

SMITH, CURRIE & HANCOCK LLP
ATTORNEYS AT LAW

A LIMITED LIABILITY PARTNERSHIP THAT INCLUDES PROFESSIONAL CORPORATIONS

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November 21, 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 and E-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 Request that the California Department of Transportation Accept its Bid on Contract #12-0F96E4

Dear Mr. McMillan:

On behalf of Flatiron, I am submitting this letter regarding Contract No. 12-0F96E4 (the "Contract"). Flatiron maintains that they are the low, responsible, responsive bidder for the Contract as detailed in letters Flatiron sent the Department on November 4, 5, 12 and 15, 2013. Flatiron hereby requests again that the Department reconsider and reverse its November 13, 2013 decision and award the Contract to Flatiron.

A major reason for this concern is the fact the Department has recently determined this exact issue – in favor of the low, responsible bidder. The bids for Contract No. 03-3F0304 were opened on February 27, 2013 (the "Sierra Project"). After opening those bids, the Department found that Sierra Nevada Construction ("Sierra") was the low, responsible, responsive bidder even though Sierra added a new subcontractor and scope of work to the Subcontractor List form after the bids had been opened. The Department found the bid-day Subcontractor List was the controlling document.

The order of bid prices from lowest to highest on bid day was as follows: Sierra, Granite Construction Company ("Granite"), and then Teichert Construction.

Mr. John McMillan
November 21, 2013
Page 2

Sierra listed the following subcontractors in this order on its day-of-bid Subcontractor List:

- Gerco Contractors
- Par Electrical Cont. Inc.
- Midstate Barrier
- ABSL Construction
- Construction Area Signs
- Penhall Co.

Sierra then revised its Subcontractor List and submitted it the next day, listing:

- ABSL
- Construction Area Signs
- Gerco Contractors, Inc
- Midstate Barrier, Inc
- PAR Electrical Contractors, Inc.
- Penhall Company
- Wells Sweeping

Sierra added Wells Sweeping to their subsequently submitted Subcontractor List with "Sweeping" as their scope of work.

I have attached the following Sierra Project-related documentation:

- 3/19/13 – Granite protested Sierra's bid regarding their DBE commitment values.
- 3/20/13 – The Department deemed Granite non-responsive for adding "Message Boards" to S.T. Rhoades on their 24-hour Subcontractor List even though S.T. Rhoades was listed on their day-of-bid submittal.
- 4/25/13 – The Department responded to Granite's protest stating that their protest lacked merit.
- 4/29/13 – The Department awarded to Sierra.

The Department conducted a thorough review of Sierra's bid and found it responsive. When it did so, the Department recognized that the addition of a new subcontractor and scope of work did not render the Sierra bid non-responsive.

In conclusion, Flatiron respectfully requests that the Department follow the long established precedent reflected in the Sierra Project and agree that Flatiron's bid was responsive.

It is not appropriate for the Department to take contradictory positions on separate projects.

Mr. John McMillan
November 21, 2013
Page 3

Flatiron is the low, responsible, responsive bidder and should be awarded this Project.

Please contact me if you have any questions.

Best Regards,

A handwritten signature in black ink, appearing to read 'E. C. Brown', written over the printed name.

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

Enclosures

Received

Nov 19 2013 07:19am

775-358-0372

Sparks Mail Fax

Granite Construction 775-358-03

07:26:28

03-19-2013

2/12



Granite Construction Company
 1800 Memphis Avenue
 Box 9007
 Sparks, NV 89411
 T 775.358.6792
 F 775.358.0372
 graniteconstruction.com

March 19, 2013

Via Fax & Overnight Carrier

Mr. John McMillan
 Deputy Division Chief
 State of California
 Department of Transportation
 Division of Engineering Services
 Office Engineer, MS 43
 1727 30th Street
 Sacramento, California 95816-8041
 Phone: (916) 227-6280; Fax: (916) 227-6282

RE: California Contract #03-3P0304

Subject: Bid Protest

Dear Mr. McMillan,

Granite Construction Company (Granite) hereby protests the potential award of the above referenced Contract to Sierra Nevada Construction (SNC). On February 27, 2013, SNC submitted the apparent low bid on the Contract. Granite submitted the second low bid, thus having standing for this protest.

While SNC's listed amounts on the "California Bidder - DBE - Commitment" form show that SNC purportedly met the DBE goal, discrepancies exist nullifying SNC's bid. As supported by the enclosed documentation, the inconsistencies in the following bid item prices versus DBE commitment values show that SNC inflated its DBE participation in the DBE Commitment Form.

Bid Item	Description	Bid Price	DBE Commitment	Variance (Amount Exceeds Goal/Total Bid Price)
01	Final Compliance Plan	\$ 500.00	\$ 1,900.00	\$ 1,400.00
02	Construction Area Signs	\$ 3,300.00	\$ 3,400.00	\$ 100.00
05	Portable Changeable Message Sign (LS)	\$ 3,000.00	\$ 9,600.00	\$ 6,600.00
Total Excess DBE Commitment				\$ 8,100.00

SNC claims more DBE commitment value than referenced in the respective bid item prices, overstating SNC's claimed DBE value by \$8,100. As a result, SNC failed to meet the DBE Goal of 8% for this Contract by 0.48%.

