



April 28, 2017

SENT VIA EMAIL AND FEDEX DELIVERY

P. Randolph Finch Jr.
Finch Thornton Baird, LLP
4747 Executive Dr.
San Diego, CA 92121

**Subject: Denial of Bid Protest filed by Flatiron West Inc. for
Primary Treatment Facility Package 2 (#PW16-28)**

Dear Mr. Finch:

The City has received the bid protest on behalf of Flatiron West, Inc. from Finch, Thornton, Baird dated April 11, 2017, regarding the above referenced project. While your bid protest does not specifically challenge the responsiveness of any other bidder, your protest is premised on multiple grounds which are discussed separately below. Many of the issues raised in the Bid Protest have already been discussed in the City's previous correspondence with Flatiron including the Initial Determination of Non-Responsiveness dated March 15, 2017, and the Final Determination of Non-Responsiveness dated April 5, 2017. In the interest of efficiency, the City will reference those two determination letters rather than reiterate wholesale the City's reasoning included in those letters.

**1. THE CITY'S ABILITY TO CALL OUT ITS OWN EXPERIENCE
REQUIREMENTS IN THE BID SPECIFICATIONS**

You continue to assert that the City has incorrectly called out the experience requirements in the bid specifications. Namely, you take issue with the following requirement:

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:

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

The City’s establishment of these reasonable experience requirements 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). As mentioned in the previous City Determination letters to Flatiron, the City wanted a very experienced contractor with appropriate capacity for this extremely critical infrastructure project with significant environmental implications. Accordingly, the City worked closely with its project consultants and various project staff in determining the requirements based on the group’s collective experience in dealing with projects of this size and nature given that the winning bidder would likely be performing multiple projects for different agencies simultaneously.

This well-reasoned analysis is contrary to Flatiron’s claim that the requirement was “arbitrary and capricious”. Conversely, Flatiron’s suggested methodology of dividing the engineer’s estimate by the number of years of the project ignores the practical reality of contractors balancing multiple projects at the same time, especially in the current economic climate and the fact that multiple Bay Area agencies are rehabilitating their wastewater facilities, which impacts the available bidding pool. Regardless, this experience requirement is a judgment call that is solely within the purview of the City.

The City would have not had its own best interests in mind, nor that of its taxpayers, if it crafted impossible experience requirements that precluded any bidder from qualifying, resulting in an expensive and time consuming rebidding process. On the contrary, the other two bidders on the project, C. Overaa & Co. and Kiewit Construction Co., both met all the components of the City’s experience requirements. The fact that two other bidders met the literal experience requirements undermines Flatiron’s theory that the requirement was unreasonable and unattainable.

2. THE CITY’S ABILITY TO WAIVE MINOR DEVIATIONS AND ALLOW EXPERIENCE REQUIREMENTS THAT SUBSTANTIALLY COMPLY WITH THE BID SPECIFICATIONS

On January 25, 2017, the City issued Addendum #2 which 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.”

The City’s Initial Determination and Final Determination letters elucidated why Flatiron’s inability to meet any of the experience criteria (viz. deficiencies in the \$250 million volume within 5 years and not more than 5 projects) did not amount to “substantial compliance” and therefore those reasons will not be reiterated in great detail here. However, the bid protest now argues that the City’s “substantial compliance” language should be voided as too ambiguous. This argument is without merit.

A long line of California cases have affirmed the rule that “[a] basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. However, it is further well established that a bid which *substantially conforms* to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential.” (*Bay Cities Paving & Grading Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1188 (emphasis added); citing *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App.4th 897, 904.)

Here, the City’s ability to waive minor defects in the experience requirement is well-settled under the law and the Addendum did not create any new substantive requirements; rather, it simply reiterated an agency’s inherent discretionary authority to consider bids that substantially conform to the bid requirements without having to automatically reject due to a minor deviation. Consistent with the case law, the City’s Addendum language did not affect any of the bid amounts since experience is not related to bid pricing. Moreover, none of the bidders received an unfair competitive advantage since the “substantial compliance” language was issued in an official Addendum that was delivered to all potential bidders prior to bid opening and therefore everyone received the same notice and received the same opportunity to have minor deviations waived.

It is important to note the irony that Flatiron was the bidder that expressly requested the City to broaden the experience requirement to 10 years, otherwise Flatiron “may not meet the requirements” (see attached Western Regional Manager Jason Burden’s e-mail to City dated Jan. 17, 2017), and now Flatiron is protesting the bid based on the very language that the City added to accommodate Flatiron and other bidders who may not have met the exact requirements. While the City declined to expand the requirement to 10 years, the Addendum makes clear that if any bidder substantially complies with the experience requirement then they will not be automatically rejected.

