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D. Cappel
EL DORADO CO. SUPERIOR COURT
BY *D. Cappel* (DEPUTY)

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26 **CARPENTERS WORK PRESERVATION COMMITTEE**

27 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
28 **IN AND FOR THE COUNTY OF EL DORADO**

29 CLARK & SULLIVAN BUILDERS, INC., a
30 California corporation and CARPENTERS
31 WORK PRESERVATION COMMITTEE,

32 Petitioners,

33 v.

34 CITY OF SOUTH LAKE TAHOE,

35 Respondents,

36 REEVE-KNIGHT CONSTRUCTION, INC.,

37 Real Party in Interest.

Case No: SC20100201

~~PROPOSED~~ STATEMENT OF
DECISION (10/27/10 REV.)

Dept.: 4
Judge: Hon. Steven C. Bailey

1 The petition of CLARK & SULLIVAN BUILDERS, INC., a California corporation and
2 CARPENTERS WORK PRESERVATION COMMITTEE for a writ of mandamus came on for
3 hearing before this Court on September 10 and 17 and October 4, 2010. Appearing on behalf of
4 Petitioner Clark & Sullivan Builders Inc. was Patrick T. Markham, Jacobson Markham, LLP.
5 Appearing on behalf of Petitioner Carpenters Work Preservation Committee was Patricia Gates,
6 Weinberg, Roger & Rosenfeld. Appearing on behalf of Respondent City of South Lake Tahoe, was
7 Patrick L. Enright. Appearing on behalf of Real Party In Interest Reeve-Knight Construction Inc.
8 was Jennifer L. Dauer; Diepenbrock-Harrison.

9 Petitioners sought a writ of mandate and alternative writ of prohibition enjoining and
10 prohibiting Respondent CITY OF SOUTH LAKE TAHOE ("City") from proceeding with a contract
11 for public recreation and access improvements for the El Dorado Beach Improvement Project at
12 Lakeview Commons ("Project") on the basis that the City abused its discretion and acted unlawfully
13 in awarding the contract to Real Party in Interest REEVE-KNIGHT CONSTRUCTION, INC.
14 ("RKC"), the apparent low bidder, by: 1) accepting a materially non-responsive bid; 2) allowing
15 RKC multiple opportunities to change its bid after the bids were opened; 3) giving RKC an
16 advantage not available to other bidders by specifying "specialty items" after the bids were opened;
17 4) waiving a material element of the bid and awarding the contract to RKC; and, 5) encouraging and
18 facilitating bid shopping. Petitioners also argued that RKC's ability to claim error under Public
19 Contract Code section 5103 gave it an unfair advantage not available to other bidders and that the
20 City was in violation of the Public Contract Code, specifically Public Contract Code § 5100, *et seq.*
21 (relief of bidders) and Public Contract Code § 4100 *et seq.* (California Subletting and Subcontracting
22 Fair Practices Act). Petitioners' second cause of action sought declaratory relief that the Reeve-
23 Knight contract is invalid.

24 The Court considered the briefs, the evidence, the underlying pleadings in this matter, and
25 the oral argument offered by counsel, and hereby issues this Statement of Decision and Order.

26 **I.**

27 **FINDINGS OF FACT**

28 The Court finds the content of the documentary evidence is undisputed, and based on the

1 evidence finds the following facts:

2 **A. THE INVITATION FOR BIDS.**

3 On June 25, 2010 the City advertised the Project for bid and published a Notice to
4 Contractors again inviting bids for the Project (“Invitation for bids” or “IFB”).¹ In the IFB, the City
5 reserved the right “to reject any or all bids and to waive any informality in any bid.” Bidder’s were
6 required to submit bids for the entire Project, described as Base Bid and Alternate #1 and Alternate
7 #2. The IFB stated the City had received \$6 million in grant funds for the Project from Proposition
8 84 funds. The IFB stated how the contract would be awarded based on the funding limitations.
9 Section 3 of the IFB stated the City intended to award the contract based on the bid proposal that
10 was under the specified funding cap of \$5.5 million dollars.

11 The IFB required compliance with the following:

12 No bid will be considered unless it is made on the blank bid proposal provided with
13 the bid packet furnished by the City of South Lake Tahoe Department of Public
14 Works and is made in accordance with the Standard Specifications and the Special
15 Provisions.

16 The IFB was accompanied by Special Provisions which included instructions regarding the
17 form of bid proposals and the manner in which the bid proposals were to be submitted. As is
18 pertinent to the matters herein, the Special Provisions required compliance with the following:

19 Standard Specifications shall mean Standard Specifications of the State of California,
20 Department of Transportation, dated May 2006, and the City of South Lake Tahoe
21 Public Improvement and Engineering Standards dated May 2009.

22 The Special Provisions continue:

23 The work embraced herein shall be done in accordance with the State of California
24 Department of Transportation Standard Specifications dated May 2006 ... and in
25 accordance with the following Special Provisions and the project plans. All such
26 documents are to be considered as part of the plans and specifications whether or not
27 reproduced in the Special Provisions. They are intended to be complimentary ...”

28 Special Provisions, Section 2 Proposal Requirements and Conditions, Subsection 2-1.01 General,
states in part:

The bidder’s attention is directed to the provisions in Section 2, “Proposal
Requirements and Conditions,” of the Standard Specifications and these Special

¹ The Relevant portions of the IFB are found in Exhibits 1 and 2, and then a more complete copy was admitted and considered as Exhibit 16.

1 Provisions for the requirements and conditions which must be observed in the
2 preparation of the Proposal Form and submission of bids.

3 In lieu of the provisions in the second paragraph in Section 2-1.05, "Proposal Forms,"
4 of the Standard Specifications, the following shall apply:

5 A separate Proposal Form is provided with this book. The Proposal,
6 Notice to Contractors, contract and Special Provisions bound in said
7 book shall not be submitted but shall be considered part of the bid.
8 **The bid proposal shall be submitted as described in the Notice to**
9 **Contractors.** All proposals shall set forth for each item of work in
10 clearly legible figures, a unit price and a total for the item, in the
11 respective spaces provided and shall be signed by the bidder, who shall
12 fill out all blanks in the Proposal Form, and submit as required therein.
13 (Emphasis in the original.)

14 Special Provisions, Section 5 Control of Work, Subsection 5-1.02 Subcontracting, states in relevant
15 part:

16 Attention is directed to Section 2-1.054, "Required Listing of Proposed
17 Subcontractors," and Section 8-1.01 "Subcontracting," of the Standard Specifications
18 and these Special Provisions.

19 The form for listing the subcontractors as required in Section 2-1.054, "Required
20 Listing of Proposed Subcontractors," of the Standard Specifications will be found in
21 the proposal annexed hereto ...

22 The provisions in the third paragraph of Section 8-1.01, "Subcontracting," of the
23 Standard Specifications, that the Contractor shall perform with the Contractor's own
24 organization contract work amounting to not less than 50 percent of the original
25 contract price, IS changed by the Federal Aid requirement specified under "Required
26 Contract Provisions Federal-Aid Construction Contracts" in Section 14 of these
27 Special Provisions that the Contractor perform not less than 30 percent of the original
28 contract work with the contractor's own organization.

Each subcontract and any lower tier subcontract that may in turn be made shall
include the "Required Contract Provisions Federal-Aid Construction Contracts" in
Section 14 of these Special Provisions. Noncompliance shall be corrected. Payment
for subcontracted work involved will be withheld from progress payments due, or to
become due, until correction is made. Failure to comply may result in termination of
the contract.

The Bidder's Statement of Subcontractors and Material Suppliers² which was the required
form for listing subcontractors states in pertinent part:

Pursuant to the provisions of Section 4100 *et seq.* of the California Government

² The form referred to as the required list of subcontractors was admitted and considered as part of the IFB, Exh. 16-24.

1 Code, bidder shall set forth: (a) The name and the location of the place of business of
2 each subcontractor who will perform work or labor or render service to prime
3 contractor in or about the construction of the work or improvement, or a person who
4 will, off the jobsite, specially fabricate a portion of the work or improvement
5 according to detailed drawings contained in the plans and specification, in an amount
6 in excess of one-half of one percent of prime contractor's total bid. (b) The portion of
7 the work which will be done by each such subcontractor under this act...

8 Attention is directed to Section 2-1.054, "Required Listing of Proposed
9 Subcontractors," and Section 8-1.01 "Subcontracting," of the Standard Specifications
10 and these Special Provisions for any questions pertaining to subcontracting.

