

FROM

Received

Nov 15 2013 02:42pm

(FR1) NOV 15 2013 14:25/ST. 14:25/No. 6852052051 P 2

SMITH, CURRIE & HANCOCK LLP
ATTORNEYS AT LAW

A LIMITED LIABILITY PARTNERSHIP THAT INCLUDES PROFESSIONAL CORPORATIONS

Telephone: (800) 832-6946
Facsimile: (415) 276-1754

Reply To:
Ernest C. Brown
Attorney at Law
244 California Street
Suite 500
San Francisco CA 94111

Cell: (415) 317-1700
ecbrown@smithcurrie.com

November 15, 2013

Mr. John McMillan
Deputy Division Chief
Division of Engineering
Office Engineer, MS 43
1727 30th Street
P.O. Box 168041
Sacramento, CA 95816-8041
Phone: (916) 227-6299
Facsimile: (916) 227-6282

Via: Facsimile, E-mail and Overnight Mail

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 Protest of the Department's November 13, 2013 Non-Responsiveness Determination Regarding Contract #12-0F96E4

Dear Mr. McMillan:

On behalf of Flatiron, I am submitting this Protest of the November 13, 2013 indication that Flatiron's low bid on the Camino De Estrella project (the "Project") Contract No. 12-0F96E4 (the "Contract") was non-responsive and is being rejected.

The Department is in full agreement that Flatiron's bid submitted on bid day was completely responsive and was the low bid that day.

The subsequent error occurred on the next day. It did not and could not change who the subcontractors were or change what work Flatiron was bound to perform. It did not provide Flatiron with the ability to withdraw its original bid by claiming a mistake. It cannot be material if such extra names had no effect whatsoever. It was a nullity.

As such, the Contract should be awarded to Flatiron.

Mr. John McMillan
November 15, 2013
Page 2

Summary of Argument

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 asked and was completely responsive.

Flatiron responded to every category and question on the bid forms and its lump sum figure was the low, responsive bid for this significant Project. That should be the end of the inquiry regarding the submission of a low, responsive bid for this Project.

Significantly, Flatiron complied with the requirement that the bids include subcontractors' names in Column 1 and their corresponding work descriptions in Column 4 of the Department's Subcontractor List form OES-OE-0102.2 (REV 3/2001) ("Subcontractor List"). There is no question that Flatiron fully complied with this requirement. The submitted bid is therefore valid on its face and contains no apparent or implied error, whether clerical or otherwise.

In submitting their bid, Flatiron committed as a matter of law to perform any item that did not have a subcontractor listed for that specific scope of work. Flatiron also committed to subcontract the work listed in Column 4, and only that work, to those subcontractors listed in Column 1. Under California law, everything else must be self-performed by the general contractor. CA Pub. Cont. Code § 4107. And Flatiron is well qualified and properly licensed to perform those scopes of work it committed to self-perform.

Once they were the low apparent bidder, Flatiron had 24 hours to complete Columns 2 and 3 of the Subcontractor List. See Department's Standard Specifications § 2-1.33A through C and the revised April 19, 2013 Standard Specifications § 2-1.33C in the Special Provisions of the Contract. That revised section states:

On the Subcontractor List, you must either submit each subcontracted bid item number and corresponding percentage with your bid or fax these numbers and percentages to (916) 227-6282 within 24 hours after bid opening. Failure to do so results in a nonresponsive bid.

Id. Flatiron supplied the bid item numbers and corresponding percentages for all of the subcontractors that had been identified on bid day. Thus, they complied with that requirement as well.

Flatiron's bidding department also identified two extra subcontractors on the Subcontractor List – subcontractors who had not been previously identified and who were therefore not eligible to be subcontractors on this Project.

Mr. John McMillan
November 15, 2013
Page 3

The inclusion of these two extra subcontractors in Columns 2 and 3 was merely surplus information that has no legal or practical effect. Flatiron responded completely on bid day by listing their subcontractors in Column 1 of the Subcontractor List and their corresponding work description in Column 4. The Subcontract List was complete and responsive on bid day, so these two other subcontractors were not eligible for consideration. Furthermore, Flatiron followed the instructions by providing supplemental information for legally subcontracted work within 24 hours. Therefore, their bid is the lowest responsive, responsible bid.

As such, the errata was trivial, immaterial and an inappropriate ground for rejecting the bid.

The Subcontractor List was Complete and Responsive

At the core of the Department's basis for rejecting Flatiron's bid is the erroneous assumption that the inclusion of those two subsequently-listed subcontractors was a "material" mistake that would permit Flatiron to withdraw its bid thereby rendering the bid non-responsive. However, the Subcontractor List was complete and responsive on bid day. Any later-added additional names had no effect, whether material or otherwise. It did not affect the price of the bid, provide Flatiron with an advantage not allowed other bidders, or violate the letter or policy of California's Subletting and Subcontractor Fair Practices Act (the "Act"). It was just a trivial, waivable error with no impact on the bidding process or the subsequent Contract.

