivalent value with the City in accordance with the provisions of Sections 22300 of the Public Contract Code. All expenses of such substitute deposit shall be borne by the Contractor. Securities eligible for investment under the section shall include those listed in Section 16430 of the California Government Code or certificates of deposit of a bank or savings and loan association. The Contractor shall be the beneficial owner of any securities substituted for monies withheld and shall receive any interest thereon. Such securities, if deposited by the Contractor, shall be valued by the City's Finance Director (Treasurer), whose decision on valuation of the securities shall be final.

Alternatively, upon the Contractor's request, the City will make payment of retentions earned directly to the escrow agent. The Contractor may direct the investment of the payments into securities, and the Contractor shall receive the interest earned on the investments upon the same terms provided for securities deposited by the Contractor. Upon satisfactory completion of the contract, the Contractor shall receive from the escrow agent all securities, interest and payments received by the escrow agent from the City, pursuant to the terms in Section 22300 of the Public Contract Code.

Prospective bidders and interested parties may download copies of the bid documents, related attachments and all future communication and correspondences regarding this bid process from BidNet Direct at www.bidnetdirect.com. The City's current advertised projects on BidNet Direct can be accessed, and bid documents downloaded for FREE, through the City's website at <https://www.hayward-ca.gov/business/doing-business-with-hayward/bidding-construction>. The City of Hayward will not be a distribution point for the bid documents. The bid documents may also be reviewed at the various builders exchanges and construction service offices throughout the San Francisco Bay Area.

Project Addendum notifications will be issued through BidNet Direct at www.bidnetdirect.com. BidNet Direct will email notifications to all plan holders.

A handwritten signature in black ink, appearing to read "Miriam Lens", written over a horizontal line.

MIRIAM LENS – City Clerk