



Gordon N. Ball Inc. October 6, 2016

Via Golden State Overnight and
Facsimile (916) 227 6282

General Engineering Contractors

Tel 925.838.5675

Fax 925.838.5915

333 Camille Avenue

Alamo, CA 94507

Mr. John McMillan
Deputy Division Chief
State of California
Department of Transportation
Division of Engineering Services
1727 30th Street, MSC 43
Sacramento, California 95816

Re: *Construction on State Highway in Calaveras County Near Arnold from 0.7 Mile West to 0.2 Mile West of Big Trees State Park Entrance in District 10 on Route 4*

Subject: Bid Protest
Bid Opening Date: September 21, 2016
Contract No. 10-0F2804
Project ID 1000000033

Dear Mr. McMillan:

Gordon N. Ball, Inc., the contractor that submitted the lowest responsive bid for the above-referenced project ("Project"), has reviewed the bids of K.W. Emerson, Inc. ("Emerson") and Vinciguerra Construction ("Vinciguerra"), the purported lowest and second lowest bidders, and finds that these bids are not responsive, because these bidders failed to comply with the instructions to bidders relating to Disadvantaged Business Enterprise ("DBE") requirements.

Section 2-1.12B(2) *DBE Commitment Submittal* requires bidder to:

- (a) submit a copy of the quote from each DBE shown on the DBE Commitment form that describes the type and dollar amount of work shown on the form; and
- (b) Submit a DBE Confirmation form for each DBE shown on the DBE Commitment form to establish that it will be participating in the Contract in the type and dollar amount of work shown on the form.

Both Emerson and Vinciguerra failed to comply with either of these requirements. In that regard, Emerson failed to submit copies of quotes from any DBE shown on the DBE Commitment form describing the type and dollar amount of work shown on the form. Further, Emerson failed to submit a DBE Confirmation form from for all DBEs shown on the DBE Commitment form to establish that each would be participating in the Contract in the type and dollar amount of work shown on the DBE Commitment form. Pursuant to section 2-1.33 *Bid Document Completion and Submittal*, subsection A, the "Failure to submit the forms and information as specified may result in a nonresponsive bid." With respect to Vinciguerra, the bidder failed to provide any of the required DBE forms.

Further, Emerson's DBE Commitment form contains a litany of errors and omissions, including the following non exhaustive list:

- (a) Required work category codes missing for Nitta Erosion Control;
- (b) Required work category codes missing for K.W. Emerson;
- (c) Missing DBE Certification Number for Nitta Erosion Control
- (d) Missing DBE Certification Number for K.W. Emerson
- (e) The sum of the amount of total value of all subcontract (\$3,003,594) combined with the amount of services provided by Emerson (\$2,103,207) does not equal the amount of Emerson's bid amount of \$6,609,288.80.

Finally, and most importantly, Emerson failed to sign its DBE Commitment form as required, *see* Section 2-1.33.

To be responsive, a bid must be in strict and full accordance with the material terms of the bidding instructions. *Taylor Bus Serv., Inc. v. San Diego Bd. Of Educ.*, 195 Cal. App. 3d 1331 (1987); *MCM Constr., Inc. v. City & County of S.F.*, 66 Cal.App. 4th 359 (1998). Whether a bid is responsive can be determined from the face of the bid without outside investigation or information. *Valley Crest Landscape, Inc. v. City Council of the City of Davis*, 41 Cal. App. 4th 1432 (1996). "A basic rule of competitive bidding is that bids must conform to specifications and that if a bid does not so conform, it may not be accepted." (*Id.* at 1440.) A bid that differs materially from the bidding instructions must be rejected. *See, e.g., Stimson v. Hanley*, 151 Cal. 379 (1907); *Ghilotti Constr. Co. v. City of Richmond*, 45 Cal. App. 4th 897 (1996). The requirement to include quotes from subcontractors whom bidders propose to use to satisfy DBE commitments was included in the Instructions to Bidders and/or bid forms and is mandatory. Accordingly, by definition, Emerson and Vinciguerra's bids were nonresponsive because each violated mandatory requirements Caltrans imposed in its instructions for bidding. (*Valley Crest*, 41 Cal. App. 4th at 1464 [error in listing subcontractors could not be waived]); *National Identification v. Board of Control*, 11 Cal. App. 4th 1446, 1464 (1992).)