11 The form had four columns that bidders were required to complete: "Work to be performed," "% of
12 Total Contract," "Subcontractor Name/Address," and "Lic.No./Class./Expir.Date."

13 As is pertinent to the matters herein, the Standard Specifications required compliance with
14 the following:³

15 SECTION 2. PROPOSAL REQUIREMENTS AND CONDITIONS

16 2 1.054 REQUIRED LISTING OF PROPOSED SUBCONTRACTORS

17 Each proposal shall have listed therein the name and address of each
18 subcontractor to whom the bidder proposes to subcontract portions of the work in an
19 amount in excess of one-half of one percent of the total bid or \$10,000, whichever is
20 greater, in accordance with the Subletting and Subcontracting Fair Practices Act,
21 commencing with Section 4100 of the Public Contract Code. The bidder's attention is
22 invited to other provisions of the Act related to the imposition of penalties for a
23 failure to observe its provisions by using unauthorized subcontractors or by making
24 unauthorized substitutions.

25 A sheet for listing the subcontractors, as required herein, is included in the
26 "Proposal and Contract" book.

27 2-1.06 REJECTION OF PROPOSALS

28 Proposals may be rejected if they have been transferred to another bidder, or if
they show any alteration of form, additions not called for, conditional bids,
incomplete bids, erasures, or irregularities of any kind.

2-1.095 RELIEF OF BIDDERS

Attention is directed to the provisions of Public Contract Code Sections 5100
to 5107, inclusive, concerning relief of bidders and in particular to the requirement
therein, that if the bidder claims a mistake was made in the bid presented, the bidder
shall give the Department written notice within 5 days after the opening of the bids of
the alleged mistake, specifying in the notice in detail how the mistake occurred.

SECTION 3: AWARD AND EXECUTION OF CONTRACT

³ The Standard Specifications were admitted and considered as Exhibit 3.

1 3-1.01 AWARD OF CONTRACT

2 The right is reserved to reject any and all proposals.

3 The award of the contract, if it be awarded, will be to the lowest responsible
4 bidder whose proposal complies with all the requirements prescribed. The award, if
5 made, will be made within 30 days after the opening of the proposals. This period
6 will be subject to extension for such further period as may be agreed upon in writing
7 between the Department and the bidder concerned.

8 All bids will be compared on the basis of the Engineer's Estimate of the
9 quantities of work to be done.

10 SECTION 8: PROSECUTION AND PROGRESS

11 8-1.01 SUBCONTRACTING

12 * * * *

13 The Contractor shall perform, with the Contractor's own organization, contract
14 work amounting to not less than 50 percent of the original total contract price, except
15 that any designated "Specialty Items" may be performed by subcontract and the
16 amount of any designated "Specialty Items" performed by subcontract may be
17 deducted from the original total contract price before computing the amount of work
18 required to be performed by the Contractor with the Contractor's own organization.
19 When items of work in the Engineer's Estimate are preceded by the letters (S) or
20 (S-F), those items are designated as "Specialty Items." Where an entire item is
21 subcontracted, the value of work subcontracted will be based on the contract item bid
22 price. When a portion of an item is subcontracted, the value of work subcontracted
23 will be based on the estimated percentage of the contract item bid price, determined
24 from information submitted by the Contractor, subject to approval by the Engineer.

25 The Engineer's Estimate referenced in section 8-1.01 did not designate any specialty items.

26 The City was also required to incorporate the Required Contract Provisions Federal-Aid
27 Construction Contracts language. The Special Provisions specifically state that the Federal-Aid
28 Requirements are intended to be compatible with the Contract Documents and the Special
29 Provisions, not to conflict therewith. As is pertinent to the matters herein, the Special Provisions and
30 Federal-Aid Requirements required compliance with the following:

31 The work will be funded, in part with Federal funds. The documents entitled Federal
32 Requirements for Federal-Aid Construction Projects and Form 1273 including
33 Required Contract Provisions Federal-Aid Construction Contracts, as well as Federal
34 Minimum Wages North are included in the Appendix of these Special Provisions.
35 Said documents are hereinafter incorporated by reference, and are intended to comply
36 with the federal requirements for partially federally funded projects, where applicable

37 These provisions supplement the Contract Documents with additional federal
38 requirements that may be applicable, and are intended to be compatible with the
39 Contract Documents and these Special Provisions, not to conflict therewith.

40 Contractor shall review and comply with all applicable federal requirements, as called
41 for in the bidding process, Contract award, Work progress and completions, and
42 thereafter where applicable. To the extent the provisions in Section 1 through 13 of

1 the Special Provisions herein above, specify stricter and/or higher compliance with
2 both federal and state or local regulations are required, the Contractor shall comply
3 with both said requirements. In the event that these general federal requirements
4 conflict with other Contract Document provisions, or are otherwise ambiguous, the
5 provisions shall be interpreted to require maximum compliance with all applicable
6 laws.

7 The Required Contract Provisions for Federal-Aid Construction Contracts state in part:

8 I. GENERAL

9 1. These contract provisions shall apply to all work performed on the contract by the
10 contractor's own organization and with the assistance of workers under the
11 contractor's immediate superintendence and to all work performed on the contract by
12 piecework, station work, or by subcontract.

13 2. Except as otherwise provided for in each section, the contractor shall insert in each
14 subcontract all of the stipulations contained in these Required Contract Provisions,
15 and further require their inclusion in any lower tier subcontract or purchase order that
16 may in turn be made. The Required Contract Provisions shall not be incorporated by
17 reference in any case. The prime contractor shall be responsible for compliance by
18 any subcontractor or lower tier subcontractor with these Required Contract
19 Provisions.

20 3. A breach of any of the stipulations contained in these Required Contract
21 Provisions shall be sufficient grounds for termination of the contract.

22 * * * *

23 VII. SUBLETTING OR ASSIGNING THE CONTRACT

24 1. The contractor shall perform with its own organization contract work amounting to
25 not less than 30 percent (or a greater percentage if specified elsewhere in the contract)
26 of the total original contract price, excluding any specialty items designated by the
27 State. Specialty items may be performed by subcontract and the amount of any such
28 specialty items performed may be deducted from the total original contract price
before computing the amount of work required to be performed by the contractor's
own organization (23 CFR 635).

* * * *

2. The contract amount upon which the requirements set forth in paragraph 1 of
Section VII is computed includes the cost of material and manufactured products
which are to be purchased or produced by the contractor under the contract
provisions.

B. BIDDING AND BID PROTEST.

The City received six bids that were opened on July 19, 2010 in a blind bid opening format.
City staff determined that bidder "C" was the apparent low bidder at \$4,448,815.43 for the base bid
and additive alternate #1. Bidder "C" was identified as RKC. The second lowest bidder was
Petitioner C&S with a bid of \$4,897,837.00. Both the RKC bid and the C&S bid were below the

1 \$5.5 million funding cap established in the IFB.⁴ After the bid opening, City staff determined that
2 RKC's required Bidder's Statement of Subcontractors and Material Suppliers ("Statement of
3 Subcontractors")⁵ indicated that RKC had subcontracted approximately 96.46% of the contract work
4 [the sum of the contractor work percentage listed on the bid submitted by RKC was 96.46%]. This
5 left only 3.6 % of the work for RKC to self perform, rather than the required "not less than 30%."⁶
6 The RKC percentage of subcontract work was signed and verified in the mandatory form for
7 Statement of Subcontractors in the column entitled "% of Total Contract" on the RKC bid proposal.
8 (1st RKC Statement of Subcontractors.)

9 Petitioner C&S timely filed a bid protest with the City challenging the RKC bid and the
10 Notice of Intent to Award the work to RKC ("Protest").⁷ The bid protest was joined by the Work
11 Preservation Committee.⁸ The basis of the C&S Protest was RKC's failure to comply with the 30%
12 self performance requirement ["Reeve Knight is not in compliance with the specifications."].⁹ City
13 staff "discovered through investigation that Reeve-Knight had submitted subcontractor percentages
14 for the project greater than the 70% cap..."¹⁰ "Staff notified Reeve-Knight and asked them to re-
15 submit subcontractor listings..."¹¹ By letter dated July 21, 2010 from the City to RKC, "Your
16 submitted subcontractor listing for the scope of work that the City proposes to award (Base Bid and
17 Additive Alternate #1) is as follows ... Subcontractor total percentage of contract 86.3%).
18 (Referred to by C&S as 2nd RKC Statement of Subcontractors.)¹²

19 The letter from the City stated in part:

20 The review of the submitted subcontractor listing shows that Reeve-Knight as the
21 prime contractor is performing approximately 13.7% of the proposed contract with
22 the contractors own organization. **This percentage is significantly less than the
30% required in the project special provisions.**

23 "The City may determine the bid submitted by Reeve-Knight to be non-responsive. If

24 _____
25 ⁴ August 3, 2010 City Council hearing transcript ("Transcript") p. 3:1-4. The Transcript was lodged and considered by
the Court.

