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November 5, 2013

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Via: Facsimile

Re: Contract No. 12-0F96E4 - Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing

Subject: Flatiron West, Inc.'s Low, Responsive Bid

Dear Mr. McMillan:

I am writing regarding Flatiron West, Inc.'s ("Flatiron") October 31, 2013 low bid for Contract Number 12-0F96E4 for Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing (the "Project").

1. Flatiron's Bid and PC 4100 Subcontractor List.

The Project's bidding instructions required that bidders "list each subcontractor [who will] perform work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub. Cont. Code § 4100 et seq.)." Standard Specifications § 2-1.33C. In short, the Project's bidding protocol required that all bids include the name and place of business of each subcontractor the bidders intend to use to perform work, supply labor, or render construction services for the Project exceeding that price threshold.

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Bidders were required to later update that information to include the bid items and percentage of those bid items that each subcontractor would perform within 24 hours of bid opening if the information was not provided at bid time. See Special Provisions 2-1.33C and Public Contract Code § 4104(A)(2)(A).

On Bid Day, Flatiron's bid supplied a lump-sum price for the Project and a list of subcontractors. Under its Class A contractor's license, it is able to perform all the tasks set forth in the California Department of Transportation's ("Department") Invitation to Bid.

2. Flatiron's Bid was Complete and Responsive as a Matter of Law.

Under long established California state law cited below, Flatiron thereby agreed to perform all of the work for the Project. It further agreed to self-perform all aspects of the Project for which subcontractors were not listed. This included a commitment to perform the work designated as "Landscape and related", and "AC paving and related" in the Prime Contract.

There is no question that Flatiron submitted a responsive bid for the job. The Public Contract Code specifically states that when a contractor does not identify a subcontractor for a specific bid item, it automatically commits to self-perform those bid items. See Pub. Cont. Code § 4106.

After the submission of its bid, Flatiron asked for a copy of its subcontractor listing. This is a typical request because a general contractor rarely makes a physical copy of the bid or subcontractor submission in the last few minutes before the bid is submitted. In Flatiron's experience this request is granted as a matter of course so the contractor can verify its submission.

In this case, the Department's representative was hesitant to provide a copy of Flatiron's own bid sheet to the company when it was requested. Instead, Flatiron was told that the Department would not provide a full copy of the submitted bid list and provided only one page from Flatiron's submission. There was no explanation why the Department would withhold a publicly available bidding document from Flatiron, especially its own bid.

Within 24 hours of submitting its bid, Flatiron completed and submitted columns two and three of the Department's Subcontractor List form.

Flatiron was fully responsive with regard to providing all of the requested information for the subcontractors it listed on bid day.

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3. Flatiron's Post-Bid Submission Provided all Required Information.

The day after the bid, Flatiron provided voluminous information on various bidders for the job. Unfortunately, it also included information on two subcontractors who were not listed on bid day: Sierra Landscape; and RJ Noble. This minor mistake is traceable to the Department not providing Flatiron with a copy of the subcontractor list it submitted with its bid.

In any case, the inclusion of these extra names did not affect Flatiron's bid in any way. Flatiron was not entitled to use these subcontractors because Flatiron had not listed them. Flatiron's bid that had been submitted the previous day was unequivocal in its commitment to self-perform those items. As such, those extra names were extraneous to the original, properly submitted bid, not material, and had no legal effect on the validity of the low, responsive bid submitted the previous day.

4. Flatiron's Bid Was Fully Responsive to the Request for Bids.

It is important to realize that Flatiron provided the Department with a complete, unequivocal and responsive bid on bid day. The submission of extra information the next day did not change that state of affairs.

The inclusion of extra information cannot be seen as unresponsiveness. If anything, the supplying of additional information regarding subcontractors that were considered but not listed was "over-responsive" on the part of Flatiron. Again, it had no legal effect.

A bid is responsive if it promises to do what the bidding instructions demand. *D.H. Williams Const., Inc. v. Clovis Unified School Dist.*, (2007) 146 Cal.App.4th 757, 764 (citing *Taylor Bus Service v. San Diego Bd. of Educ.*, (1987) 195 Cal. App. 3d 1331). Flatiron's bid promised to do everything the bidding instructions demanded rendering it completely responsive.

5. The California Subletting Act does not Protect Unlisted Subcontractors.

The California Subletting and Subcontracting Fair Practices Act (the "Act") is intended to protect subcontractors actually listed by the general contractor on bid day. The Act does not provide any relief or penalty for subcontractors that are not listed on bid day. A State policy that acceptable bids are thereafter rejected based upon the submission of information on unlisted subcontractors would lead to the Department rejecting the low bid on many projects every year. We are not aware of any regulation, statute or policy that supports such a position.

While Flatiron must subcontract with those subcontractors identified in its bid, it has no obligations to any subcontract not listed on bid day. Pub. Contr. Code § 4107. Flatiron therefore has no obligation towards any extraneous subcontractors who were inadvertently identified in its follow-up list of subcontractor information. The fact they were under consideration prior to bid is of no legal or practical effect. Inclusion of those two additional subcontractors in Flatiron's follow-up list is merely extraneous information.

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6. A Bid with Extraneous Material is Still Responsive.

The addition of surplus information regarding subcontractors that Flatiron did not actually list in its bid is a harmless error. It has no legal or material effect on Flatiron's bid or the subcontractors who have been listed for the work.

Neither the Notice to Bidders nor the Public Contract Code provides that a bid becomes non-responsive merely because it includes extraneous information. And, the law of California is that the inclusion of such surplus information does not render the bid non-responsive. See, e.g., *Cypress Sec., LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1015 (City properly found that a bidder submitting three pricing models in its bid instead of one did not make bid nonresponsive) and *D.H. Williams, supra*.

In *D.H. Williams*, the general contractor listed an unlicensed bidder on its subcontractor listing. *Id.*, at 765. The court overruled the public agency's conclusion that the bid was unresponsive, the *D.H. Williams* court explained that the inclusion of the unlicensed subcontractor in its bid did not render the bid non-responsive because there, as here, the contractor was "fully ready to perform the [] work itself". *Id.*, at 767.

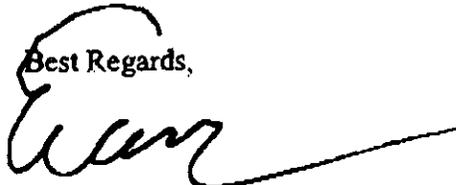
In this situation, the mention of two extraneous subcontractors occurred an entire day after the submission of Flatiron's binding and enforceable bid. It had no effect on the previously submitted bid because Flatiron was, as in *D.H. Williams*, "... fully ready to perform the work itself". In this case, Flatiron did not even list these subcontractors on bid day. The bid-day list is the list that matters under the Act.

As the Department is fully aware, such a minor informality may be waived by the public entity without prejudicing unsuccessful bidders. In this case, it was a harmless and immaterial error.

The inclusion of information on two extra subcontractors in Flatiron's "day after bid" informative list did not have any impact on its commitment to self-perform or the validity of Flatiron bid to do this work.

As the responsive, low bidder, Flatiron should be awarded the contract. Please contact me if you have any questions.

Best Regards,



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Partner
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FROM: Ernest Brown, Esq., P.E.

TOTAL NUMBER OF PAGES 5, INCLUDING THIS COVER SHEET

DATE: November 5, 2013

COMMENTS:

Re: Contract No. 12-0F96E4 - Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing

Please see the attached November 5, 2013 letter regarding Flatiron West, Inc.'s Low, Responsive Bid

Thank you,
Jay R. Houghton, Esq. (415-249-0869)

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