



TIMOTHY L. MCINERNEY

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Pete Gonda
Purchasing Officer
Purchasing Division
City Hall Annex
650 West Olive Avenue
Sunnyvale, CA 94086

RE: Primary Treatment Facility Package 1
BID PROTEST of Anderson Pacific Engineering Construction, Inc.

Dear Mr.Gonda:

I represent Anderson Pacific Engineering Construction, Inc., (Anderson Pacific) regarding the bids for the Primary Treatment Facility Package 1 (Project) for the City of Sunnyvale (City). The bid of DeSilva Gates/Mountain J.V., (JV) failed to meet the City's minimum safety requirements and cannot be "considered" by the City. In addition, the JV's bid is nonresponsive and must be rejected by the City. One of the JV's members failed to include critical experience information expressly required by the City's contract documents. This defect is material and cannot be waived.

1. The JV's Bid Cannot Be Considered By The City

The JV failed to meet the minimum safety requirements as set forth in the City's Invitation for Bids (IFB). In Part D: CONTRACTOR'S SAFETEY RECORD; Section 00460 – 11, the City required that:

For a Bidder's bid to be considered, the Bidder shall meet at least two of the three minimum safety standards specified herein. (emphasis added)

If the bidder was a joint venture, "each participant" shall provide the information requested by the City. Section 00460, page 3 of the IFB, the City stated:

“If the bidder is a Joint Venture of two or more companies, each participant in the Joint Venture shall meet this prior project experience requirement and provide project information for each Joint Venture participant in the format below”.

The City set forth three specific safety standards regarding experience modification rates (EMR), recordable incident rates (RIR) and lost time incident rates (LTIR). There were objective criteria associated with each category which the Bidder must achieve in order for its bid to be “considered”. Here, Mountain Cascade failed achieve the minimum standard for “*at least two of the three minimum safety standards...*”. Mountain Cascade did not meet the City’s threshold for RIR or LTIR in order for its bid to be considered.

This is not a defect that the City can waive. The IFB specifically states that failing to meet the minimum, safety standards, prohibits the City from considering the JV’s bid. It is not a case where the City can entertain the argument that the defect is inconsequential – the bid itself may not be “considered”.

2. The JV’s Bid Is Non Responsive

A bid is responsive if it promises to do what the bidding instructions require. *Taylor Bus Service v. San Diego Board of Education* (1987) 195 Cal App.3d, 1331. Section 001004-24 Bid Evaluation requires a “responsive bid” to conform in “all material respects” to the IFB and “demonstrates compliance with the mandatory experience as described in Section 2”. Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information. *MCM Construction, Inc. v. District and County of San Francisco* (1998) 66 Cal.App. 4th, 359.

The City’s IFB clearly sets forth the “mandatory experience” requirements for all bidders. Specially, the IFB required every bidder to include very specific information regarding its earthmoving experience with similar sized projects over a five year period. However, JV chose to ignore the City’s explicit instructions, and did not provide any experience information for Mountain Cascade. As a result, it is undisputed that JV’s bid is nonresponsive and must be “disqualified” as required by the City’s contract documents.

The only option JV has is to plead for the City to waive the defect as being an immaterial mistake – it is not, and the City cannot legally entertain such action. While California law allows the City the option to waive (or not) an “inconsequential irregularity” in a bid, it can only do so if the deviation “could not be a vehicle for favoritism, affect amount of bid...or affect ability to make comparisons.” *Ghilotti Construction Company v. District of Richmond* (1996) 45 CalApp 4th 897, 906. The City must determine if the failure to include Mountain Cascade’s experience gives JV an unfair advantage not enjoyed by other bidders. Here, JV’s defect qualifies under all the criteria as a material error that cannot be waived.

By failing to fully comply with the City's IFB, the City cannot fairly compare JV's bid to the experience qualifications of other bidders. It should also be noted that the JV cannot arbitrarily declare (post bid) that De Silva Gates is performing the "earthmoving" work. The City's IFB expressly requires both JV members to be qualified.

Also, by failing to fully comply with the City's IFB, JV has a clear advantage not afforded other bidders. If JV's price is competitive, they can request a waiver of the defect and attempt to "supplement" the bid after opening with Mountain Cascade's experience information (conduct prohibited by the IFB). Or, if its price was too low, the JV can acknowledge the error and have its bid rejected as nonresponsive without consequence. California law does not give the JV two bites at the apple, nor does the law allow the City to waive such a defect because it gives JV a clear advantage not allowed to other bidders.

Anderson Pacific is the lowest responsible bidder and should be awarded the contract.

Very truly yours,

A handwritten signature in black ink, appearing to read "Timothy L. McInerney". The signature is stylized and written in a cursive-like font.

Timothy L. McInerney

TLM:sjf

Cc: Anderson Pacific Engineering Construction, Inc.
DeSilva/Mountain JV (Fax: 925.803.4263)