

May 14, 2026

RESPONSE TO BID PROTEST

VIA U.S. AND ELECTRONIC MAIL

Ms. Kymberly Corbin
Senior Civil Engineer
City of Oceanside
300 North Coast Highway
Oceanside, California 92054
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Re: Response to Eagle Paving LLC Bid Protest and Protest of Non-Responsive Determination
Protestor: Onyx Paving Company, Inc.
Owner: City of Oceanside
Project: FY25-26 Pavement Rehabilitation Project, CIP25-00023

Dear Ms. Corbin:

We represent Onyx Paving Company, Inc. (“Onyx”). This is Onyx’s response to Eagle Paving LLC’s (“Eagle”) bid protest regarding the City of Oceanside’s (“City”) FY25-26 Pavement Rehabilitation Project, CIP25-00023 (“Project”) and response to the City’s May 12, 2026 correspondence regarding the same.

As one California court has observed, “[i]t certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal ... of the [winning] bidder after the fact, cancel the [winning] bid on minor technicalities, with the hope of securing acceptance of his ... [less favorable bid].” (*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 383.)

Onyx is the lowest responsive and responsible bidder for the Project. As set forth below, Onyx’s bid and subcontractor listing complied with the Bid Documents. To the extent the City believes there is an irregularity with Onyx’s subcontractor listing, the City can and should waive the alleged irregularity. Accordingly, the City should reject Eagle’s bid protest and award the Project to Onyx.

1. Brief Factual Background

Onyx is an experienced asphalt paving and concrete contractor doing business across Southern California since 1990. Onyx has a long history of successful private and public projects in the region, has proven itself as a dependable firm on countless occasions, and has fostered a strong working relationship with many public entities.

The City published the Bid Documents for the Project on March 25, 2026. Bids for the Project were opened on May 6, 2026. Onyx submitted the lowest responsive and responsible bid with a base bid of \$9,669,000.00. Eagle’s bid was \$9,687,969.69 – approximately \$19,000 higher. As shown in the table below, when the additive alternates are included, Eagle’s bid was approximately \$207,000.00 higher:

Item	Onyx	Eagle
Base Bid	\$9,669,000.00	\$9,687,969.69
Additive Alternate No. 1	\$420,000.00	\$490,706.00
Additive Alternate No. 2	\$177,000.00	\$179,629.20
Additive Alternate No. 3	\$424,000.00	\$422,432.00
Additive Alternate No. 4	\$1,354,000.00	\$1,423,747.80
Additive Alternate No. 5	\$1,007,000.00	\$1,073,886.00
Additive Alternate No. 6	\$60,000.00	\$39,650.40
Total	\$13,111,000.00	\$13,318,021.09

On May 12, 2026, Eagle submitted a bid protest (“Protest”), alleging a minor irregularity with Onyx’s bid. Specifically, Eagle contends Onyx omitted a percentage on the Designation of Subcontractors form for its slurry and seal contractor, Pavement Coatings Co. (“PCC”). As set forth below, the Protest should be denied.

2. Onyx’s Bid Is Responsive

A. Legal Standard for Responsiveness

A bid is responsive if it promises to do what the bidding instructions require. Questions of responsiveness are generally determined by looking exclusively at the face of the bid and do not depend on outside investigation or information. (*Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1453 [a determination of responsiveness is almost always made from the face of the bid without the need for outside investigation]); see also *Taylor Bus Service, Inc. v. San Diego Board of Education* (1987) 195 Cal.App.3d 1331, 1341.) “In all of the cases where a public entity’s determination that a bid was nonresponsive was upheld, the determination of nonresponsiveness was readily ascertainable on the face of the bid.” (*Great West Contractors, Inc., supra*, 187 Cal.App.4th at p. 1454.)

B. The Alleged Irregularity Lacks Merit

As set forth below, Onyx’s bid is responsive. Eagle claims Onyx failed to properly complete the Designation of Subcontractors form, alleging Onyx failed to list a percentage of work to be performed by PCC.

