

FELDMAN & ASSOCIATES, INC.

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March 20, 2015

VIA FACSIMILE AND EMAIL

Mr. John C. McMillan
Deputy Division Chief
California Department of Transportation
Division of Engineering Services
1727 30th Street
Sacramento, CA 95819-8041

Re: IO Environmental & Infrastructure, Inc./Caltrans
Contract No. 01-262054

This firm represents IO Environmental & Infrastructure, Inc. ("IO Environmental"), with respect to its recent low bid for Caltrans Contract No. 01-262054. My client received your March 18, 2015 letter regarding Hanford Applied Restoration & Conservation's protest of the award to IO Environmental. As discussed below, there is no basis for Hanford's protest, and Caltrans should choose to accept the lowest responsive bid and award the contract to IO Environmental.

The overarching purpose of California's public bidding process is to eliminate fraud and abuse and to ensure that public funds are used judiciously. As the California Court of Appeal has remarked, "it certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid." [*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377 at 383.] As a result, public agencies are permitted to waive minor bid variances or irregularities if the overall bid substantially conforms to the bid requirements, if the irregularity has not affected the overall amount of the bid, and if the bidder does not enjoy an advantage not available to all bidders [47 Ops. Cal. Atty. Gen. 129, 130 (1966), quoted with approval in *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 889, 905.] In other words, public agencies have discretion to waive inconsequential issues in order to avoid the wasteful and ludicrous outcomes that would result from a rule of strict compliance.

Hanford's protest is little more than an attempt to find *any* technicality that might call IO Environmental's low bid into question, and should be rejected in whole.

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First, Hanford's protest is premised upon language that was removed from the bid package in Addendum three. The only provision cited in support of the protest is Special Provision Section 2-1.33, which, until Addendum three was issued, provided in relevant part "...[t]he Subcontractor List must show the name, address, and work portions to be performed by each subcontractor listed. Show work portions by bid item number, description, and percentage of each bid item subcontract."

Addendum three reissued Special Provision Section 2-1.33, and the revised language omits the portion upon which Hanford relies. Copies of the Addendum three cover sheet and revised Special Provision Section 2-1.33 are attached for your review. As you will see, the language that Hanford cites has been removed in its entirety, and consequently its protest is without merit or authority.

Second, and perhaps even more importantly, the issue Hanford raises is no way material to the bid. Material terms are typically those that affect price, quantity, quality, or delivery. [See *Stimson v. Hanley* (1907) 151 Cal. 379.] A bid that fails to comply with a material term of the bid package gives a bidder a substantial economic advantage or benefit not enjoyed by other bidders, and must therefore be rejected. [See *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, and *Universal By-Products v. Modesto* (1985) 43 Cal. App. 3d 145.]

Hanford has not pointed to a material deficiency that would require Caltrans to reject IO Environmental's bid. The subcontractor percentages do not affect the overall price of IO Environmental's bid, and IO did not possess any kind of advantage over other bidders. Rather, the issue presented is one of denominators. Hanford argues that since IO Environmental divided by X instead of Y, both of which quantities are set forth in the bid, Caltrans and California taxpayers should spend an additional \$3.1 million for Hanford to complete the project. IO Environmental respectfully submits that the most appropriate and reasonable course of action consonant with the purpose of public bidding would be for Caltrans to waive the minor irregularity and award the project to IO Environmental.

Finally, the previous bid protests Hanford referenced are distinguishable from the current situation. The Martinez Landscape Company issue related to Caltrans' inability to determine the amount of work that was to be subcontracted based on the information Martinez provided. Even assuming for the sake of argument that Hanford's protest is correct, IO Environmental's bid provides ample information for such a determination to be made. With respect to the USS Cal Builders matter, USS Cal Builders was the third low bidder when it was disqualified from consideration for Contract 08-3401U4, not the apparent low bidder. Further, Caltrans 2010 specifications applied to that bid, *not* the amended provisions that were issued via addenda in the present case. The previous decisions resulted from dissimilar circumstances and should not be given any weight or precedential effect.

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In sum, my client encourages you to reject Hanford's ploy. The special provision cited is not correct, the issues raised are immaterial, and the past decisions it referenced are inapplicable. IO Environmental is available to answer any questions you might have, and looks forward to working with Caltrans on the project.

Sincerely,



Kevin Hannifan
for FELDMAN & ASSOCIATES, INC.

cc: Mark Feldman
Client

STATE OF CALIFORNIA-CALIFORNIA STATE TRANSPORTATION AGENCY

EDMUND G. BROWN Jr., Governor

DEPARTMENT OF TRANSPORTATION

DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER

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February 23, 2015

01-Men-101-45.0/50.8

01-262054

Project ID 0115000013

ACNHP-Q101(263)E

Addendum No. 3

Dear Contractor:

This addendum is being issued to the contract for CONSTRUCTION ON STATE HIGHWAY IN MENDOCINO COUNTY IN AND NEAR WILLITS AT VARIOUS LOCATIONS.