Furthermore, Flatiron’s reference to the *Baldwin-Lima-Hamilton* case is misplaced. That case dealt with an agency’s requirement to “buy American”, but with exceptions under the Government Code. However, the requirement itself was unconstitutional and preempted by federal treaties and trade agreements and therefore inherently nonsensical.

That example is a far cry from the City's clear experience requirements, but with flexibility for minor deviations.

The City's experience standard was not impossible to meet as evidenced by the fact that none of the other two bidders (viz. C. Overaa & Co. and Kiewit Construction Co.) even needed the City's exercise of discretion since they both met the literal experience requirements in terms of the \$250 million project volume and requisite number of projects within the five-year period. The fact Flatiron could not meet these requirements, even with the added flexibility, does not render the City's requirements invalid.

3. ALLEGATION OF CITY FAVORITISM AND RECENT CITY AWARD OF MULTI-MILLION DOLLAR CONTRACT TO FLATIRON

Your bid protest's allegation that the City's Addendum language allowing substantial compliance is tantamount to "\$250 million or whatever the City decides" is both hyperbolic and inaccurate. You also imply that this could lead to City favoritism. For the reasons stated above, this inherent discretion to waive minor deviations is already granted to a public agency in reviewing bids and does not, in and of itself, constitute a form of favoritism. Most importantly, the City prides itself in making fair and equitable decisions and did not know in advance which potential bidders might or might not meet these requirements (other than those expressly relayed to the City after the publication of the bids). To further underscore this point, the City has very recently awarded Flatiron a \$4.3 million contract for the Old Mountain View-Alviso Road Bridge Replacement Project No. TR-14/01-15. Therefore, the City does not harbor any animus toward Flatiron; if a bidder is the lowest responsive and responsible bidder, then the City will award them the contract.

4. THE CITY'S ABILITY TO REJECT ALL BIDS

The City does not dispute its ability to reject all bids for any reason. This is a well-settled right granted under state law, the Sunnyvale Municipal Code as well as the bid documents themselves. However, there is no reason to do so in this case since the City has determined there is another bidder, C. Overaa & Co., who is responsive to the bid specifications and whose bid price is within the City's acceptable budget. Therefore, the City is not recommending rejecting bids for this project given the sufficiency of C. Overaa's bid and the City's need to adhere to the construction timeline. However, since your protest is advocating for the rejection of all bids, which would preclude the award of the project to C. Overaa, you were required to notify the affected bidders of your protest within five days of the Notice of Intent to Award under the bid protest requirements in the specifications. There has been no confirmation that you served notice of your protest to the affected bidders within the timeframe required by the bid instructions and C. Overaa has communicated via email that they received your protest letter the day after it was required to be delivered. The City reserves its right to assert this procedural violation in further proceedings.

5. CONCLUSION

City staff has spent considerable time reviewing the bids, the various correspondence and the underlying issues. In summary, Flatiron's bid was nonresponsive on its face since the experience listed did not meet any of the components of the experience requirements. It would be too great a stretch to consider this deficiency substantially compliant. Moreover, the City's specifications were both reasonable and specific with respect to what was required from bidders and other bidders had no issues submitting responsive bids. For all these reasons, Flatiron's bid protest is denied.

Since the City has recently awarded Flatiron West Inc. another contract, we look forward to working with you on that project and hope that we can cultivate an environment of continued collaboration. If you have any additional questions please do not hesitate to contact me at (408) 730-7418.

Best regards,

Pete Gonda (Electronic Signature)

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

attach.

cc: Kent Steffens, Assistant City Manager
Manuel Pineda, Director of Public Works
Office of the City Attorney
C. Overaa & Company

From: Burden, Jason <jburden@flatironcorp.com>
Sent: Tuesday, January 17, 2017 3:49 PM
To: Peter Gonda
Cc: Carter, Jannette
Subject: Primary Treatment Facility Package 2 (Questions)

Pete,

I am submitting the following question regarding bidder qualifications for the above referenced project on behalf of Flatiron Construction Corp.

1) Bidder Qualifications: Section 00460

Ref. 8. Bidders Experience

4-b. The 5-year term limits the number of qualified firms able to submit on this project.

As a General Engineering firm that performs over a \$1B per year in construction in a number of diverse areas of work in the US, we have completed well over \$500M of Water / Wastewater Treatment Plant Facilities in the last 10 years but may not meet the requirements of completed \$250M worth of Water / Wastewater Treatment Plant work in the last 5 years as stated in the qualification requirements. Please consider opening up the time frame from 5 years to 10 years.

Thank you,

Jason Burden
Area Manager
Western Region

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