Due to the errors stated above, SNC's bid should be deemed non-responsive, and Granite should be declared the lowest responsive bidder and awarded the contract.

1. *SNC Failed to Meet Contract DBE Goal*

Since SNC's claimed DBE commitment should be reduced by the discrepancy between the commitment values and bid item prices, SNC failed to meet the Contract's DBE Goal by 0.48%. Granite submitted the lowest responsive bid on this project, meeting the DBE Goal.

Received

Nov 19 2013 07:19am

775-358-0372

Sparks Main Fax

Granite Construction 775-358-03

07:24:08

03-19-2013

3/12

Per the Contract's Specifications, bidders are required to "[t]ake necessary and reasonable steps to ensure that DBEs have the opportunity to participate in the contract." (See Standard Specification 2-1.12A). To this end, each bidder was required to meet the 8% Contract DBE goal or demonstrate that it made adequate good faith efforts to meet that goal.

II. Defects in SNC's Bid Are Material

California Public Contract Code §10180 requires the Department to award its construction contracts to the lowest responsive bidder via competitive bidding. "A basic rule of competitive bidding is that bids must conform with specifications, and that if a bid does not so conform, it may not be accepted." *Kovick Business Machines USA, Inc. v. Regents of University of California* (1988) 206 Cal. App. 3d 449, 454. "The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition." (See legislative intent declared in the citations to Pub. Cont. Code, § 10300.)

A bid that does not strictly conform to the call for bids cannot be accepted if the variance could have affected the amount of the bid or gives the bidder an advantage or benefit not allowed other bidders. In other words, a public agency can only waive a deviation from bid specifications that is inconsequential and not material. A bid containing a material deviation must be rejected as non-responsive. See 47 Ops. Cal. Atty. Gen. 129, 130 (1966); *Kovick*, supra, 206 Cal. App. 3d at 454; see also *Valley Creek Landscapes, Inc. v. City Council* (1996) 41 Cal. App. 4th 1432. Factors considered in determining whether a deviation is a minor irregularity or material departure include whether the deviation could be a vehicle for favoritism, affect the amount of the bid, influence potential bidders to refrain from bidding, or affect the awarding entity's ability to make bid comparisons. *Kovick*, supra, 206 Cal. App. 3d at 455.

In this case, SNC's violations of the Department's Bid Specifications and governing DBE regulations created an advantage for SNC not available to other bidders. The defects in its bid enabled SNC to claim more DBE participation than that to which it was entitled. In sum, SNC failed to satisfy the mandates contained in specifications and significantly oversteered its DBE participation. Such defects are material, give SNC a competitive advantage over other bidders, and render SNC's bid non-responsive. Because Granite submitted the lowest responsive and responsible bid, it should be awarded the Contract.

If you have any questions or require additional information please contact me at your convenience.

Sincerely,



Chris Martin
Chief Estimator
Granite Construction Company - Nevada Region
Direct 775.352.1938 | Cell 775.813.0907 | Fax 775.358.0372

Enclosed: Supporting Documentation and Analysis from SNC's Bid Submittal (9 pgs.)

FROM

Received

Nov 21 2013 12:22/pm

(THU) NOV 21 2013 12:10/ST. 12:09/No. 6852052054 P. 7

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ERMAUNO 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!

March 20, 2013

Facsimile: (831) 768-4021

Chris Burke, Chief Estimator
Granite Construction Company
P.O. Box 50085
Watsonville, CA 95077-5085

03-3F0304
03-NeV-80-R12.3/13.3
B.O. 02/27/2013

Dear Mr. Burke:

The Department of Transportation (Caltrans) received a bid submitted by Granite Construction, Company (Granite) for Contract No. 03-3F0304 on February 27, 2013. By this letter, Caltrans notifies Granite that its bid is nonresponsive because it revised column 4 on the Subcontractor List form.

The Subcontractor List form states in part, "...Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid."

On the original submitted Subcontractor List, Granite identified bid item 14, Street Sweeping to be performed by S.T. Rhoades Construction, Inc. However, on the second submitted Contractor List submitted on February 27, 2013, bid item 5, Portable Changeable Message Sign (LS) was added to columns 2 and 4 as additional work to be performed by S.T. Rhoades.

Based on the above, Caltrans will proceed to award the contract to the lowest responsible bidder.

Your attention is directed to Section 3-1.04 of the Amendments to the 2010 Standard Specifications. Caltrans is not obligated to offer an extension of the award period for a nonresponsive bid. Should you wish to extend your bid while resolving a nonresponsive finding, you must send your request to the Office Engineer no later than 4:00 p.m., two business days prior to the expiration of your bid.