Submit bids for this work with the understanding and full consideration of this addendum. The revisions declared in this addendum are an essential part of the contract.

Bids for this work will be opened on Tuesday, March 3, 2015.

This addendum is being issued to revise the *Notice to Bidders and Special Provisions*, and the *Bid book*.

In the Special Provisions, Section 1-1.11, is added as attached.

In the Special Provisions, Section 2-1.04, is added as attached.

In the Special Provisions, Section 2-1.10, is added as attached.

In the Special Provisions, Section 2-1.33, is added as attached.

In the Special Provisions, Section 3-1.03, is added as attached.

In the Special Provisions, Section 3-1.18, is added as attached.

In the Special Provisions, Section 7-1.02K(1), is added as attached.

Replace section 2-1.33 of the RSS with:

2-1.33 BID DOCUMENT COMPLETION AND SUBMITTAL

2-1.33A General

Complete the forms in the *Bid* book.

Use the forms provided by the Department except as otherwise specified for a bidder's bond.

Do not fax forms except for the copies of forms with the Department of Industrial Relations' numbers submitted after the time of bid. Fax these copies to (916) 227-6282.

Submit the forms and copies of the forms to the Office Engineer.

Failure to submit the forms and information as specified may result in a nonresponsive bid.

If an agent other than the authorized corporate officer or a partnership member signs the bid, file a Power of Attorney with the Department either before opening bids or with the bid. Otherwise, the bid may be nonresponsive.

2-1.33B Electronic Bids

Section 2-1.33B applies to electronic bids.

For an electronic bid, complete and submit the electronic portion of the *Bid* book under the *Electronic Bidding Guide* at the Bidders' Exchange website and submit the paper forms as specified for a paper bid.

Your authorized digital signature is your confirmation of and agreement to all certifications and statements contained in the *Bid* book.

On forms and certifications that you submit through the electronic bidding service, you agree that each form and certification where a signature is required is deemed as having your signature.

2-1.33C Paper Bids

Section 2-1.33C applies to paper bids.

Submit your bid and any *Bid* book forms after you submit your bid:

1. Under sealed cover
2. Marked as a bid
3. Identifying the contract number and the bid opening date

2-1.33D Bid Form Submittal Schedules

2-1.33D(1) General

The *Bid* book includes forms specific to the contract. The deadlines for the submittal of the forms vary depending on the requirements of each contract. Determine the requirements of the contract and submit the forms based on the applicable schedule specified in section 2-1.33D.

Bid forms and information on the form that are due after the time of bid may be submitted at the time of bid.

2-1.33D(2) Federal-Aid Contracts**2-1.33D(2)(a) General**

Section 2-1.33D(2) applies to a federal-aid contract.

2-1.33D(2)(b) Contracts with a DBE Goal

Section 2-1.33D(2)(b) applies if a DBE goal is shown on the *Notice to Bidders*.

Submit the bid forms according to the schedule shown in the following table:

**Bid Form Submittal Schedule for a
Federal-Aid Contract with a DBE Goal**

Form	Submittal deadline
Bid to the Department of Transportation	Time of bid except for the Department of Industrial Relations' number
Copy of the Bid to the Department of Transportation as submitted at the time of bid with the Department of Industrial Relations' number	10 days after bid opening
Subcontractor List	Time of bid except for the Department of Industrial Relations' number
Copy of the Subcontractor List as submitted at the time of bid with the Department of Industrial Relations' numbers	10 days after bid opening
Small Business Status	Time of bid
Opt Out of Payment Adjustments for Price Index Fluctuations ^a	Time of bid
DBE Commitment	No later than 4 p.m. on the 4th business day after bid opening
DBE Good Faith Efforts Documentation	No later than 4 p.m. on the 4th business day after bid opening

^aSubmit only if you choose the option.

2-1.33D(2)(c) Contracts without a DBE Goal

Reserved

2-1.33D(2)(d)–2-1.33D(2)(h) Reserved**2-1.33D(3) Non-Federal-Aid Contracts****2-1.33D(3)(a) General**

Reserved

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FELDMAN & ASSOCIATES, INC.
ATTORNEYS AT LAW

FAX

To: John McMillan

From: Kevin Hannifan

Fax: (916) 227-6282

Pages: 7 (including fax cover)

Phone: (916) 227-6299

Date: 3/20/2015

Re: 10 Environmental & Infrastructure INC.

cc:

Urgent Please Reply

• **Comments:**

cc: Alicia @ 10 Environmental & Infrastructure Inc.
(619) 677-5648

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