The rule that no subcontractor can be added after bid day was set by the California legislature and the Department, and the courts have repeatedly applied it to this exact situation. The Act prohibits contractors from adding a new subcontractor after a bid has been submitted and requires that the general contractor self-perform all work not assigned to subcontractors in the bid regardless of how the subsequent listing is revised. See CA Pub. Cont. Code § 4107; and *R. M. Sherman Co. v. W. R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563.

In addition, the state legislature has provided very narrow grounds upon which a contractor can withdraw its bid, namely a clerical error that is apparent in its original bid – not an error of judgment and not something that occurs days or weeks later. CA Pub. Cont. Code § 5103. Listing subcontractors on the subsequently-completed Subcontractor List is not an error that would entitle Flatiron to withdraw its bid.

The Department's New Rule Would Encourage Contractors to Game Their Bids

We are extremely concerned about the analytical path that the Department's letter has taken. It departs from previous letters dealing with revised Subcontractor Lists. But it creates an improper loophole in the bidding process that the Department and legislature never intended to create.

Mr. John McMillan
November 15, 2013
Page 4

The issue is this: if it is a material mistake to add one or more subcontractors to one's Subcontractor List the day after a bid has been submitted and, as the Department apparently has assumed, doing so would allow a bidder to withdraw its bid after viewing the other bids because of the "mistake", then any contractor can do just that to intentionally evade a bid if they, for example, conclude the bid was too low in comparison to the other bids.

The issue now created by the Department is that any bid can be withdrawn simply by listing extraneous subcontractors in the next-day Subcontractor List. This would allow contractors to game the system in the way that the Act was enacted to prevent.

The Department's Past Decisions Support Awarding the Contract to Flatiron

The Department and California courts have clearly stated that a general contractor who assigns additional items of work not specified for a previously listed subcontractor on the second day submittal must instead self-perform the work.

On at least two prior occasions, the Department has rejected "revised" subsequently-submitted Subcontractor Lists finding that the contractor was obligated to perform the work according to its initial submittal because not doing so would "violate the [Act] of the Public Contract Code." *See, e.g.*, Department's June 6 and 28, 2012 Letters regarding Contract Nos. 03-1-F6004 and 04-0G3104, respectively (enclosed). It appears that this determination is pro forma because, with the exception of contract, project and contractor-specific language, both of those letters are exactly the same. *See id.* But here, the Department is mistakenly rejecting the bid instead of the revised Subcontractor List.

The Department's prior decisions are also clear that the grounds for bid withdrawal are extremely narrow and rarely granted – and then only where the contractor has made a clerical (not judgment) error on bid day.

In order for the Department's decisions to be consistent, the rule should remain that any items of work not accompanied by a subcontractor's name on bid day must be self-performed by the general contractor.

In following that rule, it is apparent that the subsequent listing of extra subcontractors following the submittal of a bid is a nullity, has no legal or practical effect, and could never be the basis of the general contractor withdrawing its bid for the project.

If the Department's new rule is applied to bids going forward it will very likely result in taxpayers paying millions of dollars extra that they would not otherwise need to pay for projects. It is important to protect the taxpayers and the integrity of the bidding process by making every reasonable attempt to accept the low, responsive and responsible bidder. The Department must keep the low bidder bound to its responsive bid.

Mr. John McMillan
November 15, 2013
Page 5

Trivial Errors Should Be Waived

This was a trivial and immaterial error on the part of the contractor. An error completing the subsequently-submitted Subcontractor List should not deprive the public or the contractor of the value inherent in a low, responsible bid. *See, e.g., Ghilotti Const. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897 (a public entity may waive inconsequential deviations from contract specifications in a public contract bid).

The inclusion of two new subcontractors on Flatiron's subsequently-submitted Subcontractor List is trivial because California law requires that Flatiron self-perform those scopes of work.

Summary

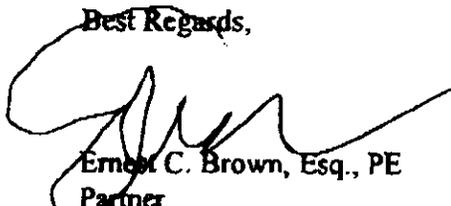
It is clear that Public Contract Code Sections 4107 and 5103, as well as the Department's past practices and interpretation of the Act, support awarding the Contract to Flatiron.

As previously stated, this document serves as Flatiron's bid protest of the Contract Award to any contractor other than Flatiron. Additional information will be provided within the next five business days.