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

Sincerely,

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

Enclosures

Received

Feb 27 2013 03:16pm

775-358-0372

Sparks Main Fax

Granta ConstructIn 775-358-03

15:21:34

02-27-2013

2/2

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
SUBCONTRACTOR LIST
 DES-CB-010224 (REV 1/2011)

Bidder Name: Granta Construction Company

The bidder must identify each subcontractor performing 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.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-8282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
- PAR ELECTRICAL CONTRACTORS INC. 1465 W. 4th Str. Reno, NV 89503	#43	100%	MAINTAIN EXISTING TMS SIGN ILLUMINATION
	#44	100%	
- DIVERSIFIED CONCRETE CUTTING 59 Corey Island Dr. Sparks, NV 89409	#18	100%	REMOVE CONCRETE BARRIER RAIL
- S.T. RHODES CONSTRUCTION INC. 2585 COMMERCIAL WAY REDDING, CA 96044	#44	100%	STREET SWEEDING MESSAGE BOARDS
	#5	100%	
- MIDSTATE BARRIER W.C. P.O. BOX 30550 STOCKTON, CA 95203	#40	100%	CONCRETE BARRIER (TYPE C0E)
	#41	100%	CONCRETE BARRIER (TYPE C0E)
	#42	100%	CONCRETE BARRIER (TYPE C0E)
	#36	100%	METAL BEAM GUARDRAIL
	#38	100%	END ANCHOR ASSEMBLY
	#39	100%	CRASH CUSHION (FEDERATION) METAL ATT.
	#47	100%	CRASH CUSHION - TRAC
GREGG CONTRACTORS INC. 2250 GRAY VALLEY HWY #306 AUBURN, CA 95603	#28	100%	SUPPLY AND INSTALL CONCRETE PAVE SIGN BOARD. INSTALL SIGN STRUCTURES (TRUSS) FURNISH SIGN STRUCTURE (TRUSS) FURNISH UNLIMITED PANELS (TYPE A)
	#30	100%	
	#30	100%	
	#32	100%	

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FROM

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
SUBCONTRACTOR LIST
DEB-08-0102R (REV 3/2011)

Bidder Name: Greene Construction Company

The bidder must identify each subcontractor performing 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.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-8282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
PAR Electrical Contractors Inc. 1905 West 4th St. Reno, NV 89503			Metallic Exposed T&S and Sign Installation
Professional Concrete Cutting 69 Casey Island Dr. Sparks, NV 89431			Concrete Barrier Rail
ST Rhodes Construction Inc. 8585 Commercial Way Rialto, CA 92404			Street Sweeping
Mid State Barrier Inc. 70 Box 30850 Stockton, CA 95213			Metal Beam Erector, Cable Caster, End Anchor Assembly, Concrete Barrier Rail
GeoCo Contractors Incorporated 2285 Green Valley Highway #306 Auburn, CA 95603			CIDH, Inset Sign Structure

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Contract No. 03-9F0304

MH

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ERDMUND R. BASTON, Jr., Governor

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
1727 30th STREET
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TTY 711



*Flex your power!
Be energy efficient!*

April 25, 2013

Facsimile: (831) 768-4021

Chris Burke, Chief Estimator
Granite Construction Company
P.O. Box 50085
Fresno, CA 93706

03-3F0304
06-Tul-216-1.972.9
B.O. 02/27/2013

Dear Mr. Burke:

The Department of Transportation (Caltrans) received the attached letter dated March 19, 2013 from Granite Construction Company (Granite) protesting Sierra Nevada Construction's (Sierra Nevada) bid. The protest alleges that Sierra Nevada failed to meet the Disadvantaged Business Enterprise (DBE) goal of 8 percent.

Caltrans conducted a review of the protest and found that Sierra Nevada did meet the stated DBE goal for the contract.

Based on the above, Caltrans finds Granite's protest lacks merit and will proceed to award the contract to the lowest responsible bidder provided that all requirements are met.

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

11/19/13

Caltrans - Office Engineer - Bid Item Search Results

[Home](#) → [Contract Awards and Services](#) → [Awarded Search Results](#)

Awarded Search Results

1 records found ([Search again](#))

Contract Number: 03-3F0904

Bid Opening Date: 2013-02-27

Advertising Date: 2013-01-14

Award Date: 2013-04-29

Contractor: SIERRA NEVADA CONSTRUCTION INC

Phone number: (775)355-0420

Bid Amount: \$1,276,007.00

Project Location: 03-Nev-80-R12.3/13.3

Type of Work: Pave Median; Install Concrete Median Barrier & Sign Truss Structure.

SMITH, CURRIE & HANCOCK, LLP

244 California Street
Suite 500
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Phone: (415) 249-0830
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Fax

To: John McMillan
Deputy Division Chief
Division of Engineering

From: Kristy Panchal

Fax: (916) 227-6282

Pages: 11 (including cover sheet)

Phone: (800) 832-6946

Date: November 21, 2013

Re: Contract No. 12-0F96E4

Urgent **For Review** **Please Comment** **Please Reply** **Please Recycle**

Regards,

Kristy Panchal

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