Caltrans in the past has properly rejected bids as non-responsive because of this very reason, and now, it must similarly reject Emerson and Vinciguerra's bids in order to comply with its own bidding requirements. *See*, for example, bid protest of Hazard Construction dated February 14, 2013, and Caltrans (John McMillan) letter dated March 18, 2013, finding the bid of Atlas Development, Inc. to be nonresponsive, in part, for Atlas' failure to include DBE quotes (attached).

Bidders who fail to attach the requisite quote(s) enjoy a competitive advantage. The non-compliant bidder could claim the required quote was mathematically different from the quote that the bidder intended to use, and withdraw the bid. As a consequence, failure to include the required bid confers a competitive benefit and constitutes a discrepancy that cannot be waived. (*Valley Crest Landscape*, 41 Cal. App. 4th at 1440 [discrepancy that allows bidder to assert grounds for withdrawal of bid confers a competitive advantage and therefore constitutes a non-waivable defect].)

Further it is not possible to cure a defective bid that fails to attach a required quote by agreeing after the bid opening to so do. Eliminating requirements in favor of one bidder, and not another, introduces an improper and unfair element of subjectivity into the bid process. (*City of Inglewood-LA County Civic Center v. Superior Court* (1972) 7 Cal.3d 861, 867.) To fail to enforce the contract documents uniformly would be arbitrary, capricious, and grounds for setting aside an award of the project. (*Id.*)

For the reasons set forth above, Emerson and Vinciguerra's bids contain material irregularities and omissions which render their bids nonresponsive. Their bids must be rejected.

An Illegal Award To A Bidder Other Than Gordon N. Ball, Inc. Carries Consequences

Caltrans may only award a contract to the lowest responsible bidder that submits a responsive bid. A contract awarded to a bidder other than Gordon N. Ball, Inc. would be illegal and void. (*Valley Crest Landscape, Inc. v. Davis* (1996) 41 Cal.App.4th 1432; *Monterey Mechanical v. Sacramento Regional County Sanitation City* (1996) 44 Cal.App.4th 1391.)

Payment of any funds to another bidder also would violate the California Constitution. Section 10 of Article XI of the Constitution provides that "a local government body may not ... pay a claim under an agreement made without authority of law."

A concerned taxpayer, as well as Gordon N. Ball, Inc., may bring an action to enjoin payments on a contract awarded to another bidder and to require the return to Caltrans of any such payments. (*Rubino v. Lolli* (1970) 10 Cal.App.3d 1059; *Miller v. McKinnon* (1942) 20 Cal. 2d 83.) The public policy underlying competitive bidding is so strong that a court is required, on its own initiative, to order the return of payments even if the parties to a lawsuit do not request such an order. (*Greer v. Hitchcock*, (1969) 271 Cal.App.2d 334.)

Conclusion

For the foregoing reasons, Gordon N. Ball, Inc.'s protest should be sustained and the project should be awarded to Gordon N. Ball, Inc. as the lowest responsible bidder.

Gordon N. Ball, Inc. is an experienced and qualified contractor with an impeccable history and reputation. Gordon N. Ball, Inc. and the Caltrans have worked together successfully on a number of projects, and Gordon N. Ball, Inc. hopes to continue that track record of success here.

We would appreciate your advising us of any meetings or hearings that may be held to discuss this protest or the award of the project so we may attend and be given the opportunity to present evidence and argument as the law requires. (*City of Inglewood*, 7 Cal.3d at 867.)

