



Via email only: mhilliard@brothersmithlaw.com

May 3, 2024

Mark J. Hilliard
Brother Smith LLP
2033 N. Main Street, Suite 720
Walnut Creek, CA 94596

RE: City of Brentwood Pavement Management Program 2024 (Asphalt)
CIP Project No. 336-31703
Response to Bid Protest

Dear Mr. Hilliard:

I write on behalf of the City of Brentwood (“City”) in response to the bid protest dated April 26, 2024 (“Protest”), which you submitted on behalf of your client, J.V. Lucas Paving, Inc. (“JVL”), which submitted the second lowest bid for the above-referenced City public works project (“Project”). Bids for the Project were opened on April 24, 2024. The Protest challenges the bid submitted by the low bidder, DSS Company dba Knife River Construction (“KRC”).

A. SUMMARY BACKGROUND

The Protest urges that the City should reject KRC’s bid as non-responsive based on KRC’s failure to include the Total Base Bid price set forth in KRC’s Bid Schedule in Section 1 of KRC’s Bid Proposal Form. The Protest further alleges that this omission means that the bid was “submitted with exceptions.” Finally, the Protest urges that based on the omission in the Bid Proposal form, the contract for the Project should be awarded to JVL, at JVL’s higher bid price. The Protest does not cite to or reference any relevant statutory or case law.

KRC’s bid submission, which included its completed Bid Schedule, proposed to construct the Project for \$2,077,240.00 pursuant to the Total Base Bid price entered on KRC’s Bid Schedule. It is undisputed that KRC omitted to include this amount on its Bid Proposal form. According to KRC’s written response to the Protest, this omission was “a simple clerical error.” This is a credible explanation given that clerical errors are fairly common in public bidding due to the haste required for final compilation and submission of the bid once the last-minute subcontractor quotes have been received.

B. LEGAL ANALYSIS

The legal issue presented is whether KRC’s low bid must be rejected based on this variance from the instructions in the bid documents, or whether the variance may lawfully be waived by the City as an immaterial or inconsequential deviation.

The City does not dispute that failure to enter the Base Bid price in Section 1 of the Bid Proposal form rendered KRC’s bid nonresponsive. However, the City does not agree that this particular irregularity compels the City to reject KRC’s low bid and award the contract for the same work to JVL at a higher price. Section 11 of the Instructions to Bidders, states in part: “City reserves the unfettered right, acting in its sole discretion, to waive or to decline to waive an immaterial bid irregularities....” This reservation of rights is consistent with a robust body of case law in California concerning the materiality of bidding irregularities.

In *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181 (“*Bay Cities*”), the appellate court held that pursuant to well-established case law, the city acted within its discretion in waiving the successful bidder’s omission of the first page of its bid bond as an immaterial or inconsequential irregularity. *Bay Cities* applied the established rule for waiver of bidding variances as set forth in California case law:

“[I]t 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, supra*, 223 Cal.App.4th 1181 at 1188, quoting *Ghilotti Construction Co. v City of Richmond* (1996) 45 Cal.App.4th 897.)

Thus, the first inquiry in this two-prong test is whether the failure to enter the Bid Schedule price on the Bid Proposal form could have affected the amount of KRC’s bid. It could not. There is no dispute as to the amount of KRC’s bid, which was set forth on the Bid Schedule submitted with its bid. As indicated in Section 18 of the Instructions to Bidders and the instructions on the Bid Schedule form, the Base Bid price is determined by the sum of the extended totals on the Bid Schedule, subject to correction in the event of any computational errors.

The second inquiry is whether the variance in KRC’s bid could have given KRC “an advantage or benefit not allowed other bidders.” This includes consideration of whether KRC could have withdrawn its bid without forfeiting its bid security pursuant to Public Contract Code section 5103 (“PCC § 5103). However, under PCC § 5103, a bid may only be withdrawn without forfeiting bid security if a clerical mistake “made the bid materially different” from what the bidder intended it to be. That is not the case here.

A computational total was not carried over from one bid document to another, but there was no error in the total itself. KRC’s error did not afford KRC an advantage not available to other bidders, because it could not serve as grounds for withdrawal under PCC § 5103. (See, e.g., *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1180-1181 [upholding a county’s waiver of a bidder’s failure to sign its bid proposal form, where this irregularity did not afford the bidder an opportunity to withdraw its bid without forfeiting its bid security].)

In addition, the bid bond surety for KRC has confirmed in writing that the irregularity on KRC’s Bid Proposal form does not render the bid bond unenforceable: KRC remains bound by the terms of its bid bond for the amount of its bid. There is no evidence that the omission in KRC’s Bid Proposal form gave KRC an advantage over other bidders.

In addition, contrary to the allegation in the Protest, there is no evidence that KRC’s bid included any “exceptions.” An exception, in this context is an express statement to the effect that the bid proposal excludes specified requirements. There are no exceptions in KRC’s bid.

It is further noted that the arguments regarding the Federal Acquisition Regulation (“FAR”) in KRC’s response to the Protest and in JVL’s subsequent supplement to its Protest are not relevant. The Project is not subject to the FAR.

C. CONCLUSION

Finally, the Protest must be considered in light of well-established public policy favoring award to the low bidder. California courts have consistently held that protests alleging nonresponsiveness must be evaluated from a practical, rather than speculative or hypertechnical perspective, and relative to the *public* interest:

“They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal...of the low bidder after the fact, [and]


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cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy." (*Bay Cities, supra*, 223 Cal.App.4th 1181, 1189; internal quotation marks omitted.)

There is no dispute as to the amount of KRC's bid and apart from the clerical omission on the Bid Proposal form, KRC's bid substantially complies with the bidding instructions and offers the lowest price for the Project. The public will benefit from having the work for the Project performed at the lowest price.

Accordingly, staff intends to recommend that the City Council waive the omission in KRC's bid and award the contract to KRC as the lowest responsible bidder. The City appreciates JVL's interest in the Project and welcomes its participation in future public works bids.

Sincerely,



Allen Baquilar
Director of Engineering/City Engineer
City of Brentwood

c: (via email only)

Donald Lowe, Estimating Manager (KRC)
City Attorney's Office

