

RESOLUTION

of the

Board of Directors

of

NORTH COAST RAILROAD AUTHORITY

Resolution No. 2019-12

WHEREAS, on July 10, 2019, the NCRA Board of Directors adopted Resolution No. 2019-11; and

WHEREAS, upon further consideration by the Board of Directors and in light of certain facts and events occurring after adoption of Resolution No. 2019-11, the Board of Directors has determined that Resolution 2019-11 should be rescinded; and

NOW THEREFORE BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE NORTH COAST RAILROAD AUTHORITY as follows:

Resolution No. 2019-11, regarding a waiver of public bidding and a delegation of authority to the Executive Director to execute a construction contract with Wipf Construction, is hereby rescinded, and shall be of no further force or effect.

Introduced and adopted this 29th day of July 2019, at a teleconference meeting of the Board of Directors of North Coast Railroad Authority at Ukiah, California.

AYES:

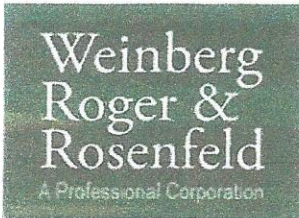
NOES:

ABSENT:

ATTEST:

Mitch Stogner
NCRA Executive Director

Richard Marks
NCRA Board of Directors Chair



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Andrea Matsuoka
amatsuoka@unioncounsel.net

July 24, 2019

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VIA U.S. MAIL AND EMAIL
ncra.mstogner@sbcglobal.net

Mr. Mitch Stogner
Executive Director
North Coast Railroad Authority
419 Talmage Road, Suite M
Ukiah, CA 95482

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KATHARINE R. McDONAGH
BENJAMIN J. FUCHS
CHRISTINA L. ADAMS

Re: North Coast Railroad Authority's Failure to Follow Competitive Bidding Requirements -- Ukiah Depot Project

Dear Mr. Stogner:

This correspondence is sent to you on behalf of our client, the Construction Industry Force Account Council (CIFAC), regarding the North Coast Railroad Authority's (NCRA) failure to follow the Public Contract Code's bidding requirements. CIFAC is a non-profit organization that monitors state and local government agencies for competitive bidding compliance in order to promote fair and open bidding on all public construction projects.

On July 10, 2019, NCRA's Board of Directors ("Board") approved NCRA's award of the remainder of work on the Ukiah Depot project ("Project") to Wipf Construction. NCRA had not competitively bid the Project. **NCRA's award of the Project to Wipf Construction violates the requirement that public agencies competitively bid their projects.**

In its resolution approving the award (Resolution No. 2019-11), the Board attempted to justify its actions by explaining why competitive bidding was "not appropriate in this case." The Board explained that competitively bidding the "Project would not produce an advantage to NCRA within the meaning of *Graydon v. Pasadena Redevelopment Authority*¹," and "would be undesirable and impractical." Specifically, the Board explained that competitively bidding the Project would "increase the cost of the completion of the Project, cause delays, and potentially cause NCRA to incur additional costs and liabilities associated with completion of its obligations under the Off-Site Improvement Agreement with [the Judicial Council of California]."

¹ (1980) 104 Cal. App. 3d 631.

However, NCRA is wrong about its interpretation of *Graydon* and its ability to avoid competitive bidding on this Project. First, in *Graydon*, the court never squarely held that the project in question, a retail center, did not need to be competitively bid. Rather, the issue was whether a 60 day statute of limitations for a validation action established by Code of Civil Procedure section 860 et seq. applied. Second, the language in *Graydon* concerning a narrow exception to public agency competitive bidding does not apply here. The court explained that “it has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where competitive proposals do not produce *any* advantage, or where it is *practically impossible* to obtain what is required and to observe such form, competitive bidding is not applicable.” The court suggested, but did not hold, that competitive bidding may not apply in that case, where it would lead to a 14 month delay and a loss of over \$1.5 million in tax increment revenue that would impair the public agency’s ability to pay its bonds and fulfill its statutory purpose of carrying out its redevelopment plan.

Here, at the July 10, 2019 Board meeting, both you and Project Manager Steve Honeycutt stated that competitive bidding would put the Project only 40 days behind. Further, you admitted that you and Mr. Honeycutt had discussed putting the project out to bid. Finally, no one at the Board meeting could advance a plausible explanation for why competitively bidding the Project would be unavailing, not produce an advantage, or be practically impossible. Therefore, the limited exception to competitive bidding outlined in *Graydon* does not apply.