Please feel free to contact me if you have any questions or would like to discuss this matter further. We look forward to receiving Caltrans' determination of the protest.

Sincerely,

GORDON N. BALL, INC.



Hal Stober
President

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
1727 30th STREET
P. O. BOX 168041
SACRAMENTO, CA 95816-8041
PHONE (916) 227-6280
FAX (916) 227-6282
TTY 711



*Flex your power!
Be energy efficient!*

March 18, 2013

Facsimile: (858) 453-6034

Jason A. Mordhorst, Vice President
Hazard Construction Company
P.O. Box 229000
San Diego, CA 92192-9000

11-403704
11-SD-163-5.8/6.4, 8.5/8.8
B.O. 1/24/13

Dear Mr. Mordhorst:

The Department of Transportation (Caltrans) received the attached letter dated February 14, 2013, from Hazard Construction Company (Hazard), protesting Atlas Development, Inc.'s (Atlas) DBE Commitment form. The protest states that Atlas failed to provide copies of DBE quotes and did not make a good faith effort to meet the stated contract goal as required by the specifications. Hazard requests that Caltrans find Atlas nonresponsive and award the contract to Hazard.

After a review of the submitted DBE Commitment form, Caltrans finds that Hazard's protest has merit and will proceed to award the contract to the lowest responsible bidder.

If you have any questions, please contact Mulissa Smith, Contract Awards Branch Manager, at (916) 227-6228.

Sincerely,


JOHN C. McMILLAN
Deputy Division Chief
Office Engineer
Division of Engineering Services

Attachment



Phone (858) 587-3600
Fax (858) 453-6034
6465 MarIndustry Place
San Diego, CA 92121
hazardconstruction.com
License No. 750542 A/B

February 14, 2013

Department of Transportation
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, CA 95816
Attn: John C. McMillan

Re: Bid Protest of Apparent Low Bidder
Caltrans Contract 11-403704

Dear Mr. McMillan:

Hazard Construction ("Hazard") has reviewed the bid forms and DBE Commitment Form as submitted by the apparent low bidder, Atlas Development, Inc. ("Atlas") and asks that Caltrans find Atlas non-responsive due to failure to meet to properly meet the 8% DBE goal and failure to submit a good faith effort to attain the 8% DBE goal.

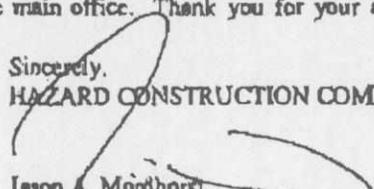
The Caltrans Bidder - DBE Commitment Form, the third sentence of the first paragraph of the Caltrans Bidder - DBE - Commitment Form states "Failure to submit the required DBE information will be grounds for finding the proposal nonresponsive." (emphasis added) The lower left hand corner of this form states "Copies of DBE quotes are required." (emphasis added)

Because Atlas failed to submit a good faith effort and failed to provide copies of DBE quotes to substantiate the dollars claimed in their DBE Commitment Form, as required by the specifications, their bid must be found non-responsive.

Hazard Construction hereby protests any award to Atlas because they are non-responsive due to failure to comply with Section 2-1.02 DISADVANTAGED BUSINESS ENTERPRISES, sixth paragraph which states "Meet the DBE goal shown in the Notice to Bidders or demonstrate that you made adequate good faith efforts to meet this goal." We ask that Caltrans award the contract to Hazard, the true apparent low bidder, having met all of the requirements of the contract.

If you have any questions regarding any of these matters or need further clarification, please do not hesitate to call myself at the main office. Thank you for your attention to this matter.

Sincerely,
HAZARD CONSTRUCTION COMPANY



Jason A. Mordhorst
Vice President

cc: Bid File
Attachment

Low (In Bid Book)

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
CALTRANS BIDDER - DBE - COMMITMENT
DATE: 02-07-12 1:00 (NEW 02/2012)

Low Bidder

This information may be verified at www.caltrans.ca.gov. If it is not, and you are the apparent low bidder of the contract, you should, if possible, the potential low bidder contact the Office of the Special Provisions. Failure to provide the required information will be grounds for terminating the proposed participation.

