

CITY OF VENTURA

CITY COUNCIL AGENDA

Supplemental Information Packet

**Public Communications and Agenda Related Items
Received by 4 p.m., January 22, 2021.**

Meeting of January 25, 2021

Supplemental Information:

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available in the City Clerk's Office, 501 Poli Street, Room 204, Ventura, during normal business hours as well as on the City's Website – www.cityofventura.ca.gov
<https://www.cityofventura.ca.gov/1236/City-Council-Public-Hearing-NoticesSuppl>

AGENDA ITEM
9J

Date: January 22, 2021

Council Action Date: January 25, 2021

TO: Honorable Mayor and City Council**FROM:** Alex D. McIntyre, City Manager
Phillip L. Nelson, Public Works Director**SUBJECT: Reschedule Agenda Item 9J - Award the Public Works Contract to Staples Construction for the Emergency Generators Project**

Staff requests to reschedule item 9J from the City Council Meeting on January 25, 2021 to the City Council Meeting on February 8, 2021. The City has received a bid protest from bid protest letter from SMTD Law LLP on behalf of EverLevel LLC, the second apparent low bidder on subject project (Attachment A). Staff requires more time to resolve the protest before bringing this item to Council for action.

Prepared by: Phil Nelson, Public Works Director

ATTACHMENTS

- A Bid Protest Letter from SMTD Law LLP on behalf of EverLevel LLC dated January 12, 2021

Tracy Oehler

From: noreply@cityofventura.ca.gov
Sent: Thursday, January 21, 2021 4:07 PM
To: City Clerk
Subject: -EXT- Online Form Submittal: Public Comment Form

Public Comment Form

Disclosure:

Providing your name/contact information is optional to participate in a Public Meeting. However by providing, it will allow staff to follow-up with you on your item. All emails submitted to any Legislative Body are Public Records. Copies of forms submitted are posted online, with name and contact information redacted. You may only submit one comment form per agenda item. You may submit more than one form per agenda to address additional topics.

Submission Deadlines:

Submit your Comment Form at least 2 hours prior to the scheduled/posted start time of the meeting, as stated on the posted Agenda. If submitting a comment during a meeting, please submit before the Agenda Item concludes, during a Live Meeting, to be considered part of the record. Select the Legislative/Hearing Body below to ensure your comment is emailed to the correct body.

Name	Gunnar Lee-Miller
Address	52 E Harriet St
Phone Number	626-560-7910
Email Address	gunnar@everlevelcorp.com
Select Legislative/Hearing Body	City Council
Meeting Date	1/25/2021
Select a Topic:	Agenda Item Number/Topic
Agenda Item Number/Topic	Consent Item 9J
Recommendation	Against Recommendation
Written Comments	A protest has been lodged against Staples Construction being awarded this contract. The protest was lodged correctly and acknowledged by Public Works Department, Design & Construction Mgr Ernie Ferrer. The protest has not been adjudicated and this it is improper to award the contract until

the formal protest has been resolved. Staples Construction submitted a non-responsive bid.

Upload Files

[2021.01.12 serv EverLevel Bid Protest to City.pdf](#)

Email not displaying correctly? [View it in your browser.](#)

CAUTION: This email originated from outside the City of Ventura. Exercise caution when opening attachments or clicking links, especially from unknown senders.



SMTD LAW LLP

SALAMIRAD • MORROW • TIMPANE • DUNN

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Irvine, CA 92614
(949) 537-3800
(949) 537-3822 (f)

January 12, 2021

VIA FEDEX 7726 0914 4725

William Trax, EIT
Associate Engineer
CITY OF SAN BUENAVENTURA
501 Poli Street, Room 120
Ventura, CA 93002

**Re: EverLevel Holdings LLC's Bid Protest For The Emergency Generators
Specification No. 2019-048 Project**

Dear Mr. Trax:

This firm represents EverLevel Holding LLC ("EverLevel"), the lowest responsive and responsible bidder on the Emergency Generators Specification No. 2019-048 Project ("Project") for the City of San Buenaventura ("City"). In accordance with the Contract Documents and the City of San Buenaventura Public Works Construction Contract Bid Protest Procedures ("Protest Procedures"), this letter is EverLevel's formal protest of the bid proposal of the apparent low bidder, Staples Construction Company, Inc. ("Staples"). (See Contract Documents, Instructions for Bidders, p. 6.) This protest is submitted within seven days of the City's announcement that it had rescinded its previous determination that the Staples bid was non-responsive. (See Protest Procedures, §§ 1-2.¹)

This protest is submitted on behalf of:

EverLevel Holding LLC
52 East Harriet Street
Altadena, CA 91011
(951) 966-9153

Please address all future correspondence regarding this bid protest to:

SMTD Law LLP
Christopher Morrow (949) 537-3809
Josh Hardy (949) 537-3814
17901 Von Karman Avenue, Suite 500, Irvine, CA 92651
cm@smtdlaw.com; jhardy@smtdlaw.com

¹ The Protest Procedures do not include a deadline to submit a bid protest after the City has overturned its non-responsive determination. (See Protest Procedures, § 1 [explaining that "these bid protest procedures shall not apply with respect to any bidder protesting a bid that the City intends to reject anyways"].)