Thus, NCRA’s informal award of the contract to Wipf Construction via Resolution No. 2019-11 violates the competitive bidding requirement for public agencies. *Graydon v. Pasadena Redevelopment Agency* does not justify the award, and to our knowledge NCRA does not meet any other limited exception to the competitive bidding requirement. **Thus, NCRA must rescind Resolution No. 2019-11 and rebid the Project. NCRA must also ensure that prevailing wages are paid on the Project pursuant to Labor Code section 1771.**

If NCRA does not rebid the Project, the resulting contract will be void. (See *Miller v. McKinnon* (1942) 20 Cal.2d 83, 87-88 (holding that a contract let in violation of competitive bidding requirements is void and unenforceable).)

CIFAC would like this problem remedied in order to ensure that NCRA awards projects in a fair and transparent manner to the benefit of the public and all parties involved. **Please respond to this letter by July 31, 2019, confirming that (1) the remainder of the Ukiah Depot Project will be rebid and awarded to the lowest responsible bidder and (2) prevailing wages will be paid on the Project.** CIFAC would prefer to avoid legal action. However, if NCRA does not respond, or if NCRA’s response is inadequate, CIFAC will consider legal action, up to and including litigation remedies. We will also seek to recover all attorney fees and expenses incurred, as permitted by law. Please provide the response to the undersigned, Andrea Matsuoka, at amatsuoka@unioncounsel.net and Michelle Tucker at mtucker@cifac.org.

We look forward to your response by July 31, 2019. Thank you in advance for your immediate attention to this matter.

Sincerely,



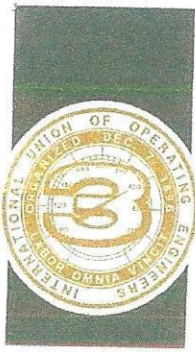
Andrea Matsuoka

ACM:tg

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cc: Michelle Tucker, CIFAC Executive Director, mtucker@cifac.org
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OPERATING ENGINEERS LOCAL UNION No. 3

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Jurisdiction: Northern California, Northern Nevada, Utah, Hawaii, and the Mid-Pacific Islands

July 24, 2019

VIA EMAIL AND U.S. MAIL
Ncra.mstogner@sbcglobal.net

Mr. Mitch Stogner
Executive Director
North Coast Railroad Authority
419 Talmage Road, Suite M
Ukiah, CA 95482

Re: **Objection to Contract Award – Ukiah Depot Project**

Dear Mr. Stogner:

Operating Engineers Local Union No. 3 represents over 36,000 members, the majority of which are workers in the construction industry working for thousands of general engineering contractors here in Northern California.

We write to express our deep concerns and dissatisfaction with the board's recent decision to forgo the competitive bidding process and arbitrarily select a hand-picked contractor for the Ukiah Depot Project. The board's actions are wrong for the reasons set forth below.

The board's reliance on *Graydon v. Pasadena*, 104 Cal.App.3d 634 (1980) to circumvent its competitive bidding obligations under state law is misplaced and improper. Under *Graydon*, the public entity was permitted to bypass the competitive bidding requirement only where going through the process would have adversely affected the agency's statutory purpose and ability to meet its financial obligations. None of these factors exist in the instant situation. Nonetheless, the board decided to bypass the bidding process despite several objections from fellow board members, their own attorney and state agencies.

To forgo the competitive bidding process does a huge disservice to the public at large as this does not guarantee that they receive the lowest bid possible for the project and that public funds are used most effectively. Indeed, the board's decision may even be a breach of its fiduciary responsibility to ensure that public funds are spent in a responsible manner.

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Through its decision to bypass the bidding process, the Authority is exposing itself to potential legal challenges by contractors and other industry stakeholders. Moreover, members of the public, including Local 3 members, expressed to the Union their perception that the board's actions reflected public officials acting improperly to select a local contractor that is part of the "good ol' boy network," with the contractor's most valued qualification being a personal friendship or relationship with someone on the board. We sincerely hope this is not the case.

The Operating Engineers Local Union No. 3, stands together with our contractors and industry partners to do anything necessary to ensure that all projects are competitively bid in a fair and transparent manner as required by law.

Sincerely,



Michael Pickens
District Representative
District 10 Rohnert Park
mpickens@oe3.org
916.240.1544

Cc: Hiedy Torres, NCRA Executive Assistant, ncra.heidy@sbcglobal.net
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