CONTRACT NO: 11-403704

DBE COMMITMENT: 1,279,835.22

DBE OPENED DATE: 1,24/13

BIDDER NAME: Atlas Development

DBE GOAL FROM CONTRACT, %: 8%

DBE FIRM CONTRACTOR CERTIFICATION:

CONTRACT ITEM NO	TYPE OF WORK AND DESCRIPTION OF SERVICES TO BE PROVIDED OR MATERIALS TO BE PROVIDED	FIRM CALTRANS LINE ONLY	NAME OF DBE (Must be verified on the date into our system - include Caltrans verification #, DBE address and phone number) (Indicate first and last name for subcontractors)	DOLLAR AMOUNT DBE
<u>17,18,50-56,59</u>	<u>Pavement Markers/Striping</u>		<u>Topco SPECIALTY Inc. 110 W. 2nd Ave, Suite 100 #100, Brea, CA 92622 (949) 251-9207 DBE # 102</u>	<u>36,570.00</u>
<u>23</u>	<u>Excavation Haul Away</u>		<u>Beedley Transport, (916) 224-7700 7000 Maple Ave, Lincoln, CA 95648 (916) 224-7700 DBE # 102</u>	<u>206,915.00</u>
<u>44,46,47,48</u>	<u>Concrete Barrier Rebar</u>		<u>Northridge Rebar, 1775 Alameda Ave, Suite 100, CA 94511 (415) 241-1000 DBE # 102</u>	<u>60,977.91</u>

REPORTING: Identity of DBE firms being selected for work, regardless of size, amount of work and the DBE subcontractors and their respective amounts of work to be performed shall be submitted, where applicable, with the return and items of work to the "Dissemination List" published with your bid. Copies of the DBE contract shall be provided.

Total DBE Participation: 303,570.91

28.71 %

- DBE firms subcontractors must submit their subcontract number and details of work to be performed by DBE including work performed by its own firm.
- If work of this kind is not to be performed or completed by DBE, describe exact portion of that to be performed or completed.
- Use Section titled "Dissemination List" published with your bid. Section 2 "Bidding" of the special provisions to determine the work to be done by DBE firms.

DBE-014

DBE 40
OFFICE ENGINEER
DEPARTMENT OF TRANSPORTATION
1727 BETH STREET
SACRAMENTO, CA 95834 916

M. Atafi
Signature of Bidder

1/24/13
Date

(617) 200-0992
Phone Number

Mark Atafi
Print Name of Bidder

ADA Notice: For individuals with sensory disabilities, only documents available in electronic format. For information call (916) 224-3110 or TDD (916) 224-3110 or write: Bureau and Bureau of Engineering, 1727 N Street, SAC, Sacramento, CA 95811.

*** Transmit Conf. Report ***

P. 1

Mar 18 2013 03:39pm

CALTRANS CONTR AWARDS Fax 916-227-6282

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DEPARTMENT OF TRANSPORTATION
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 TTY 711



*Plan your journey!
Be energy efficient!*

March 18, 2013

Facsimile: (858) 453-6034

Jason A. Mordhorst, Vice President
 Hazard Construction Company
 P.O. Box 229000
 San Diego, CA 92192-9000

11-403704
 11-SD-163-S.B/6.4, R.5/B.8
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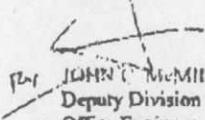
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If you have any questions, please contact Melissa Smith, Contract Awards Branch Manager, at (916) 227-6228.

Sincerely,


 JOHN C. McMILLAN
 Deputy Division Chief
 Office Engineer
 Division of Engineering Services

Attachment