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November 7, 2014

Via Email and Facsimile (916) 227-6282

Ms. Erin Holbrook
California Dept of Transportation
Legal MS 57
PO Box 1438
Sacramento, CA 95812

Mr. Earl Seaberg
MSC 43
Office Engineer
California Department of Transportation
1727 30th Street
Sacramento, California 95816-7005

Re: Contract No. 04-4S0504
04-SCL-09-4.2
Bid date: October 8, 2014

Protest of Gordon N. Ball, Inc.

Dear Ms. Holbrook and Mr. Seaberg:

This law firm represents Gordon N. Ball, Inc., the contractor that submitted the lowest responsive bid for Contract No. 04-4S0504. On October 31, 2014, Gordon N. Ball, Inc. submitted a timely protest of the award of this project to any other bidder.

The bid documents for the contract state that "the Department will receive bids until 2:00 p.m. on the bid open date via Bid Express web site. Bids received after this time will not be accepted."

The Department's longstanding interpretation of this standard language is that a bid will be timely so long as it is received while it is still 2:00 p.m. - i.e., before 2:01 p.m. This is consistent with the usual and customary calculation of time. For example, it is still Wednesday until it is Thursday; 11:59 in the evening on Wednesday is still Wednesday. Similarly, it is 2:00 p.m. until it is 2:01 p.m. *In re Haskell Co.*, No. B-292756, 2003 U.S. Comp. Gen. LEXIS 196, 2003 Comp. Gen. Proc. Dec. ¶ 202 (U.S. Comp. Gen. 2003) (rejecting protest of bid that was received after 1:59, but before 2:01 p.m.)

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When this contract first bid, a screen shot of the bid results showed that the Department had set its software to receive bids until 2:01 p.m., which is the reasonable and logical reading of the Department's bid solicitation language:

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Thus, before any dispute arose regarding the meaning of the Department's bid solicitation language, the parties shared a common understanding, which is that a bid submitted while it was still 2:00 p.m., and before 2:01, would be considered timely. That interpretation therefore is controlling. *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal. 2d 751, 761, 128 P.2d 665 (1942).

In addition, the Department on multiple occasions – even after the bid on this project – has utilized an identical interpretation of the above language concerning the submission of bids. We have reviewed a large number of screenshots from bid openings, which invariably have shown a cutoff time of 2:01 p.m. A representative sample is enclosed for your review. The Department's own consistent custom and practice is to interpret the bid submittal language in question as allowing bids to be received up until 2:01 p.m. Even prior to adopting electronic bidding, the Department accepted bids after 1:59 p.m. and before 2:01 p.m. Under standard principles of contract interpretation, the Department is bound by the custom and practice. See Civ. Code § 1646; *Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.*, 135 Cal. App. 2d 40 (1955).

The fact that the Department itself consistently has interpreted its bid solicitation language in the same way that Gordon N. Ball has in connection with this matter attests to reasonableness of an interpretation authorizing the submission of bids until 2:01 p.m. Accordingly, because it was the Department that prepared the bid language, any uncertainty concerning what that language means must be construed against the Department and in favor of Gordon N. Ball, Inc. See Civ. Code § 1654; *Weeshoff Construction Co. v. Los Angeles County Flood Control Dist.*, 88 Cal. App. 3d 579, 588 (1979).

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The Department cannot abruptly, and without notice to bidders, reinterpret its bid solicitation language to shorten the time within which contractors may submit bids. Actions taken by a public agency "based on no more than the will or desire of the decision-maker" constitute arbitrary and capricious conduct and hence an abuse of discretion. *D.H. Williams Constr., Inc.*, 146 Cal. App. 4th 757, 763 (2007); *Verdugo Hills Hosp., Inc. v. Dep't of Health* 88 Cal. App. 3d 957, 964 (1979). The Department can be compelled to comply its own prior and subsequent interpretations of its bid solicitation language. See *Pozar v. Dept. of Transportation*, 144 Cal. App. 3d 269, 272 (1983).

The federal procurement decision in *In re Haskell Co.*, No. B-292756, 2003 U.S. Comp. Gen. LEXIS 196, 2003 Comp. Gen. Proc. Dec. ¶ 202 (U.S. Comp. Gen. 2003) is instructive as it decided an issue identical to the one in this case. In *Haskell*, a disappointed bidder protested the award of a contract to a contractor that had submitted its bid prior to 2:01 p.m., but after 1:59 p.m. The Comptroller General ruled that the solicitation, which stated the "closing date for submission of Part 2 Proposals is 25 June 2003, 1400 hours", reasonably could be read "as requiring that they [bid proposals] be received by 14:00:59."

