

MOUNTAIN VIEW WHISMAN SCHOOL DISTRICT

**Resolution No. 03-012419, Declaring the Futility of Public Bidding
for Additional Excavation Work at District Office Construction Project**

WHEREAS, on November 15, 2019, the Mountain View Whisman School District (“District”) awarded Project Number 18-409, the District Office Modernization Project (“Project”) to Premier Builders (“Premier”), finding that it was the lowest responsive and responsible bidder. Premier’s bid was \$1,820,199; and

WHEREAS, when Premier began excavation at the Project, they discovered approximately 2,229 cubic yards of recycled base rock in the area below the new building pad. This was an unforeseen condition as the base rock did not show up on the soils report or any previous site investigations; and

WHEREAS, after review with Premier, the District’s design team, the Project soils engineer and Greystone West, the District’s construction manager, it was determined that approximately 900 tons or 600 cubic yards could be reused onsite while the other approximately 1,600 yards of material had to be off-hauled and disposed of. Furthermore, due to the small size of the site and the significant amount of space required for stockpiling this material, where the lime treatment at the building pad was originally to be performed in one step, it was agreed that it now had to be performed in 2 phases (together “Additional Work”); and

WHEREAS, Public Contract Code section 20118.4 requires that all change orders on a project in excess of ten percent of the original contract price cannot simply be performed by the prime contractor for the project, but must be competitively bid and awarded to the lowest responsive and responsible bidder; and

WHEREAS, on January 4, 2019, Premier submitted a change order for the Additional Work in the amount of \$235,674(See **Exhibit A**) – well in excess of the ten percent ceiling; and

WHEREAS, California law provides that, “Where competitive proposals work an incongruity and are unavailing as affecting the final result or where they do not produce any advantage . . . the statute requiring competitive bidding does not apply” (*Hiller v. City of Los Angeles* (1961) 197 Cal.App.2d 685, 694), and that public entities need not comply with competitive bidding processes where to do so would be impractical or futile and would not serve the purposes of competitive bidding. (*Los Angeles Dredging Company v. City of Long Beach* (1930) 2 Cal. 348; *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631.); and

WHEREAS, if the District were to bid the Additional Work separately, it would delay the Project a minimum of 10 weeks and possibly much longer; and

WHEREAS, bidding the Additional Work would not produce a competitive advantage to the District. The delays of at least ten weeks would require either compensating Premier for their extended general conditions while they waited for the Additional Work to be completed or asking them to demobilize and remobilize when the Additional Work was completed. Either way, the estimated cost of this would be at least \$38,500.

WHEREAS, another reason bidding would not produce a competitive advantage is that contractors bidding on the Additional Work would not be able to compete on price with Premier which is already mobilized on the site so it does not need to include that substantial cost in its bid; is already familiar with the Additional Work; and has crews and equipment ready to begin the Additional Work immediately.

NOW THEREFORE, the Governing Board of the District hereby finds, determines, declares, orders, and resolves as follows:

- Section 1. That the foregoing recitals are true.
- Section 2. For the reasons stated above, public bidding of the additional excavation work for the Project would not produce an advantage to the District and would produce a net burden and distinct disadvantage to the District.
- Section 3. Based on the foregoing, it would be incongruous, futile, and unavailing to publicly bid the additional excavation work for the Project.
- Section 4. The Board hereby approves the change order submitted by Premier for the additional excavation work without further advertising for or inviting of bids – consistent with the pricing in the January 4, 2019 change order to the District.
- Section 5. That the District’s Superintendent or his designee is authorized to take all steps and perform all actions necessary to execute and implement this Resolution.

PASSED AND ADOPTED by the Board of Education of the Mountain View Whisman School District of Santa Clara County, State of California, this 24-day of January 2019, by the following vote:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

President of the Board of Trustees
Mountain View Whisman School District
Santa Clara County, California

EXHIBIT A

PREMIER CHANGE ORDER CPR 001 REV 1, DATED JANUARY 4, 2019