The City initially correctly determined that Staples failed to comply with the Contract Documents in submitting its bid. At the bid opening on December 10, 2020, Ernie Ferrer, Design & Construction Division Manager, declared Staples Construction's bid as non-responsive because it did not include a signed copy of Addendum No. 1. When the City published the bid results on December 11, 2020, it listed the Staples bid as non-responsive. On January 8, 2021, however, the City notified EverLevel that it decided to accept the incomplete and non-responsive bid from Staples even though it did not include a signed copy of Addendum No. 1 as required, apparently on the grounds that the City had the discretion to waive mandatory requirements of the Contract Documents.

EverLevel disagrees with the City's revised interpretation of the Contract Documents and requests that the City reject Staples's bid and award the Project contract to EverLevel, the lowest responsive and responsible bidder. EverLevel submits this protest on the grounds that (1) Staples failed to comply with the mandatory bid instructions requiring bidders to sign Addendum No. 1 and include a copy with their bid, and (2) that Staples gained a material advantage over the other bidders because its bid includes errors that would have allowed it to withdraw its bid without penalty.

In accordance with the requirements of the Protest Procedures in the Contract Documents, this letter is intended to be:

1. A protest against any award of the contract to a bidder other than EverLevel.
2. A request for copies of all correspondence between the City and Staples regarding Staples's bid on the Project.
3. A request for a meeting with the City Engineer, (Protest Procedures, § VII-a), and a request to address the City before or during consideration of any issues pertaining to the award of that contract, which opportunity is guaranteed by Government Code section 54954.3, subdivision (a).
4. A request under Government Code section 54954.1 for written notice of all meetings of the City at which any issues pertaining to the award of that contract are on the agenda for the meeting. If there is any fee for this service, please telephone that information to us immediately, so we can promptly pay the fee.
5. A request to be informed (by telephone or fax) as soon as any staff reports or recommendations concerning any issues pertaining to the award of that contract are available to the public, so we can immediately inspect those reports or recommendations.

If this letter is not sufficient to accomplish any of these purposes, please let us know immediately what else is required, so we can comply. If we do not hear from you, we will proceed on the basis that this letter is sufficient.

I. THE CITY CANNOT AWARD TO PROJECT TO A CONTRACTOR THAT DID NOT SUBMIT A RESPONSIVE BID.

The potential for abuse in the letting of public contracts requires close judicial scrutiny. (*Schram Construction, Inc. v. Regents of University of California* (2010) 187 Cal.App.4th 1040, 1052.) California law mandates that a public entity must competitively bid public works contracts and award the contract to the lowest responsible bidder that submits a responsive bid. (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 368.) These requirements are strictly enforced to protect taxpayers by inviting competition, which helps “guard against favoritism, improvidence, extravagance, fraud and corruption,” and serves “to secure the best work or supplies at the lowest price practicable.” (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173.) When evaluating a bid, a public entity must follow the requirements of the Public Contract Code and any additional requirements it mandates in the bid documents. (*Pozar v. Department of Transp.* (1983) 145 Cal.App.3d 269.)

To be responsive, a bid must conform to the material terms of the bid documents. (*City of Inglewood v. Los Angeles County Civic Center Authority*, (1972) 7 Cal.3d 861, 867; *Konica Business Machines v. Regents of the University of California* (1988) 206 Cal.App.3d 449, 456-57; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1180.) Whether a bid is responsive typically is “determined from the face of the bid without outside investigation or information.” (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1438.) A public entity may only waive minor or inconsequential irregularities in a bid, and bids that differ materially from the bid specifications must be rejected. (*Stimson v. Hanley* (1907) 151 Cal. 379; *Ghilotti Construction Co. v. Richmond* (1996) 45 Cal. App. 4th 897, 904.) Typically, the material terms of a bid are those that affect price, quantity, quality, or delivery, along with those terms that the bid package clearly identifies as mandatory, and these terms may not be waived. (*Konica Business Machines v. Regents of the University of California* (1988) 206 Cal.App.3d 449, 454-45.)