With regard to the Designation of Subcontractors form, the Bid Documents provide:

2.8 DESIGNATION OF SUBCONTRACTORS. The Bidder shall comply with the Subletting and Subcontracting Fair Practices Act as set forth in the Public Contract Code Section 4100 et seq., hereinafter referred to as the "Subcontracting Act." Any reference in these Contract Documents to the requirements of the Subcontracting Act are for the bidder's reference, and shall not limit the CONTRACTOR's obligations under law.

2.8.1 The Bidder shall set forth in Subsection 3.6 of the Bid Documents:

- a. The name, the location of the place of business, the California contractor license number, and the public works contractor registration number issued pursuant to Section 1725.5 of the Labor Code of each subcontractor who will perform work or labor or render service to the Bidder in or about the construction of the work for this project, or a subcontractor licensed by the State of California who, under subcontract to the Bidder, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half (½) of one percent (1%) of the Bidder's total bid or, in the case of bids or offers for the construction of streets or highways, including bridges, in excess of one-half (½) of one percent (1%) of the Bidder's total bid or ten thousand dollars (\$10,000.00), whichever is greater.
- b. The portion of the work which will be done by each subcontractor described in Subsection 2.8.1(a) above.

2.8.2 The Bidder shall list only one subcontractor for each portion of the Work as is defined by the Bidder in the Bid Schedule.

(See Bid Documents, Invitation for Bids ("ITB"), Section 2.8.) In other words, the City requested bidders to list the "portion" of work for each listed subcontractor. (*Id.*, Section 2.8.1, subd. b.) This requirement was not modified by the City's Designation of Subcontractors form which provided the following instructions:

3.6 DESIGNATION OF SUBCONTRACTORS. As specified in Subsection 2.8 of the Instructions to Bidders, the Bidder shall comply with the Subletting Subcontracting Fair Practices Act as set forth in the Public Contract Code Section 4100 et seq. ("Subcontracting Act").

3.6.1 The Bidder shall be subject to the penalties set forth in the Subcontracting Act if the Bidder lists in his bid another contractor who will in turn sublet portions constituting the majority of work covered by the prime contract.

3.6.2 If the Bidder fails to specify a subcontractor or if the Bidder specifies more than one (1) subcontractor for the same portion of the work in excess of one-half (½) of one percent (1%) of the bidder's total bid, the Bidder agrees that it is fully qualified to perform that portion itself, and that the Bidder shall perform that portion itself.

If, after award of contract, the successful bidder ("CONTRACTOR") subcontracts, except as provided in the Subcontracting Act, the CONTRACTOR shall be subject to the penalties set forth in the Subcontracting Act. If the CONTRACTOR violates any provisions of the Subcontracting Act, the CONTRACTOR violates the contract, and the City Council may either cancel this Contract or assess a penalty to the CONTRACTOR in accordance with the terms of the Subcontracting Act.

3.6.3 The Bidder hereby certifies that the following is a list of all subcontractors which the Bidder is required by law to name in this bid:

(See Bid Documents, Designation of Subcontractors form.)

Here, as shown in the screenshot below of Onyx's Bid, Onyx properly identified four subcontractors on the Designation of Subcontractors form:

Item #'s of Work	Full Company Name, Address and Phone	Type and % of Work to be Performed	License No. & Classification; DIR Registr. No.
1. PCC-items B BB-3-5, SA, 6-9, A11-4-8, A11-2-4, S, A11-4-4, A11-5- 4-6 Crack Seal - BB-10, A11-10, A11-4-10, A11-5-10	Pavement Rehab Company Yorba Linda, CA 714-238-1444	PCC and crack seal 11.27%	1051374-A, C12, C8 1000064823
2. Item # BB-18 (Contract) 28-A11-28, A11-2-28, A11-2-28, A11-3- -28, A11-4-28 A11-5-28, A11-6-3, 4A, 4B, 4C, 4D 4E, 4F, 4G	Statewide Stripes inc. San Diego, CA 858-560-6887	Stippling 4.08%	788286-C32, C61, D38, C61, D42 100001334
3. Item BB-23- 27, A11-5-25-28	HMS construction, inc. Vista, CA 760-727-9608	Electrical work 1.18%	765590-A, B, C10, HAZ 1000000923
4. Item # BB-12, 30, A11-2-12, A11-4-12, A11-5-12	Pavement coatings co. Jurupa Valley, CA 714-826-3011	Slurry Seal	303609-A, C32 1000003382

(See Onyx Bid, pp. 33-34.)