26 ⁵ Required List of Subcontractors, Exhibits 16-24.

27 ⁶ The Required List of Subcontractors is found in the RKC bid submittal, Exhibit 4, last 2 pages.

28 ⁷ Exhibit 7, 9, 12, 24 .

⁸ Exhibit 12.

⁹ Exhibit 24.

¹⁰ Exhibit 5, page 2.

¹¹ Exhibit 5, page 2.

¹² Exhibits 6 and 18.

1 you do not provide additional information with respect to the above and demonstrate
2 why any changes in the subcontractors do not affect the bid price the City will
3 determine whether the bid is responsive based on the bid documents. The City is not
4 allowing Reeve-Knight the option to withdraw its bid based on the above. Please
provide the City your response to this letter by no later than 3:00 p.m. today.”¹³
(Emphasis added.)

5 Pat Chism for RKC responded to the City’s July 21, 2010 letter at 3:02 PM, stating “I have
6 realized I made an error. The percentages I listed were based on the total dollar amount of the
7 scopes of work and not the subcontractor specific value.”¹⁴ The letter goes on to state, “I have
8 revised my listing ...” RKC then revised its subcontractor percentages and submitted a third
9 Statement of Subcontractors that indicated the subcontractors were listed to perform 68.71% of the
10 contract. (3rd RKC Statement of Subcontractors.) The 3rd RKC Statement of Subcontractors did
11 not include two subcontractors (helical pile subcontractor and steel subcontractor) that were
12 previously listed on the 1st RKC Statement of Subcontractors and the 2nd RKC Statement of
Subcontractors.¹⁵

13 On July 26, 2010, Jim Marino of the City stated in an e-mail to Clark & Sullivan that the 3rd
14 RKC Statement of Subcontractors had been submitted by RKC, and it “complies with the project
15 special provisions.”¹⁶ By letter dated July 27, 2010, Petitioner C&S again protested the bid on the
16 additional ground that RKC improperly omitted the helical pile subcontractor and steel subcontractor
17 from its Statement of Subcontractors and from the calculation of subcontractor percentages.
18 Petitioner C&S argued that by adding back the work of the helical pile subcontractor and the steel
19 contractor, RKC would again be over the 70% limit on subcontractor work and that the RKC bid was
20 non-responsive.¹⁷ Jim Marino of the City followed up by letter to RKC on July 27, 2010, stating
21 “As you can see, Clark & Sullivan does not appear to be letting it go. How do you want to
22 proceed?”¹⁸ On July 29, 2010, C&S again sent the City a follow up e-mail stating that RKC “is not
23 in compliance with the specifications.” The e-mail continued, “...Reeve Knight did not provide a
24

25 ¹³ Exhibits 6 and 18.

26 ¹⁴ Exhibit 20.

27 ¹⁵ See C&S comparison of subcontractor percentage listings, attached to its memorandum of points and authorities. In
addition to the percentages, the amounts were revised from listing to listing. See also, Exhibits 4, 18, 20 and 27 for the
four revised subcontractor lists submitted and accepted by City Staff.

28 ¹⁶ Exhibit 22.

¹⁷ Exhibit 9.

¹⁸ Exhibit 23.

1 bid that is in compliance with the subcontracting requirements of the specifications. Clark &
2 Sullivan did adhere to the subcontracting requirements of the specifications and should therefore
3 legally be awarded this project.”¹⁹

4 On July 30, 2010, the City wrote, “in an effort to prepare for the August 3, 2010 City
5 Council meeting ...” The letter began by requesting a “complete breakdown of your subcontractor
6 listing, amounts and, percentages”²⁰ The letter also states that for RKC, “Structural Steel and
7 Helical piles are considered specialty items ...” RKC revised its subcontractor percentages and
8 submitted a fourth Statement of Subcontractors that excluded the helical pile and steel
9 subcontractors, and changed the percentages of work to be done by other subcontractors which
10 brought the subcontractor work from 68.71% down to 65.47%. (4th Statement of Subcontractors.)²¹

11 By letter dated August 20, 2010 from RKC to the City²², RKC explained:

12 RKC’s estimated **subcontractor percentages** were **overstated** in its **bid** for two
13 principal reasons. First, RKC listed the estimated subcontractor percentages based on
14 the base bid plus alternates one and two. However, the City elected to award on the
15 base bid plus alternate one, not alternate two. Thus, the percentages needed to be
16 clarified based on the actual work to be done, base bid plus alternate one, not the base
17 bid plus all alternates.

18 Second, RKC listed the percentages based the estimated percentages [sic] of the type
19 of work to be performed, including materials. That is, when calculating the estimates
20 **RKC included all costs of the work, whether or not they would be subcontracted.**
21 Because RKC will provide certain materials, such as concrete and pavers, the
22 estimated percentage was overstated.

23 C. CONTRACT AWARD AND WAIVER OF IRREGULARITY.

24 At the City Council meeting on August 3, 2010, the City Attorney opened a public hearing
25 on the bid protests and the issue of the award of the contract.²³ Representatives of the City staff,
26 C&S, RKC and the public, appeared and were heard by the City Council. City staff concluded both
27 bidders were “responsible,” and so advised the City Council. According to staff, “The question is
28 not whether either party is responsible....The question is whether the bid was responsive to what the
bid documents were that we put out.”²⁴ The City Attorney informed the City Council that purpose

¹⁹ Exhibit 24.

²⁰ Exhibit 25

²¹ Exhibit 27.

²² Exhibit 10.

²³ Transcript, p. 15:24-16:6.

²⁴ Transcript, p. 3:24-4:2.

1 of the hearing was to determine if the RKC bid was responsive, and “if yes, the council has the
2 discretion to [waive] the irregularity, the subcontractor percentage if it was not material.” If no, then
3 the counsel must award to Clark & Sullivan or reject all bids and start over.²⁵

4 The Petitioner Carpenters Work Preservation Committee (the “Work Preservation
5 Committee”) protested the bid, and members of the Work Preservation Committee appeared and
6 testified. As a Joint LMC, the Work Preservation Committee has an interest in the job security and
7 economic development of signatory contractors and members of various Carpenter Local Unions in
8 Northern California.

9 City staff recommended the contract be awarded to RKC on the grounds that the RKC bid
10 was responsive and that the “irregularity” could be waived.²⁶ The City Attorney advised the City
11 Council in a written memorandum and orally at the City Council meeting that: 1) the listing of the
12 percentages was not required and was therefore not a material element of the bid documents; 2) the
13 City specifically informed RKC that it was not allowing RKC to withdraw its bid based on the
14 listing of subcontractor percentages; and 3) that the City could therefore determine that the listing of
15 the percentages was an irregularity that was not substantial.²⁷ The City Attorney further advised that
16 changing the percentages after the opening of the bids did not 1) affect the amount of the bid; 2) give
17 a bidder an advantage over other bidders; 3) become a potential vehicle for favoritism; 4) influence
18 potential bidders to refrain from bidding; or, 5) affect the ability to make bid comparisons.²⁸

19 After hearing testimony from RKC, C&S, the Work Preservation Committee, and the public,
20 and after considering information and recommendations from City staff, the City Council voted to
21 “approve and authorize the mayor to execute contract agreement No. C-66-10, between the City of
22 South Lake Tahoe and Reeve-Knight Construction Inc. of Roseville, CA in the amount of
23 \$4,448,815.43; and waive the irregularity.”²⁹ The award was made over the protests of both C&S
24 and the Work Preservation Committee.
25

26
27 ²⁵ Transcript, p. 16:2-4.

²⁶ The transcript of the hearing was lodged with the court.

28 ²⁷ Exhibit 14, p.6.

²⁸ Exhibit 14, p. 6.

²⁹ Exhibit 29, page 3, item 16.

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II.