In accordance with Section 3-1.04 of the 2010 Standard Specifications and the April 19, 2013 revised Standard Specifications in the Contract's Special Provisions, Flatiron has authorized me to extend the validity of their bid beyond November 30, 2013 while this bid protest is being handled administratively and/or properly adjudicated.

Please contact me if you have any questions.

Best Regards,



Ernest C. Brown, Esq., PE
Partner
Smith Currie & Hancock LLP

Enclosures (w/o attachments)

STATE OF CALIFORNIA — BUSINESS TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROOKER, Governor

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



*Print your name!
 Be always efficient!*

June 6, 2012

Facsimile: (888) 400-8169

Hilda Fox, President
 CW Fox Construction, Inc.
 2701 Secret Lake Trail
 Cool, CA 95614

03-1F6004
 03-ED-193-23.4
 B.O. 5/30/12

Dear Ms. Fox:

The Department of Transportation (Caltrans) received the attached revised "Subcontractor List" on May 31, 2012, for Contract No. 03-1F6004 from CW Fox Construction, Inc. (CWFC). In the revised list, Sierra Traffic Marking was added for Bid Item 20 Lead Compliance Plan. This letter is to inform you that Caltrans cannot accept the revised "Subcontractor List" as it would violate the Subletting and Subcontracting Fair Practices Act of the Public Contract Code. The subcontractor list originally submitted by CWFC with its bid on May 30, 2012 will be used.

The statement on the bottom of the "Subcontractor List" form that reads, "If not submitted with the bid, fix the percent of each bid item subcontracted by no later than 24 hours after bid opening to (916) 227-6282" refers to the percentage of subcontracted work previously submitted only. No other revisions to the form are permitted.

Since Sierra Traffic Marking was omitted for Bid Item 20 on the "Subcontractor List" submitted with your bid, CWFC will be required to perform 100 percent of the Bid Item 20 Lead Compliance Plan with its own forces.

A copy of this letter will be provided to the Resident Engineer for monitoring contract compliance.

If you have any questions, please contact Tammy Thomas, Contract Awards Branch Chief, at (916) 227-6228.

Sincerely,

EARL SEABERG
 Chief, Office of Contract Awards and Services
 Office Engineer
 Division of Engineering Services

Attachments

STATE OF CALIFORNIA — BUSINESS TRANSPORTATION AND HOUSING AGENCY

RODOLFO G. BROWN, Jr., Governor

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!*

June 28, 2012

Facsimile: (530) 795-5734

Ed Carbahal, President
 Vintage Paving Co., Inc.
 P. O. Box 461
 Winters, CA 95694

04-0G3104
 04-Sub-121-3.4/6.5
 B.O. 6/26/12

Dear Mr. Carbahal:

The California Department of Transportation (Caltrans) received the attached revised "Subcontractor List" on June 27, 2012 for Contract No. 04-0G3104 from Vintage Paving Co., Inc. (Vintage). In the revised list, Bid Item 15, Furnish Single Sheet Aluminum Sign and Bid Item 16, Roadside Sign – One Post, were added to Columns 2 and 4 for the subcontractor Chrisp Company. This letter is to inform you that Caltrans cannot accept the revised "Subcontractor List" as it would violate the Subletting and Subcontracting Fair Practices Act of the Public Contract Code. The subcontractor list originally submitted by Vintage with its bid on June 26, 2012 will be used.

The statement on the "Subcontractor List" form that reads, "Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening." Refers to the percentage of subcontracted work previously submitted only. No other revisions to the form are permitted.

Since Item No. 15 and 16 were not listed on the "Subcontractor List" submitted with your bid, Vintage will be required to perform 100% of these items with its own forces, if awarded this contract.

A copy of this letter will be provided to the Resident Engineer for monitoring contract compliance.

If you have any questions, please contact Tammy Thomas, Chief, Office of Contract Awards and Services, at (916) 227-6228.

Sincerely,

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

Attachments

SMITH, CURRIE & HANCOCK LLP

244 California Street, Suite 500

San Francisco, CA 94111

800- 800-832-6946 (Phone)

415-276-1754 (Facsimile)

FACSIMILE TRANSMITTAL

TO: Mr. John McMillan

ADDRESS: Division of Engineering, Office Engineer, MD 43, 1727 30th Street, P.O. Box 168041

FACSIMILE: 916-227-6282 TELEPHONE: _____

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

TOTAL NUMBER OF PAGES 8, INCLUDING THIS COVER SHEET

DATE: November 15, 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

Attached is Flatiron West, Inc.'s November 15, 2013 Bid Protest responding to the Department's November 13, 2013 letter.

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

The information contained in this facsimile message is intended only for the use of the individual(s) named above and is privileged and confidential. Any dissemination, distribution or copy of this communication other than to the person(s) named above is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message (and any copies) to the sender named above. Thank you.