Relevant here, Eagle contends Onyx's Bid is nonresponsive because it did not include a specific percentage for PCC, which Onyx listed for all slurry seal called for in the Bid Specifications (Base Bid Item 12 (Slurry Seal, Type II), Item 30 (Type II Microsurfacing) and Item 12 (Slurry Seal, Type II) for Additive Alternate Items 2, 4 and 5.) As set forth below, this does not make Onyx's Bid nonresponsive.

First, from the text of Bid Documents, it is not explicit that bidders must list the percentage of the overall bid or bid item as opposed to merely identifying the portion of work each listed subcontractor will perform (i.e. what aspect of each identified bid item). Indeed, the Bid Documents only state bidders shall set forth the "portion of the work which will be done by each subcontractor[.]" (See Bid Documents, ITB, Section 2.8.1, subd. b.) This requirement is not modified by the specific instructions on the Designation of Subcontractors form or the Subletting and Subcontracting Fair Practices Act. Identifying the portion of work performed is not the same as a percentage of the total bid price. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1439 ["If the Legislature intended 'portion' to mean percentage, it could have simply used the term 'percentage' instead. By using the different term 'portion,' the reasonable inference is the Legislature intended a different meaning than percentage."]) Accordingly, to be responsive, bidders were only required to identify the actual scope of each identified bid item that the listed subcontractor would be performing. Onyx did this for each of its listed subcontractors, and thus, its bid is responsive. If the Bid Documents required percentages, Section 2.8.1 should have specifically instructed accordingly. Instead, Section 2.8.1 requires only bidders to identify the subcontractors and the corresponding name, location of the business, California contractor license number, and public works

contractor registration number — all of which Onyx’s bid provided. To the extent there is a conflict with the Designation of Subcontractors form’s column description, Onyx’s interpretation was still reasonable given the instructions in Section 2.8.1.

Second, Onyx’s bid complies with the purpose of the Subletting and Subcontracting Fair Practices Act and the Designation of Subcontractors Form. The Bid Documents’ requirement that bidders list their subcontracting commitments is consistent with California’s Subletting and Subcontracting Fair Practices Act. (Pub. Contract Code, § 4100 et seq.) The central purpose of the Subletting and Subcontracting Fair Practices Act is to protect both the public and subcontractors from the practices of bid shopping and bid peddling in connection with public works projects. (See *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 668; see also *JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College Dist.* (2018) 30 Cal.App.5th 945, 958 [The Subletting and Subcontracting Fair Practices Act’s “express and singular purpose is to prevent bid shopping and bid peddling”].) Generally speaking, the Subletting and Subcontracting Fair Practices Act effectuates this purpose by requiring bidders to list their subcontracting commitments. (See *Id.* at p. 951.) The intent is to prevent a prime contractor from using a subcontractor’s bid to prepare its bid, and then shopping that bid to get a lower price after award. (*Valley Crest Landscape, Inc. v. City Council, supra*, 41 Cal.App.4th at 1439-40 [holding a bidder could not change subcontractor percentages incorrectly listed based on a typographical error post bid.])

This purpose is accomplished by requiring bidders to list the portion of work the subcontractor is to perform. (*Id.*) If a certain subcontractor is listed, for example, in this instance, as performing the slurry seal work, the public entity can ensure the particular subcontractor is performing the slurry work, not another subcontractor that was pressured to perform at a lower cost. (*Id.*) Once listed, subcontractors have statutory protections to the work and may only be replaced on the Project under certain statutory grounds. (See Pub. Contract Code, § 4104, subd. (a).)

Here, despite the alleged irregularity, Onyx’s subcontracting commitments are sufficiently clear. Specifically, Onyx designated PCC to perform any Slurry Seal work associated with the listed bid items. Based on this designation, Onyx could not bid shop this scope of work. Accordingly, Onyx’s subcontractor designations are sufficiently clear as to comply with the purposes of the Subletting and Subcontracting Fair Practices Act.