STANDARD OF REVIEW

This is a case of traditional mandamus. *Valley Crest Landscape, Inc. v. City of Davis* (1996) 41 Cal.App.4th 1432, 1437 and *Ghilotti Construction Company v. City of Richmond* (1996) 45 Cal.App.4th 904, FN 1. In *Valley Crest*, the court stated, “[R]eview by ordinary mandamus is confined to an examination of the agency proceedings to determine whether the action taken is arbitrary, capricious or entirely lacking in evidentiary support, or whether it failed to conform to procedures required by law. [Citation.]” (*Stauffer Chemical Co. v. Air Resources Board* (1982). 128 Cal.App.3d 789, 794 [180 Cal.Rptr. 550].) Cited in *Valley Crest*, supra, 41 Cal.App.4th at 1437. “When making that inquiry, the ‘court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.’ [Citation.]” ‘ [Citation.]’ (*American Board of Cosmetic Surgery v. Medical Board of California* (2008) 162 Cal.App.4th 534, 547-548, 75 Cal.Rptr.3d 574, fn. omitted (*American Board* .).) *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 586. Legal questions are reviewed by the trial court, de novo. *Jefferson v. Compton Unified School District* (1993) 14 Cal.App.4th 32, 38 [“...question of law such as the interpretation of a statute is one which we undertake de novo”]; cited in *Valley Crest*, supra, 45 Cal.App.4th at 1437. The trial court may consider evidence outside the administrative record. The court therefore independently construed the writing (the IFB). No conflicting evidence was offered by the City as an aid to interpretation that differed from the Court’s independent interpretation of the IFB.

When a trial court's construction of a written agreement is challenged on appeal, the scope and standard of review depend on whether the trial judge admitted *conflicting* extrinsic evidence to resolve any ambiguity or uncertainty in the contract. If extrinsic evidence was admitted, and *if* that evidence was in conflict, then we apply the substantial evidence rule to the factual findings made by the trial court. But if no extrinsic evidence was admitted, or if, as here, the evidence was not in conflict, we independently construe the writing. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166 [6 Cal. Rptr. 2d 554]; *Morey v. Vanucci*, supra, 64 Cal.App.4th at pp. 912-913; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 [44 Cal. Rptr. 767, 402 P.2d 839].)

1 III.

2 CONCLUSIONS OF LAW

3 The Court makes the following conclusions of law and findings of fact. The court finds
4 Petitioners have no plain, speedy and adequate remedy in the ordinary course of law. As such, the
5 Writ as requested and as modified shall issue.

6 **A. THE LISTING OF THE SUBCONTRACTOR PERCENTAGES WAS A**
7 **MATERIAL REQUIRED ELEMENT OF THE BID.**

8 The court finds the IFB required bidders to list subcontractor work as a percentage of the
9 contract to demonstrate compliance with the 30% self performance requirement set forth in Special
10 Provisions, Section 8-8.101 and Special Provisions, Sec.14, Required Contract Provisions Federal-
11 Aid Construction Contracts, VII, 1,³⁰ and that the listing of the subcontractor percentages and the
12 30% self performance requirement were material required elements of the IFB. The City of South
13 Lake Tahoe abused its discretion by finding the required material element of the bid was
14 inconsequential and subject to potential waiver.³¹ On substantively identical facts and bid
15 provisions, the Third District Court of Appeal found the "specification made listing the
16 subcontractor percentages a material element of the bid." *Id.* at 1443.

17 In *Valley Crest*, the City of Davis solicited bids for construction of a park. The bid
18 specifications required the contractor to perform contract work amounting to at least 50% of the
19 original total contract price. The City of Davis required the bidders to fill out a form for the listing
20 of subcontractors. "The form for listing subcontractors had four columns In the last column the
21 bidder listed the percentage of the contract bid item price." *Id.* at 1436. North Bay Construction
22 submitted the lowest of four bids, but its subcontractor list reported the percentage of subcontracted
23 work to be 83%, which exceeded the 50% limit. *Valley Crest*, the second low bidder, filed a protest

24
25
26 ³⁰ The "Required Contract Provisions Federal-Aid Construction Contracts" ("Required Provisions") are included in the
27 bid documents in Section 14 of the Special Provisions. Strict compliance with the Federal Requirements and Required
28 Provisions is mandatory in order to receive federal funding. The federal government does not allow the provisions to be
incorporated by reference in contracts. Instead, the federal government requires that the provisions be physically
incorporated into each contract, subcontract and sub-subcontract to ensure that all contractors and subcontractors are on
notice that a breach of any of the stipulations set forth therein, including the 30% self perform requirement, is grounds
for termination of the contract and loss of federal funding.

³¹ Transcript 16:4.

1 on the ground that the 83% listed subcontract work, left only 17% self-performed work for North
2 Bay, well below the 50% requirement in Cal Trans Standard Specification Section 8-1.

3 After receiving the bid protest, the City engineer contacted North Bay concerning the 83%
4 figure, indicating that "barring any other information from you," he would recommend the bid be
5 deemed non-responsive. North Bay responded that the 83% total was a mistake and that it did not
6 have the final subcontractor figures until just prior to bid closing, so it used estimated totals that
7 resulted in higher percentages. North Bay submitted "actual correct subcontractor percentages"
8 totaling 44.65%. The contract was awarded to North Bay over the objection of Valley Crest. *Id.* at
9 1436-1437. Valley Crest challenged the award of the bid by way of a writ of mandate arguing that
10 the North Bay bid was non-responsive; that North Bay had an unfair advantage when it was allowed
11 to change the percentages after the bid was submitted; and, that 83% subcontractor work listed was
12 not an inconsequential irregularity, and could therefore not be waived by the City.

13 The court in *Valley Crest* held that listing the subcontractor percentages was not required by
14 the Subletting and Subcontracting Fair Practices Act, but that the City of Davis could impose its own
15 subcontractor percentage requirement on the bidders, and that it could not waive listing the
16 subcontractor percentages because the "specification made listing the subcontractor percentages a
17 material element of the bid." *Id.* at 1443. The bid specification requiring self performance in the
18 *Valley Crest* case is substantively the same bid specification as in the present case, except that here
19 the 50% requirement was changed to 30%. The City of Davis bid specification language in *Valley*
20 *Crest* was as follows:

21 Section 8-1 of the specifications provided in part: "The Contractor's own organization
22 shall perform Contract work amounting to not less than 50 percent of the original
23 total Contract price... Where an entire item is subcontracted, the value of work
24 subcontracted will be based on the Contract item bid price. When a portion of any
item is subcontracted, the value of work subcontracted will be based on the estimated
percentage of the Contract bid item price, determined from information submitted by
the Contractor, subject to approval by the Engineer." *Id.* at 1436.

25 The language in the IFB is substantively identical to *Valley Crest*, and is as follows:

26 The Contractor shall perform, with the Contractor's own organization, contract work
27 amounting to not less than 50 percent of the original total contract price, ... Where an
entire item is subcontracted, the value of work subcontracted will be based on the
28 contract item bid price. When a portion of an item is subcontracted, the value of
work subcontracted will be based on the estimated percentage of the contract item bid
price, determined from information submitted by the Contractor, subject to approval
by the Engineer. (Standard Specifications, §Sec. 8, 8-1.01.)

1 The required form for listing subcontractors in *Valley Crest* is substantively the same as the
2 form used by the City of South Lake Tahoe.³² The City of Davis in *Valley Crest* required a form for
3 listing subcontractors that required, among other things, that the bidder list the “percentage of the
4 contract bid item price” for each subcontractor. *Id.* at 1436. Here, the City of South Lake Tahoe
5 had a required form for listing subcontractors that required bidders to list “% of Total Contract
6 Price” for each subcontractor. In addition to requiring the listing of the name of subcontractors that
7 will perform work in an amount in excess of one-half of one percent of the prime contractor’s bid,
8 public entities can also impose their own self-performance requirements and require verification in
9 the bid. As noted in *Valley Crest*:

10 The Act does not require the subcontractor's work to be stated as a percentage of the
11 contract. We decline to add a requirement not found in the statute. We conclude the
12 percentage requirement was included to show compliance with section 8-1 of the
specifications and was independent of the requirements of the Act. *Id.* at 1440.

13 The court in *Valley Crest* concluded “...This specification made listing the subcontractor
14 percentages a material element of the bid...” *Id.* at 1435.