Given that it is reasonable to interpret the Department's bid language as allowing bids to be received until it no longer is 2:00 p.m., the rejection of a bid received prior to 2:01 p.m. violates basic rules of contract interpretation, the Department's own custom and practice, and would be arbitrary, capricious, and an abuse of discretion, for the reasons set forth above.¹ California law prohibits the Department from awarding the contract to another bidder. Pub. Contract Code § 10180. For the reasons set forth above, an award to a contractor other than Gordon N. Ball, Inc. would be illegal and void. *Valley Crest Landscape, Inc. v. Davis*, 41 Cal. App. 4th 1432 (1996); *Monterey Mech. v. Sacramento Regional County Sanitation Dist.*, 44 Cal. App. 4th 1391 (1996).

During our telephone call, I had asked that Ms. Holbrook share any legal authority that she may have that would support the Department's position. I reiterate that request and look forward to her reply.

Please also consider this letter to be a formal request for records under the Public Records Act, Government Code Section 6250 et seq. Please produce the following records:

¹ To the extent that the bid language is ambiguous concerning the exact cutoff time for accepting bids, the Department would be in violation of FHWA regulations. 23 C.F.R. § 635.112(h) (which requires the recipients of FHWA grants to "clearly identify in the bidding documents those requirements which the bidder must assure are complied with to make the bid responsive".)

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a. Copies of screen shots or other records indicating, for projects awarded since October 1, 2013, the "cutoff time" utilized for acceptance of bids.

b. For the past seven years, documents relating to any bid received after 1:59 p.m., but before 2:01:00 p.m., which was accepted by the Department, where the bid time was 2:00 p.m..

c. For the past seven years, documents related to any protest of a bid received after 1:59 p.m., but before 2:01:00 p.m., where the bid time was 2:00 p.m.

d. For the past two years, documents related to any procurement where bids were to be received "until" a particular time, and a cutoff time was established for a time after that particular time (e.g., "until 2:00 p.m.", and the cutoff time was established as 2:01:00 p.m.)

e. Any memorandum, manual, guidance, opinion, or ruling, utilized by the Department in interpreting what "until 2:00 p.m." in its bid solicitation means with respect to the exact moment when bids no longer may be accepted.

We would like to discuss this matter with the Department, and if possible meet with Department representatives, to see if fair and mutually acceptable resolution can be reached. However, unless the Department in writing advises that it will refrain from awarding the contract while these informal efforts are pursued, Gordon N. Ball, Inc. would have no alternative but to require an immediate response from the Department, and to commence a proceeding for a writ of mandate, an injunction, and other appropriate relief.

This letter is sent with a full reservation of rights and remedies.

Very truly yours



A. Robert Rosin

Enclosures

cc: Client

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◀ Letting of October 1, 2014 ▶

Letting ID: 04-4S0504
Opening Time: 02:01:00 PM PST
Cut-Off Time: 02:01:00 PM PST

Proposal	Call Order	Items	Amendments	Plan Sheets	Counties
04-4S0504	1	This proposal has been withdrawn This proposal has been moved to the letting of October 8, 2014			

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11/07/14 17:04 FAX 6506912889 Received
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Letting ID: 02-4G00U4
Opening Time: 02:01:00 PM PDT
Cut-Off Time: 02:01:00 PM PDT

Proposal	Call Order	Items	Amendments	Plan Sh
02 4G00U4	1	35	0	

CONSTRUCTION ON STATE HIGHWAY IN SISKIYOU COUNTY NEAR WEED FROM ANGEL VALLEY ROAD TO MAPLE AVENUE In District 02 on Route 5

(1 Active Proposal)

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Letting ID: 01-0B0804
Opening Time: 02:01:00 PM PDT
Cut-Off Time: 02:01:00 PM PDT

Proposal	Call Order	Items	Amendments	Plan Sh
01 0B0804	1	45	1	

CONSTRUCTION ON STATE HIGHWAY IN DEL NORTE COUNTY NEAR KLAMATH FROM 0.4 MILES NORTH OF KLAMATH RIVER BRIDGE TO HIGH PRA on Route 101

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