A bid fails to comply with the bid package if it gives the bidder an unfair competitive advantage over other bidders. (*Ghilotti Construction Company v. City of Richmond*, (1996) 45 Cal.App.4th 897, 904; *Konica Business Machines v. Regents of the University of California* (1988) 206 Cal.App.3d 449, 456-57; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1180-81.) Notably, unfair advantages include those errors and omissions which would allow a contractor to withdraw its bid without forfeiting its bid bond or other penalty. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1442.) These errors include the kinds of mistakes “made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans and specifications” that allows a bidder to withdraw its bid without penalty. (Pub. Cont. Code, § 5103, subd. (d).) By allowing a contractor to withdraw its bid without penalty, such errors confer a material advantage to bidders and therefore public entities must reject any

such bid that is not withdrawn voluntarily. (*Valley Crest Landscape, Inc. v. City Council*, (1996) 41 Cal.App.4th 1432, 1442.)

EverLevel is informed and believes that Staples argued that that the City could waive its failure to submit a signed copy of Addendum No. 1 because Addendum No. 1 says that “[f]ailure to do so may result in the disqualification of your proposal,” not that it must. This argument depends on isolating a single sentence and giving it preference over the rest of the Contract Documents as well as California’s public works bidding requirements. As will be discussed in greater detail below, Staples’s bid is non-responsive. Staples submitted an incomplete bid, one that omitted the signed copy of Addendum No. 1 required by the Contract Documents.

There is no valid argument Staples can make to excuse its fatal error. If Staples argues that its failure to comply with the mandatory requirements of the Contract Documents resulted from its carelessness in reviewing the Contract Documents, then Staples failed to comply with these mandatory requirements and its bid must be rejected as non-responsive. If Staples argues that its failure to comply with the mandatory requirements of the Contract Documents was somehow just an inadvertent clerical error that should be waived, then its bid still must be rejected because this error would give Staples an unfair advantage over other bidders, as Staples would be able to withdraw its bid without penalty. Under any scenario, Staples’ bid is non-responsive and must be rejected by the City.

II. STAPLES DID NOT SUBMIT A RESPONSIVE BID BECAUSE IT DID NOT COMPLY WITH THE MANDATORY REQUIREMENT TO SUBMIT A SIGNED COPY OF ADDENDUM NO. 1.

If Staples’s failure to include a signed copy of a Addendum No. 1 in its bid package resulted from Staples’s carelessness in reviewing the Contract Documents, Staples’s carelessness cannot be excused and its bid must be rejected. As the City recognized at the bid opening, by failing to include a signed copy of Addendum No. 1 with its bid package Staples submitted an incomplete and non-responsive bid that must be rejected by the City. When evaluating a bid, a public entity must follow the requirements of the Public Contract Code **and any additional requirements it mandates in the bid documents**. (*Pozar v. Department of Transp.* (1983) 145 Cal.App.3d 269, 271.) This requirement is echoed in the Instructions for Bidders. In explaining how it will award the contract for the Project, the Instruction for Bidders states that “[t]he City Council **will award** the contract to the lowest responsible bidder or bidders **complying with all instructions** and with the provision of the advertised Notice Inviting Bids.” (Contract Documents, p. 6 [emphasis added].) There is no equivocation in this statement. Either a bidder complies with all of the instructions required by the Contract Documents or it cannot be awarded the contract.

The Contract Documents further explain that “[w]ritten addenda shall be the sole means for modifying the plans and/or specifications prior to the bid opening.” On December 3, 2020, the City issued Addendum No. 1, adding significant requirements to the specification

for tree protections and changing the Plan Notes on three Contract Drawings. In addition to these substantive changes, the addendum also added a new mandatory requirement to the other requirements of the Contract Documents. Addendum No. 1 explicitly states that “[a]cknowledgement of this addendum by signing and returning a copy with your proposal **is required.**” (Addendum No. 1, p. 3. [emphasis added].) This requirement, along with the rest of the Addendum, is incorporated into “the contract documents to the same extent as though it was originally included.” (Addendum No. 1, p. 1.) This makes the requirement to include a signed copy of Addendum No. 1 a mandatory requirement of the Contract Documents, no different than the other mandatory requirements included on the proposal itself, and a bidder cannot be awarded the Project if it did not comply with this requirement. (See Contract Documents, p. 6.) Because there is no section on the bid form requiring bidders to list the addenda that have been incorporated into the bid, including a signed copy of Addendum No. 1 is the only way provided for the City to verify that the bid includes the additional scope of work in Addendum No. 1, and therefore the entire scope of work for the Project.