15 The City of South Lake Tahoe’s required Statement of Subcontractors specifically references
16 both the listing of subcontractors for purposes of the Act (Section 2-1.054 of the Standard
17 Specifications) and the listing of percentages for purposes of Section 8, 8-1.01 of the Special
18 Provisions, the self perform requirement. The City argued that the actual subcontractor percentages
19 could not be determined until after the scope of the contract was determined; therefore, the
20 subcontractor percentage column on the required Statement of Contractors was an “unrequired
21 column” on the form. On the other hand, RKC argued that subcontractor percentages were required
22 to be listed on the form; however, the listing of percentages was an irrelevant exercise in which the
23 percentages could add up to any amount. The court rejects both of these arguments based on the
24 terms of the IFB and the content of the undisputed documentary evidence. No credible extrinsic
25 evidence was offered by Respondents to support the contention that the subcontractor percentage
26 listing was either “unrequired” or informational only. For example, before the dispute, the City
27 informed RKC the bid may be non-responsive based on the failure to demonstrate compliance with
28

³² See Chart attached to C&S Reply Memorandum.

1 the self performance requirement in the required list of subcontractors listed bid percentages.³³ RKC
2 acknowledged this by revising, and re-submitting subcontractor percentage lists and explaining how
3 the post-bid lists complied with the 30% self performance requirement.³⁴ The City's waiver of the
4 "irregularity" established that the City considered the listing in excess of the 70% subcontractor cap
5 to be a requirement of the bid in the special provisions, otherwise there was no irregularity to waive.

6 **B. THE RKC BID WAS NON-RESPONSIVE TO THE IFB SUBCONTRACTOR**
7 **LISTING REQUIREMENT.**

8 The IFB required bidders to bid the entire project, Base Bid and Alternates #1 and #2. The
9 RKC bid included the "Required List of Proposed Subcontractors." The sum of all listed
10 subcontractor work in the bid submitted by RKC on July 19, 2010 totaled 96.46% of the contract.³⁵
11 This left less than 3.64% of the contract for RKC to self-perform. This was substantially less than
12 the 30% requirement in the IFB. RKC argued the bid responsiveness must be evaluated based on
13 base bid plus additive one. However, the equivalent "subcontractor total percentage of contract" for
14 base bid plus additive alternate one was 86.3%.³⁶ This figure left less than 13.7% of possible work
15 for RKC to self-perform. This was substantially less than the 30% requirement in the IFB.

16 Pursuant to the IFB, the subcontractor percentage of the contract could not exceed 70%, and
17 must be listed on the Required List of Subcontractors. "A bid is responsive if it promises to do what
18 the bidding instructions require." *Valley Crest*, 41 Cal.App.4th at 1438. RKC's bid did not "promise
19 to do what the bidding instructions require" because RKC's bid submitted on July 19, 2010, listed
20 subcontractor percentages of work that exceeded the 70% cap set forth in the IFB and Federal
21 Requirements. RKC argues the subsequent decision to reduce the scope of the work by awarding on
22 base bid and additive alternate one, changed the analysis of bid responsiveness. However, this court
23 finds the issue of responsiveness of the bid must be based on the IFB, and the IFB sought bids for
24 the entire project. The RKC bid for the entire project listed subcontractor percentages, the sum of
25 which totaled over 96% and was non-responsive to the IFB. The determination of whether the bid
26

27 ³³ Exhibits 6 and 18.

³⁴ Exhibits 6, 8, 10, 18, 20, 21, 22, 25 and 27.

28 ³⁵ Exhibit 4, see also City Attorney memorandum, "the original submittal of Reeve-Knight's list of subcontractors, they listed approximately 95% of the work being done by subcontractors.", Exhibit 14, p. 1.

³⁶ Exhibit 6, page 2.

1 is responsive is based on the bid for the “entire work described herein.” Since it was materially non-
2 responsive to the IFB, the City had no discretion to accept the RKC bid. The City’s acceptance of
3 the non-responsive bid received from RKC was an abuse of discretion.

4 The City and RKC attempted to distinguish the present case from *Valley Crest* on two main
5 grounds. First, Respondents argue the IFB requested bids on the “entire project,” base bid and
6 alternates #1 and #2 while the contract was awarded for the base bid and only alternate #1. For the
7 reasons set forth above, the court rejects RKC’s contention that its nonresponsive bid became
8 responsive because the scope of the work changed after the bid opening. Petitioners’ argued and the
9 evidence supports that the IFB set out material requirements that RKC failed to follow and even
10 when the City gave RKC the opportunity to adjust its numbers based on the reduced scope of work,
11 RKC’s list of subcontractors based on base bid and additive alternate one was 86.3% percent. This
12 prompted the City to send RKC the letter that stated: “This percentage [13.7%] is significantly less
13 than the 30% required in the project special provisions” and prompted RKC to respond with a claim
14 of error. The letter from the City demonstrates that the City and RKC were treating the percentages
15 as material elements of the bid. The City stated it utilized the listed percentages in evaluating the
16 bids for responsiveness to the 30% self perform requirement: “City staff reviewed the lowest bid and
17 found it to be irregular in one respect – compliance with a provision in the bid specifications that
18 required the general contractor to perform at least 30% of the contract work itself, that is within its
19 own organization.”³⁷ This evidence supports Petitioner’s interpretation of the IFB. Thus, RKC’s
20 subcontractor percentages exceeded the 70% cap for both the base bid and both alternates, and also
21 for the base bid and alternate #1 only. The outcome is unchanged regardless of whether
22 responsiveness is based on the “entire project” or base bid plus alternate one. In either case, the
23 RKC bid was non-responsive to the IFB cap of 70% subcontractor work.

24 Second, Respondents argue that the required subcontractor percentage listing was only for
25 the purpose of the Subletting and Subcontracting Act (Act), not for purposes of section 8-1.01. The
26 court rejects this argument. This argument is directly at odds with the holding in *Valley Crest*, and
27 therefore rejected by this court. In *Valley Crest*, the court refused to read into the Subletting and
28

1 Subcontracting Fair Practices Act an additional requirement (that percentages of subcontractor work
2 must be stated) that was not found in the Act itself. However, the Court of Appeal held that the City
3 of Davis could impose its own subcontractor percentage requirement and that it could not waive the
4 listing of subcontractor percentages because the "specification made listing the subcontractor
5 percentages a material element of the bid." *Id.* 41 Cal.App.4th at p.1443.

6 In *MCM Construction v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 78
7 Cal.Rptr.2d 44, the First Appellate District held, among other things, that the City had the power to
8 set bid requirements that went beyond those in the Subletting and Subcontracting Fair Practices Act
9 and that the City imposed requirement in its specifications that bidders state a dollar amount of work
10 to be performed by each subcontractor could not be waived.

11 The Court finds the City of South Lake Tahoe's bid specifications (Standard Specifications,
12 Sec. 8, 8-1.01 and Special Provisions, Sec.14, Required Contract Provisions Federal-Aid
13 Construction Contracts, VII, 1) made the listing of subcontractor percentages on the Bidder's
14 Statement of Subcontractors and Material Suppliers a material element of the bid. RKC's bid
15 indicated on its face that RKC had subcontracted 96.4% of the work. RKC's bid provided for more
16 than 70% of the work to be done by subcontractors; therefore, the RKC bid was nonresponsive to
17 Sec.8, 8-1.01 of the IFB that required the contractor to self-perform at least 30% of the contract
18 work. Pursuant to *Valley Crest* and *MCM Construction*, the only way in which the City's discretion
19 could be exercised was to reject the RKC bid as non-responsive. The City abused its discretion by
20 accepting the non-responsive bid.

21 **C. THE CITY ABUSED ITS DISCRETION BY WAIVING THE "IRREGULARITY."**

22 The City voted to waive the "irregularity" in the RKC bid. This was an abuse of discretion
23 because the irregularity was consequential and therefore the City lacked the discretion to waive it.
24 The sum of the RKC subcontracted work in the bid submission amounted to over 96% of the bid for
25 the entire project. The sum of the RKC subcontracted work in the bid submission for base bid plus
26 additive alternate one was over 86% of the contract. Both figures exceeded the 70% cap on
27 subcontracted work in the IFB. Those subcontract percentages were revised twice to reduce the
28 percentages to less than 70%, assuming the helical piles and structural steel was excluded as a

1 specialty item. RKC could not change the stated percentages after submission of its bid. RKC
2 revised and resubmitted its list of subcontractor percentages 3 times after bids were opened,
3 including revisions to the amount of work to be performed by subcontractors; changes to
4 subcontractors' purchase of materials; and the deletion of two subcontractors from the list.

