



April 5, 2017

SENT VIA EMAIL AND FEDEX DELIVERY

Steven A. Francis
Flatiron West, Inc.
2100 Goodyear Road
Benicia, CA 94510

**Subject: Final Determination of Non-responsiveness for
Primary Treatment Facility Package 2 (#PW16-28)**

Dear Mr. Francis:

The City has received additional information from Finch, Thornton, Baird dated March 22, 2017, regarding the Initial Determination of Non-responsiveness issued on March 15, 2017. The City has reviewed the original bid and the additional information submitted by Mr. Finch and we have determined that your bid is non-responsive on the following grounds:

1. INVITATION FOR BIDS ("IFB") #PW16-28, Section 00460, page 00460-2

In order to be considered responsive, the bidder "must have completed at least \$250 million in construction volume over the past 5 years...and must list at least \$250 million in construction volume on no more than five (5) and not less than three (3) projects completed within the last five (5) years" of the following types:

1. Water/Wastewater Treatment Plant Facility where the electrical, mechanical and instrumentation systems were part of the Contractor's contract.

Additionally, Addendum #2 issued on January 25, 2017, clarified that:

"The City prefers Contractors and Electrical Subcontractors whose experience meets the requirements as established in the bid specifications. However, the City will consider

deviations from the number of projects and/or construction volume requirements, provided that the Bidder's qualifications *substantially meet the experience requirements as indicated in Specification Sections 00460 and 00461*. With regard to the number of projects completed within the stated timeframe of five (5) years, the City will consider dates of 'substantial' and/or 'final' completion."

On its face, the submitted bid does not present the experience requirements as outlined in the bid documents and as clarified in Addendum #2. Specifically, Flatiron West Inc. presented three projects that were completed or substantially completed within the last five years, with a total construction volume of \$71,364,653. While these projects meet the threshold for the minimum number of three, they fall well below the construction volume requirement of \$250 million.

The additional projects that Flatiron presented for the experience requirement were completed or substantially completed more than 7 years ago and cannot be considered by the City as part of the experience requirement since that falls outside the spectrum of what the City would consider "substantial compliance" with the requisite 5-year experience period.

For Projects 5 and 6 (which were completed 8 and 8-1/2 years ago respectively, with Project 6 exceeding the maximum number of projects required by the City) you have listed work performed by E.E. Cruz, which was referred to as a "subsidiary of Flatiron" in the bid package. According to the bid submittal, these projects were substantially completed in November 2008 and February 2009. These facts alone justify the City's determination that the projects were too far in the past and too tenuous a connection to be considered as meeting the experience requirement.

As a secondary consideration, the March 22nd letter provided to the City by Mr. Finch in response to the City's Initial Determination of Non-responsiveness states that E.E. Cruz was not acquired by Flatiron until 2010. In that E.E. Cruz had no formal association with Flatiron West Inc. as of 2009, the City would not have been able to consider Projects 5 and 6 as part of the experience requirements.

The City's experience requirements were very carefully considered as part of a larger \$700 million Water Pollution Control Plant reconstruction program. The primary treatment facility construction occurring under this bid is the largest and most critical element of the program. It is imperative that the firm constructing our primary treatment facility has the capacity to do so. In this context, the City's experience requirements, which other bidders are able to meet, are rationally and reasonably constructed.

2. Flatiron West Inc. is the Bidding Entity

In the bid documentation provided by Flatiron West Inc., E.E. Cruz was portrayed as a "Flatiron subsidiary." This fact was clarified in the Finch letter of March 22 – more specifically restated to confirm that both Flatiron West Inc. (the sole bidding entity) and E.E.

Cruz were “regional sister companies” under Flatiron, itself a “wholly owned subsidiary of HOCHTIEF Construction AG.”

City Conclusion

Flatiron West, Inc. was the sole bidding entity under the umbrella of HOCHTIEF Construction AG. In Section 01090 of the City’s bid documents (References of the Contract Documents), “Bidder” is defined as an “individual, partnership, corporation, or a combination thereof, includes joint ventures offering a bid to perform the work.” In that Flatiron West Inc. is the sole bidding entity, the City cannot entertain the project experiences of E.E. Cruz or any other company that is not a party to the bid submittal.

3. The Bid Submitted by Flatiron West Inc. is Non-responsive

The bid submitted by Flatiron West Inc. plainly shows that it does not meet the experience requirements of the bid documents, and is thus non-responsive on its face.

City Conclusion

The City’s initial determination of bid non-responsiveness relative to the experience requirements was made by examining the bid submitted by Flatiron West Inc. and none of the additional information submitted by Flatiron West Inc. has modified the City’s determination. The overriding consideration is that Flatiron West Inc. did not meet any of the three experience requirement factors: 1) projects completed within a five-year timeframe; 2) construction volume; and 3) number of projects. Accordingly, the bid cannot be considered in substantial compliance with the bid specifications.

California case law firmly supports the City’s determination of non-responsiveness from the face of the bid submitted by Flatiron West Inc. (see *Taylor Bus Service, Inc. v. San Diego Board of Education* (1987) 195 Cal.App.3d 1331). The issue of non-responsibility involves a more detailed investigation including checking project references, which City staff did not undertake during its review (see *D.H. Williams Construction Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757). Furthermore, the City’s establishment of reasonable experience requirements as stated above is well within a public agency’s inherent discretion and courts have been highly deferential to a public agency’s decision-making authority in drafting its own bid requirements unless the requirements are “arbitrary and capricious or entirely lacking in evidentiary support” (see *M&B Construction v. Yuba County Water Agency* (1999) 68 Cal.App.4th 1353, 1359).

I’d like to underscore that we have spent considerable time reviewing the bids and the underlying issues. However, we feel that it is in the City’s best interests to adhere to the bid requirements as written in order to be fair and equitable to all the potential bidders.

If you have any questions, please do not hesitate to contact me at (408) 730-7418.

Best regards,



Pete Gonda

Purchasing Officer

City Hall Annex

650 West Olive Avenue

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cc: Kent Steffens, Assistant City Manager
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