Out of four bidders, Staples was the only one that did not include a signed copy of Addendum No. 1 with its bid, failing to comply with a mandatory requirement of the Contract Documents in the process. This is a material failure, one that makes Staples’s bid substantially different than what it would have looked like otherwise. Nothing in the Staples bid so much as acknowledges the existence of Addendum No. 1. There is no line elsewhere in the bid where Staples acknowledges receiving Addendum No. 1 and incorporating it into Staples’s bid. This makes it impossible for the City to determine what scope of work is included in Staples’s bid, which in turn makes it impossible for the City to make a fair comparison between Staples and the other bidders like EverLevel, who did comply with the mandatory requirement to include a signed copy with their bids. Instead, the City is comparing Staples’s bid, which might not include the additional scope of Addendum No. 1, against the other three bidders who affirmatively did include the additional scope included in Addendum No. 1. If Staples did not include the additional scope, its price would be lower than it would be if Staples had complied with the requirements of the Contract Documents, giving Staples an unfair advantage against EverLevel and the other bidders.

Moreover, to confirm that Staples included Addendum No. 1 in its bid, the City would have to go beyond the typical responsiveness review and rely on information outside of the face of the bid, including self-serving statements from Staples. There is no way to determine from the face of its bid whether the price includes the costs of Addendum No. 1. This distinguishes Staples’s failure to include a signed copy of Addendum No. 1 from cases where there was sufficient information and documentation in other parts of the bid to supplement the missing information. (E.g., *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1191 [holding that the second page of the bid bond included in the bid provided sufficient notice that the bidder complied with the bid security requirement]; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1181 [holding that the bidder’s failure to sign the bid in one location could be excused because

the bidder signed the bid in multiple locations].) Here, Staples simply provided nothing at all related to Addendum No. 1 and certainly nothing that could be interpreted as indicating that it had incorporated Addendum No. 1 into its bid.

There is no doubt that the Contract Documents required all bidders to include a signed copy of Addendum No. 1 with their bid. There is no doubt that Staples failed to satisfy this requirement, making its bid non-responsive. This is all the more true because the Contract Documents explicitly require contractors to comply with all instructions for their bid to be considered. (See Contract Documents, p. 6.) The City should reinstate its initial determination of non-responsiveness and award the Project to EverLevel.

III. IF STAPLES SIMPLY MADE AN ADMINISTRATIVE ERROR THE CITY MUST REJECT ITS BID.

In the alternative, if Staples's failure to include a signed copy of Addendum No. 1 in its bid was an inadvertent error instead of a result of Staples's carelessness in reading the Contract Documents, the City still must reject Staples's bid. Bids that include clerical errors and omissions that make the bid materially different from what was intended must be rejected because the contractor gains an unfair advantage by having the ability to withdraw the bid without penalty. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1442.) A bidder may withdraw its bid without penalty on the grounds of a mistake if "[t]he mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications." (Pub. Cont. Code, § 5103, subd. d.) Simply having the option to withdraw its bid without penalty is enough to disqualify a bidder regardless of whether the bidder has any intention of doing so. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1442.)

Here Staples failed to include a signed copy of Addendum No. 1 in its bid. Assuming that Staples intended to include a signed copy in its bid but inadvertently failed to do so, its bid must be rejected because Staples could have used that administrative error to justify withdrawing its bid without penalty. By not acknowledging that its bid included Addendum No. 1, Staples's mistake made its bid materially different than it would have been otherwise. Failing to include a signed copy was a mistake "made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications." (Pub. Cont. Code, § 5103, subd. d.) That could have allowed Staples to withdraw its bid without penalty. Even though Staples did not attempt to do withdraw its bid, the mere fact that it could have is an unfair advantage over the other bidders that requires its bid to be rejected as non-responsive. (See *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1442.)

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William Trax, EIT
CITY OF SAN BUENAVENTURA
January 12, 2021
Page 7 of 7

IV. EVERLEVEL REQUESTS THAT ITS BID PROTEST BE GRANTED AND THAT IT BE AWARDED THE CONTRACT FOR THE PROJECT.

Based upon the foregoing, EverLevel requests that the City grant EverLevel's bid protest, reject the non-responsive bid from Staples, and award the Project contract to EverLevel, the lowest responsive and responsible bidder on the Project. EverLevel looks forward to partnering with the City to complete this important Project.

Sincerely,

SMTD LAW LLP



Joshua P. Hardy

c: Client (*via email only*)
Staples Construction Co., Inc. (*via FedEx 7726 0916 5220*)