5 The Third Appellate District in *Valley Crest* held:

6 Since it was a material element of the bid, North Bay could not change its bid to
7 correct the mistake in stating the percentages. North Bay's bid provided for more than
8 50 percent of the work to be done by subcontractors; therefore, it was nonresponsive
9 to section 8-1 of the specifications. The City could not permit the mistake as to this
10 material element of the bid to be corrected by purporting to "waive an irregularity."
11 Since North Bay's bid was nonresponsive, its contract is invalid. *Valley Crest, Id.*, at
12 1435.

13 In this case, Councilman Grego summed up the issue before the City of South Lake Tahoe
14 City Council as follows:

15 "... that the percentage requirement was—clearly stated at the beginning of the bid
16 and – and the contractor was allowed to continue to modify or – you had clarified, but
17 it also could be manipulated to make sure that the 30 percent figure is there by just
18 buying supplies or not?
19 It just seems like we've given the – the – the low bidder an opportunity to correct
20 work."

21 As in *Valley Crest*, the City of South Lake Tahoe's bid specifications (Standard
22 Specifications, Sec. 8, 8-1.01 and Special Provisions, Sec.14, Required Contract Provisions Federal-
23 Aid Construction Contracts, VII, 1) made the listing of subcontractor percentages on the Bidder's
24 Statement of Subcontractors and Material Suppliers a material element of the bid. RKC's bid
25 indicated on its face that RKC had subcontracted 96.4% of the work. RKC's bid provided for more
26 than 70% of the work to be done by subcontractors; therefore, the bid was nonresponsive to Sec.8, 8-
27 1.01 of the IFB and the Federal Funding Requirements that required the contractor to self-perform at
28 least 30% of the contract work. Since listing the subcontractor percentages was a material element
of the bid, RKC could not change its bid to correct the mistake in stating percentages and the City
could not permit the mistake to be corrected by purporting to waive the irregularity. Since RKC's
bid was materially nonresponsive, its contract with the City of South Lake Tahoe is invalid.

City and RKC argue that the First District Court of Appeal decision in *Ghilotti* is authority to
permit the City discretion to waive the "irregularity." *Ghilotti Construction Co. v. City of Richmond*

1 that even if the specialty items had to be added back in, RKC could still meet the subcontractor
2 requirements. The City's waiver of the listing of the subcontractor percentages after the bids were
3 opened gave RKC an unfair competitive advantage and demonstrated favoritism toward RKC. If
4 listing the subcontractor percentages was not required or if correct percentages were not required
5 then all of the bidders and potential bidders had a right to know that information before submitting
6 their bids because meeting the self performance requirement could have impacted bid amounts
7 and/or a bidders decision whether or not to bid.

8 In *Ghilotti Construction Co. v. City of Richmond*, supra, 45 Cal.App.4th 897, 53 Cal.Rptr.2d
9 389, the court stated:

10 It is significant, as the City Attorney made clear immediately before the Council
11 voted on the contract award, that the City did not waive the necessity of complying
12 with the subcontracting limitation altogether. Instead, it found the margin of GBCI's
13 noncompliance - approximately 5.5 percent -- to be insubstantial. If the City Council
14 had simply waived the necessity of compliance, other bidders would have been
15 disadvantaged. Those who did submit bids may have come in with significantly
16 altered amounts. Others may have been encouraged to submit bids if they knew the
17 subcontracting limitation would be ignored...

18 The City Attorney informed the City counsel that it was justified in waiving the "irregularity"
19 on the grounds that listing the percentages was "unrequired;" "there is no requirement that the
20 percentages be listed" and that "the somewhat misleading subcontractor column was included for
21 informational purposes...."⁴⁰ Completely waiving compliance with the subcontracting limitation in
22 the RKC bid gave rise to all of the unfair advantages discussed in *Ghilotti*.

23 The court finds RKC had an unfair advantage in that RKC was not required to comply with
24 the subcontracting limitation in its bid; RKC was given multiple opportunities to change its bid after
25 the bids were opened; RKC was free to subcontract without concern about complying with the
26 subcontractor limitation while other bidders had to determine what to subcontract while keeping
27 within the limits; other bidders could have submitted bids that were different than the bids submitted
28 if they also did not have to comply with the subcontractor limitation; other contractors may have
submitted bids if they had known that the subcontractor limitation would be ignored; and, waiving
compliance with the subcontractor limitation was a vehicle for favoritism since RKC was the only

⁴⁰ City's Opposition to Petition for Writ of Mandate or Prohibition, 11:15-16.

1 subcontractor that was not required to comply with the limitation in its bid. This court concludes
2 that the City's waiver of the subcontractor percentage listing requirement for RKC was an abuse of
3 discretion.

4 **E. RKC HAD AN UNFAIR COMPETITIVE ADVANTAGE BECAUSE IT**
5 **COULD HAVE WITHDRAWN ITS BID WITHOUT FORFEITING ITS BID**
6 **BOND UNDER PUBLIC CONTRACT CODE SECTION 5103.**

7 In *Valley Crest*, the court also found that North Bay had an unfair competitive advantage not
8 available to other bidders because it could have claimed error under Public Contract Code Section
9 5103 and withdrawn its bid without losing its bid bond. The same unfair competitive advantages
10 were also present here because RKC could have claimed error pursuant to PCC 5103 and withdrawn
11 its bid without forfeiting its bid bond.

12 Respondents argue variously that there either was no error, RKC never claimed error, or
13 the City never gave RKC an opportunity to withdraw its bid without consequence, thus RKC's bid
14 could not have been withdrawn. These arguments fall short. RKC's argument that the listed
15 percentages were not a mistake that would allow RKC to withdraw its bid without forfeiting its bid
16 bond is based on the false premise that the IFB did not require bidders to list the subcontractor
17 percentages for purposes of the Section 8-1.01 and Federal Funding Requirements self-perform
18 requirement. As discussed above, Section 8-1.01 of the Standard Specifications in the IFB
19 specifically made the listing of subcontractor percentages a material element of the bid. See *Valley*
20 *Crest, Id.*

21 Accordingly, incorrectly listing the subcontractor percentages would have given RKC the
22 opportunity to claim error under Public Contract Code section 5103 and allow it to withdraw its bid
23 without forfeiting its bid bond. As the Court stated in *Valley Crest*:

24 Applying the same test here, we conclude North Bay had an unfair advantage because
25 it could have withdrawn its bid. Misstating the correct percentage of work to be done
26 by a subcontractor is in the nature of a typographical or arithmetical error. It makes
27 the bid materially different and is a mistake in filling out the bid. As such, under
28 Public Contract Code section 5103, North Bay could have sought relief by giving the
City notice of the mistake within five days of the opening of the bid.^{FN1} That North
Bay did not seek such relief is of no moment. The key point is that such relief was
available. Thus, North Bay had a benefit not available to the other bidders; it could
have backed out. Its mistake, therefore, could not be corrected by waiving an
"irregularity."

1 FN1. Moreover, apart from the relief afforded by section 5103 of the
2 Public Contract Code, the City gave North Bay the opportunity to
3 withdraw its bid. The City's letter to North Bay stated the bid would be
4 considered nonresponsive unless North Bay provided additional
5 information.

6 *Valley Crest, Id.* at 1442. The sum of the subcontractor percentages listed in the RKC bid totaled
7 96.46%, far in excess of the 70% cap. When applied to base bid plus alternate one, the bid
8 percentages were 86.3%. RKC contended the listing was an "error."⁴¹ As such, this incorrect
9 listing of subcontractor percentages would have given RKC the same opportunity to claim error
10 under Public Contract Code section 5103 as the bidder had in *Valley Crest*. RKC had the advantage
11 of reviewing all the bids and re-evaluating whether or not it wanted to go forward with the job or to
12 claim error and withdraw its bid without losing its bid bond. This was an advantage not available to
13 the other bidders. Since this gave RKC an unfair competitive advantage, the City could not allow
14 RKC to correct its percentages by waiving an "irregularity."