Third, even with the alleged irregularity, Onyx’s bid complies with all other requirements of the Bid Documents. For example, Onyx’ bid satisfied the 50 percent self-performance requirement. As shown in the table below, based on the specific bid item prices provided in Onyx’s Bid compared to Onyx’s designated scopes¹, it is evident Onyx is nowhere near subcontracting over 50 percent of its base bid.

¹ The Bid Documents specifically exclude striping work as a specialty item from the self-performance requirement calculation. (See Bid Documents, Special Provisions, Section 8.) Thus, Onyx’s subcontractor, Statewide Stripes, Inc., listed as performing only striping scope is irrelevant to this calculation.

Subcontractor	Identified Portion and Base Bid Items	Maximum Value of Bid Items Associated with Listed Subcontractors
Pavement Rehab Company	PCC and Crack Seal Bid Items 3, 4, 5, 5A, 6, 7, 8, 9	\$12,221.00 \$360,400.00 \$475,600.00 \$76,000.00 \$144,004.00 \$31,160.00 \$8,800.00 \$800.00
HMS Construction, Inc.	Electrical Work Bid Items 23, 24, 25, 26, 27	\$1,554.00 \$8,888.00 \$125,160.00 \$21,840.00 \$3,780.00
Pavement Coatings Co.	Slurry Seal Bid Items 12 and 13	\$182,086.80 \$261,656.46
Total Value of Bid Items Associated with Listed Subcontractors		\$1,713,950.26

Even under this calculation, the maximum amount of subcontracted work would only be approximately \$1.7 million, far short of the \$4.8 million 50 percent threshold.

Accordingly, the alleged irregularity with the Designation of Subcontractors Form does not make Onyx’s bid nonresponsive.

3. The City Can and Should Waive the Alleged Irregularity

To the extent the City believes there is a minor irregularity in Onyx’s bid, the City should exercise its discretion to waive it.

A. Legal Standard for Waiver

The Bid Documents expressly define irregularities as follows:

<p>2.11 <u>IRREGULAR BIDS.</u> Irregular bids may be rejected by the AGENCY.</p> <p>A bid shall be considered irregular if any of the following situations occur:</p> <ul style="list-style-type: none"> (a) The Bid contains unauthorized provisions, conditions, limitations, or alternatives. (Alternative Bids shall not be considered unless specifically requested and authorized by the AGENCY prior to the bid opening.) (b) The Bid is not typewritten or is not printed in ink. (c) The Bid contains interlineations, alterations, erasures, clerical errors, or is otherwise illegible or unclear. (d) The Bid is not properly signed in accordance with these instructions. (e) The Bid is made on a form other than those provided in Section 3 of these Contract Documents. Additional descriptive matter may be submitted with the Bid if clearly documented in subsection 3.15 of the Bid Documents. (f) The Bid is sent without sufficient postage. (g) Multiple project bids are contained in the same envelope.
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(See Bid Documents, Section 2.11.) In addition to the permissive “**may** be rejected” language in Section 2.11, on numerous occasions in the Bid Documents the City further reserved the right “**to waive any irregularity** except that the [City] shall not re-compute, adjust or modify the total amount bid submitted by any Bidder.” (See Bid Documents, Sections 1.10, 2.11, and 2.14.)

This broad reservation is consistent with well-established California law which allows a bid to be deemed responsive even if discrepancies exist, if the discrepancy is immaterial. (See *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 906.) A bid deviation is immaterial if it does not (1) affect the bid amount; (2) give the bidder an advantage over other bidders; (3) serve as a potential vehicle for favoritism; (4) influence other potential bidders to refrain from bidding; or (5) affect the ability to make bid comparisons. (*Id.* at p. 907.) Determining whether or not deviations in a bid are immaterial must be viewed “in light of the public interest, rather than the private interest of a disappointed bidder.” (*Id.* at p. 908.)