15 RKC and the City's argument that it never claimed error is not supported by the evidence. In
16 responding to the City's letter that informed RKC that its percentages did not meet the self perform
17 requirement, RKC actually acknowledged in writing that it made an "error"⁴² in calculating the
18 percentages submitted for subcontractor work for Base Bid and Alternate #1 (2nd Statement of
19 Contractors) and that it "overstated"⁴³ the subcontractor percentages in its bid (1st Statement of
20 Subcontractors) for Base Bid and Alternates #1 and #2 because RKC included materials that Reeve-
21 Knight was going to purchase and "included all costs of the work, whether or not they would be
22 subcontracted."⁴⁴ Moreover, RKC specifically stated that in preparing its bid (1st Statement of
23 Subcontractors, Base Bid and Alternates #1 and #2), it included its "general contractor's fee,
24 insurance bond costs, general conditions, contractor's equipment, direct material purchases and
25 several other incidental costs" in the subcontractor percentages it submitted with its bid.⁴⁵ RKC also

26 ⁴¹ Exhibit 20 and 10.

27 ⁴² The evaluator for RKC that calculated the percentages stated: "I have realized I made an error. The percentages I listed were
28 based on the total dollar amount of the scopes of work and not the subcontractor specific value." Exhibit 20.

⁴³ RKC noted that "RKC's estimated subcontractor percentages were overstated in its bid for two principal reasons..." RKC
first asserted that the percentages were overstated because the listed percentages were based on the Base Bid plus Alternates #1
and #2 and RKC's second stated reason for the "overstatement" was that the percentages included materials that Reeve-Knight
was going to purchase and "RKC included all costs of the work, whether or not they would be subcontracted." Exhibit 10.
RKC also indicated the error was caused by inclusion of its overhead and profit in the subcontractor percentage calculations.

⁴⁴ Exhibit 10.

⁴⁵ Declaration of Pat Chism in Opposition to Petition for Writ of Mandate or Prohibition, 1:21 - 2:6.

1 noted that in preparing its 2nd Statement of Subcontractors, for Base Bid and Alternate #1, it included
2 in its subcontractor percentages “not only costs of the subcontractor’s work but also costs of work
3 Reeve-Knight would perform for that type of work.”⁴⁶ Since RKC misstated/overstated/erred in
4 listing the subcontractor percentages, this error was in the nature of a typographical or arithmetical
5 error that would have allowed RKC to seek relief under Public Contract Code section 5103.
6 Actually claiming error under Public Contract Code section 5103 is not necessary, it is the fact that
7 relief under section 5103 is available to the bidder that gives the bidder an unfair advantage.

8 The City of South Lake Tahoe also gave RKC the opportunity to withdraw its bid without
9 consequence when it notified RKC that its bid may be deemed non-responsive if additional
10 information was not provided.⁴⁷ The City and RKC argue that the letter also states that the City was
11 not allowing RKC to withdraw its bid based on the listed percentages. Although the letter makes
12 this statement, in reality all RKC had to do was ignore the letter and not “provide additional
13 information.” The City’s only real option without “additional information” would be to find the
14 RKC bid non-responsive because, as noted by the City, the 2nd RKC Statement of Subcontractors
15 indicated that RKC was “performing approximately 13.7% of the proposed contract with the
16 contractors own organization. This percentage is **significantly less** than the 30% **required** in the
17 project special provisions.” (Emphasis added.) This underscores the fact that RKC’s original self-
18 perform percentage in its bid (3.7%) deviated even more from the 30% self-performance
19 requirement than the 2nd Statement of Subcontractors. After viewing the other bids and re-
20 evaluating its own bid, if RKC wanted to withdraw its bid, RKC merely had to ignore the letter and
21 have its bid rejected without suffering any adverse consequences. The court finds the opportunity to
22 withdraw its bid without consequence after bid opening was an unfair competitive advantage not
23 available to other bidders. The City’s “waiver of the irregularity” had the effect of waiving the
24 requirement of compliance with a material element of the bid for RKC only, and therefore was an
25 abuse of discretion.

26 **F. THE CITY’S WAIVER OF THE “IRREGULARITY” FACILITATED BID**
27 **SHOPPING.**

28
⁴⁶ Declaration of Pat Chism in Opposition to Petition for Writ of Mandate or Prohibition, 2:17-19.

⁴⁷ Exhibit 18, page 2.

1 RKC stated to the Council that they went back to their subcontractors after the bid and took
2 back material purchases (i.e. site work and utilities, site furnishings regarding landscape work,
3 concrete and concrete materials, and masonry materials regarding stonework and pavers) and in
4 some cases actual work (i.e. the SWPPP work) in order to comply with the self-perform requirement.
5 The City was aware that RKC was renegotiating with its subcontractors as is demonstrated by
6 testimony at the August 3, City Council meeting:

7 COUNCIL MEMBER COLE: *** So when they rectified this, clarified it, did they
8 then switch the amount of materials being bought from under the umbrella of the
9 subcontractors and they were going to buy the materials themselves? Is how that how
10 they rectified it?

11 CITY ATTORNEY ENRIGHT: I'll let Reeve-Knight address that, but I think that's
12 primarily what they did.⁴⁸

13 At another stage in the hearing. Mr. Gray for RKC stated:

14 I think in the material purchase item, we could have actually gone to our electrician
15 and asked him to, you know, have us purchase his electrical standards and light
16 fixtures and so forth. And we could have driven that percentage up higher, just the
17 subcontractors that we had in relationship with and really doesn't give us the material
18 advantage as far as cost to us. It doesn't change our dollar amount to the project,
19 certainly not an advantage that – that would have helped us in lowering the number.

20 Our subcontractors' price is – is locked in. We're not asking them to manipulate any
21 numbers that – they provided to us. It's just a matter of purchasing some materials
22 that we've gotten commitments from them early on. And we had, you know, a break-
23 out (inaudible). We've chosen to purchase that – those materials to be in compliance
24 with the 30 percent requirement.⁴⁹

25 The City and RKC point out that the RKC bid price did not change after it took back material
26 purchases from its subcontractors; however, the fact that the bid price remained the same does not
27 change the fact that allowing RKC to renegotiate with its subcontractors after the bids were opened
28 was an unfair competitive advantage. All of the other bids could potentially have been different if
all of the other bidders knew that they could renegotiate with their subcontractors and change their
subcontractor percentages after the bids were opened to conform to the self perform requirement.
The dollar value of the self perform work in the original bid was \$218,116, and the dollar value of
the self-perform work on the 4th Statement of Subcontractors was \$1,489,781. Therefore, RKC had

⁴⁸ Transcript, pp. 19:21 – 20:3.

⁴⁹ Transcript, pp. 34:17 – 35:9.

1 to take back approximately \$1,272,000 (rounded) of work that RKC had originally attributed to its
2 subcontractors in order to meet the self-perform requirement.⁵⁰

3 The court in *Valley Crest* stated:

4 In enacting the Subletting and Subcontracting Fair Practices Act (the Act), the
5 Legislature found the practices of bid shopping and bid peddling ^[FN4] resulted in poor
6 quality of materials and workmanship, deprived the public of the benefits of fair
7 competition, and led to insolvencies, loss of wages, and other evils. (Pub. Contract
8 Code, § 4101.) Bid shopping occurs where the general contractor uses the lowest bid
9 received to pressure other subcontractors to submit even lower bids. [Citation.] The
10 Act requires bidders for public contracts to list the names of all subcontractors who
11 will perform work in an amount in excess of one-half of 1 percent of the prime
contractor's bid. (Pub. Contract Code, § 4104, subd. (a).) The bidder must also set
forth: 'The portion of the work which will be done by each subcontractor under this
act. The prime contractor shall list only one subcontractor for each portion as is
defined by the prime contractor in his or her bid.' (Pub. Contract Code, § 4104, subd.
(b).)

12 FN4. " 'Bid shopping is the use of the low bid already received by the
13 general contractor to pressure other subcontractors into submitting
14 even lower bids. Bid peddling, conversely, is an attempt by a
15 subcontractor to undercut known bids already submitted to the general
16 contractor in order to procure the job. The statute is designed to
17 prevent only bid shopping and peddling that takes place after the
18 award of the prime contract.... Bid peddling and shopping prior to the
19 award of the prime contract foster the same evils, but at least have the
20 effect of passing the reduced costs on to the public in the form of
lower prime contract bids.' (*Southern Cal. Acoustics Co. v. C.V.
Holder, Inc., supra*, 71 Cal.2d at p. 726, fn. 7 [79 Cal.Rptr. 319, 456
P.2d 975], citations omitted.)"(*Cal-Air Conditioning, Inc. v. Auburn
Union School Dist.* (1993) 21 Cal.App.4th 655, 661, fn. 1, 26
Cal.Rptr.2d 703.)(*MCM Construction.*, 66 Cal.App.4th at pp. 368-
369.) *Valley Crest, supra*, at 1438.

21 A comparison of the four Statements of Subcontractors submitted by RKC reveals a
22 substantial change in subcontractor percentages. The 1st RKC Statement of Subcontractors
23 (submitted with its bid on July 19, 2010) listed total subcontractor work at **96.46%** of the total
24 contract price; the 2nd RKC Statement of Subcontractors (July 20, 2010) listed the subcontractor
25 work at **86.3%**; the 3rd RKC Statement of Subcontractors (July 21, 2010) listed the work at
26 **68.71%**; and, finally, the 4th RKC Statement of Subcontractors (July 30, 2010) listed the work at
27 **65.47%**. The fluctuating percentages can be demonstrated by the following examples. GB

28 ⁵⁰ See C&S Chart comparing statement of subcontractor work attached to C&S memorandum of points and authorities
dated August 18, 2010.

1 Engineering is listed in the 1st RKC Statement of Subcontractors as performing the "Site Work"
2 which accounted for 12% of the contract price and "Utilities" which accounted for 3.43% of the
3 contract price. In the 2nd and 3rd Statements of Subcontractors, the site work was separated into
4 "SWPPP & Erosion Control" (.069%) and "Site Work" (8.2%) and the "Utilities" percentage went
5 up to 4.86%. Then, in the 4th RKC Statement of Subcontractors, the "SWPPP & Erosion Control"
6 went down to 0% and the "Site Work" and "Utilities" were combined for a total of 13.47% of the
7 contract price. GB Engineering went from a high of 15.43% of the contract down to 13.47% of the
8 contract price. An even more dramatic example is Frazier, the "Masonry and Pavers" subcontractor.
9 Frazier is listed in the 1st Statement of Subcontractors as performing 30.74% of the contract; in the
10 2nd Statement of Subcontractors, Frazier's percentage goes up to 36.01%; in the 3rd RKC Statement
11 of Subcontractors, Frazier's percentage drops to 25.43%; and, finally, in the 4th Statement, Frazier's
12 percentage goes down to 18.69%. Frazier's subcontract was reduced by almost 50% (36.01% down
13 to 18.69%) over the course of the four Statements of Subcontractors.

14 The City's waiver of the subcontractor percentage listing requirement encouraged and
15 facilitated bid shopping by allowing RKC to renegotiate with its subcontractors after the bids were
16 opened. This was an abuse of discretion.

17 **G. THE CITY'S DESIGNATION OF "SPECIALTY ITEMS" AFTER THE BIDS**
18 **WERE OPENED, GAVE RKC AN UNFAIR COMPETITIVE ADVANTAGE.**

19 RKC also had an unfair competitive advantage not afforded the other bidders when the City
20 designated the helical pile work and steel work as "specialty items" after the bids were submitted.
21 No specialty items were designated in the IFB. RKC's 1st and 2nd Statements of Subcontractors
22 included both the helical pile and steel subcontractors and both statements listed subcontractor work
23 that exceeded the 70% cap. However, RKC's 3rd and 4th Statements of Subcontractors excluded
24 both of these subcontractors and both statements listed subcontractor work that met the self perform
25 requirement.

26 This was an unfair advantage that was not available to any of the other bidders because the
27 specialty items can be subcontracted out but are not included in the total amount of subcontracted
28 work for purposes of the self perform requirement. City's designation of specialty items after the

1 bids were opened gave RKC an unfair competitive advantage not available to the other bidders and
2 was an abuse of discretion.

3 IV.

4 **THE RKC BID IS NON-RESPONSIVE, THE CONTRACT INVALID, AND THE MATTER**
5 **IS REMANDED TO CITY WITH INSTRUCTIONS TO COMPLY WITH THIS ORDER,**
6 **THE IFB AND THE PUBLIC CONTRACT LAW IN CONSIDERING AN AWARD OF THE**
7 **CONTRACT**

8 The court makes the following conclusions based on the above findings of fact and
9 conclusions of law. The City acted arbitrarily and capriciously and abused its discretion by
10 accepting a bid that was non-responsive on its face and that materially and substantially deviated
11 from the invitation for bids and bid documents. The City further abused its discretion by allowing
12 RKC to revise its bid after the bids were opened; by assisting RKC in correcting the bid irregularity;
13 by providing an opportunity for RKC to withdraw its bid without penalty; by designating specialty
14 items after bid opening; and, by waiving a material element of the bid and awarding the contract to
15 RKC. All of these actions gave RKC an unfair competitive advantage; therefore, the City could not
16 allow changes to the bid by waiving the "irregularity." RKC also could have claimed error under
17 Public Contract Code section 5103 and withdrawn its bid without forfeiting its bid bond; therefore,
18 RKC had an unfair competitive advantage and its mistake could not be corrected by waiving the
19 "irregularity." Allowing RKC to change its bid because of mistake was a violation of Public
20 Contract Code sections 5101 and 5103. In allowing RKC to cure a material deviation from the bid
21 requirements after the bids were opened, the City favored RKC over other bidders; provided RKC
22 with a competitive advantage not available to other bidders; influenced potential bidders to refrain
23 from bidding; affected the City's ability to make bid comparisons; and was a violation of the
24 Subletting and Subcontracting Fair Practices Act (Pub. Contract Code §§ 4100 et seq.). Because
25 RKC's bid deviated materially from the 30% self-performance requirement specified in the bid
26 documents, the City had no discretion to take any action other than to reject the RKC bid as non-
27 responsive. The City failed to perform its mandatory ministerial duty to reject RKC's bid proposal
28 as non-responsive; therefore, the contract between RKC and the City is invalid. The Third District
Court of Appeal decision in *Valley Crest Landscape, Inc. v. City Council of the City of Davis* (1996)

1 41 Cal.App.4th 1432, 49 Cal.Rptr.2d 184 is controlling. As such, the Writ as requested and
2 modified shall issue.

3
4 **V.**

5 **THE DECLARATORY RELIEF CAUSE OF ACTION**

6 For the reasons set forth above, the court determines the RKC/City of South Lake Tahoe
7 contract is invalid.

8 **IT IS HEREBY ORDERED:**

9 1. A writ of mandate hereby issues commanding the City of South Lake Tahoe to cease,
10 desist or refrain from proceeding with the contract for public recreation and access
11 improvement plans for the El Dorado Beach Improvement Project at Lakeview Commons
12 (“Project”) between Respondent City and RKC because the Contract is invalid for the
13 reasons set forth above.

14 2. A writ of mandate hereby issues ordering the City of South Lake Tahoe to rescind the
15 resolution authorizing and approving the award of the Project contract to RKC and to declare
16 the contract invalid.

17 3. A writ of mandate hereby issues ordering the City of South Lake Tahoe to consider
18 any responsive bids submitted on July 19, 2010 for the for EL DORADO BEACH
19 IMPROVEMENT PROJECT AT LAKEVIEW COMMONS, PWC 10-30160051, FORMAL
20 CITY BID NO. 10-30160051-BN-2, and in so doing, follow all relevant state and federal
21 laws; adhere to the invitation for bids that was advertised for this project; to act in
22 conformity with the views expressed herein; and, to give proper consideration to the matters
23 that have occurred heretofore.

24 4. The City shall file a return on the writs within 70 days after entry of this Order,
25 demonstrating compliance with the writs directed to be issued hereunder. The writ return
26 shall be on noticed motion. This order and judgment thereon is issued without prejudice to
27 Petitioners to seek a further remedy in the event City fails to comply with the writs. The
28 stay heretofore issued by this court will be dissolved upon the City’s compliance with the

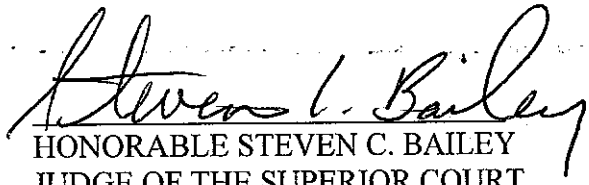
1 writs. At that time, the C&S bond posted as a condition of the injunction/stay shall be
2 exonerated;

3 5. For the reasons set forth above, the RKC/City contract is deemed invalid, thus
4 resolving the second cause of action.

5 6. Petitioners shall recover costs and any recoverable fees as the prevailing party. Any
6 right to fees must be established by noticed motion.

7
8 IT IS SO ORDERED.

9 Dated: 11/1, 2010


10 HONORABLE STEVEN C. BAILEY
11 JUDGE OF THE SUPERIOR COURT
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