In other words, the City has broad discretion to waive an error, “*if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders.*” (*Valley Crest Landscape, Inc. v. City Council, supra*, 41 Cal.App.4th 1432, 1440-41 [emphasis in original]; see also *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3rd 449 [“it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted ... if the variance is inconsequential.”].) Usually, a competitive advantage will only be found if a bidder could have sought relief under Public Contract Code section 5103 (“Section 5103”) which allows bidders to withdraw their bid without forfeiting the bid bond if the bidder made a mistake filling out the bid that made the bid materially different. Courts have further defined that qualifying bid errors under Section 5103 must be “typographical or arithmetical errors.” (*Valley Crest Landscape, Inc., supra*, 41 Cal.App.4th 1432, 1442 [citation omitted].)

B. The Alleged Irregularities Are Waivable

To the extent the City believes Onyx failed to identify the “portion” of work for PCC by not listing a specific percentage on the Designation of Subcontractors form for PCC, this minor deviation, based on Onyx’s reasonable interpretation of the Bid Documents, is waivable because it did not provide Onyx with a competitive advantage or impact its bid price. Eagle did not and cannot identify any material advantage Onyx received from the alleged irregularities. Even if Onyx’s bid included the minor irregularity alleged by Eagle, the deviation is immaterial under the *Ghilotti* standard because it could not reasonably have given Onyx any competitive advantage over any other bidder, including Eagle, or affected Onyx’s bid amount.

First, the City may waive the alleged irregularity under the express terms of the Bid Documents. As set forth above, the City reserved the right to waive any irregularity as long as the City would not be required to “re-compute, adjust or modify the total amount bid submitted by any Bidder.” (See Bid Documents, Section 2.11.) Here, waiving the alleged irregularity at issue would not require the City to take any action related to Onyx’s total bid amount. Thus, the waiver is allowed under the Bid Documents. Additionally, this alleged irregularity could not have impacted the price of Onyx’s bid. Regardless of the percentage of each bid item being performed by PCC, one fact remains clear – Onyx’s bid price remains the same.

Additionally, waiving this type of irregularity logically follows the intent of the Bid Documents, which hold that subcontractor portion designation issues are not fatal to a bidder. Specifically, Section 3.6.2 provides “If the Bidder fails to specify a subcontractor or if the Bidder specifies more than one (1) subcontractor for the same portion of the work in excess of one-half (½) of one percent (1%) of the bidder’s total bid, the Bidder agrees that it is fully qualified to perform that portion itself, and that the Bidder shall perform that portion itself.” (See Bid Documents, Section 3.6.2.) In other words, if a bidder fails to list a required subcontractor, or inadvertently lists two subcontractors for the same portion of work, rather than find the bidder nonresponsive, the Bid Documents simply require the bidder to self-perform the impacted items. Here, it logically tracks that not listing a subcontractor’s exact percentage of a certain specified portion of work could receive the same treatment as the other listing irregularities.

Finally, this alleged irregularity did not provide Onyx with a competitive advantage. As discussed above, Onyx’s subcontracting obligations are still defined such that Onyx is unable to bid shop the designated slurry seal scope for PCC and corresponding bid items. Onyx’s bid sufficiently designated PCC will perform the slurry seal scope associated with the identified bid items.

Accordingly, the City can and should waive the alleged irregularity.

4. Conclusion

The City should deny Eagle’s Protest and proceed with the award of the Project to Onyx, the lowest responsive bidder. Onyx’s bid complied with the requirements of the Bid Documents. To the extent there is a minor irregularity with the submitted Subcontractor Designation form, the City can and should waive it as allowed by the Bid Documents and California law. Onyx represents a cost savings to the City and its taxpayers. In the current economic climate and limited resources available to public agencies, the City should not unnecessarily spend extra money over an alleged immaterial deviation.

We request to be informed of any City meetings at which the Project is on the agenda and reserve the right to address the City before or during consideration of any issue pertaining to the award of the Project. Thank you for your prompt attention to this matter. Please contact us with any questions.

Very truly yours,



Daniel P. Scholz,
Partner

DPS:jcr/3UV1352

cc: Onyx Paving Company, Inc. (via email only)
Attn: Mr. Hassan Bitar, Vice President of Estimating
Mr. Corey Kirschner, CEO/President
Ms. Courtney Kirschner, Executive Director