

2807

KAMINE LAW PC
CONSTRUCTION ATTORNEYS
523 WEST 6TH STREET, SUITE 1128
LOS ANGELES, CALIFORNIA 90014
(213) 972-0119 FAX (213) 972-0005
WWW.KAMINECONSTRUCTIONLAW.COM

October 23, 2019

CITY OF LOS ANGELES
RECEIVED

OCT 23 2019

Board of Harbor Commissioners
The Port of Los Angeles
425 South Palos Verdes Street
P.O. Box 151
San Pedro, CA 90733-0151

CONSTRUCTION DIVISION
HARBOR DEPARTMENT

419-1720

Attention: Eugene D. Seroka, Executive Director

RE: Bid Protest of the Award to Griffith Company
San Pedro Waterfront
Berths 74-84 Promenade and Town Square
Specification No. 2807
Our File No.: 620.999

Dear Members of the Board of Harbor Commissioners:

We represent National Demolition Contractors, Inc. on the contract referred to above. This letter is intended to be:

- (1) A protest against any award of that contract to any bidder other than National Demolition Contractors, Inc.
- (2) A request under Gov. Code § 54954.1 for mailed notice of all meetings of the Board of Harbor Commissioners at which any issues pertaining to the award of that contract are on the agenda for the meeting. If there is any fee for this service, please telephone that information to us immediately, so we can promptly pay the fee.
- (3) A request to be informed (by telephone or fax) as soon as any staff reports or recommendations concerning any issues pertaining to the award of that contract are available to the public, so we can immediately inspect those reports or recommendations.
- (4) A request to address the Board of Harbor Commissioners before or during consideration of any issues pertaining to the award of that contract, which opportunity is guaranteed by Gov. Code § 54954.3(a).

Board of Harbor Commissioner
The Port of Los Angeles
October 23, 2019
Page 2

If this letter is not sufficient to accomplish any of these four purposes, please let us know immediately what else is required, so we can comply. If we do not hear from you, we will proceed on the basis that this letter is sufficient.

Grounds for Bid Protest

An award of the contract to any bidder other than National Demolition Contractors, Inc., would violate the competitive bidding laws, standards and practices applicable to California public works contracts, for the following reasons:

1. NATIONAL DEMOLITION CONTRACTORS, INC. SUBMITTED A RESPONSIVE BID

National Demolition Contractors, Inc., is the lowest responsible, responsive bidder on the referenced project.

Shaun Shahrestani, Chief Harbor Engineer, Director of Construction, notified National Demolition Contractors, Inc., by letter date October 18, 2019 that the referenced project was recommended for award to Griffith Company, the second lowest responsible and responsive bidder. Unfortunately, that letter did not contain any explanation for the decision for the recommendation away from National Demolition Contractors, Inc. The bid submitted by Griffith Company was \$33,059,812.50. The bid submitted by National Demolition Contractors, Inc., was \$31,583,058.40.¹ The delta between the two bids was \$1,476,754.10.

A follow-up conversation between the undersigned and Deputy City Attorney Helen Sok revealed that the apparent basis for awarding away from National Demolition Contractors, Inc., was the omission of a dollar value for bid items 78-85.² The dollar value of those line items totals \$89,700, which is ascertained by

¹ The bid submitted by National Demolition Contractors, Inc., was in the amount of \$31,672,758.40. However, National Demolition Contractors, Inc., neglected to fill in a value for bid/contingency items 78-85. For this reason, when the various line items are added up, the total is \$31,583,058.40.

² It is unfortunate that staff did not reveal the justification for awarding away from National Demolition Contractors, Inc., in contravention of the mandate to do so set forth in Ghilotti Construction Company v. City of Richmond (1996) 45 CA 4th 897, 893: "In determining whether a bid is responsive to a solicitation for bids, and whether a deviation from contract specifications may be disregarded as insubstantial, the

Board of Harbor Commissioner
The Port of Los Angeles
October 23, 2019
Page 3

adding up all the line items and subtracting the amount from the total bid submitted by National Demolition Contractors, Inc.

The omission of the line items does not render the bid of National Demolition Contractors, Inc., non-responsive. Specification #2807, 00022-1 of the INFORMATION FOR BIDDERS, at ¶03(c) provides:

If the amount set forth in the unit price is ambiguous, unintelligible, or uncertain for any reason, or is omitted, then the amount set forth in the extension or total for a bid item shall govern.

Here the amount set forth was omitted and the extension was left blank, the equivalent of zero. It is apparent that the INFORMATION FOR BIDDERS contemplated the current situation and provided a resolution so as not to invalidate a bid as non-responsive. In *Frank W. Pozar v. Department of Transportation* (1983) 145 CA 3rd 269, 272, a case involving a disparity between the line item and the bid extension amount, the court held that an agency must follow its own rules when it has a ministerial duty to do so. Here the rules in the INFORMATION FOR BIDDERS is quite clear on the procedure to follow. Staff should have applied the formula set forth in the INFORMATION FOR BIDDERS and recommended the award to National Demolition Contractors, Inc.

2. ASSUMING THE BID BY NATIONAL DEMOLITION CONTRACTORS, INC. WERE NON-RESPONSIVE, THE VARIANCE SHOULD BE WAIVED

The court in *Konica Business Machines, U.S.A., Inc. v. Regents of the University of California* (1988) 206 CA 3rd 449, 454, noted in discussing the issue of responsiveness of a bid:

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. [Citations.] 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

contracting entity must provide the bidder with notice and allow it to submit materials concerning the issue of responsiveness."

Board of Harbor Commissioner
The Port of Los Angeles
October 23, 2019
Page 4

is inconsequential. [Citations.]” (47 Ops.Cal.Atty.Gen. 129, 130 (1966))

Here, the failure to complete bid items 78-85 did not provide National Demolition Contractors, Inc., with an unfair competitive advantage. Public Contract Code §5101(b) allows for a bidder to be relieved of its bid because of a mistake; provided, however, that the bidder establishes the existence of each of the criteria set forth in Public Contract Code §5103. This relief allows the bidder to withdraw its bid without forfeiture of its bid bond, thereby garnering an unfair competitive advantage over other bidders.

Public Contract Code §5103 lists four criteria. All four must be satisfied in order for a bidder to be relieved of its bid for mistake. Public Contract Code §5103(c) mandates that: “The mistake made the bid materially different than he or she intended it to be.”

Here the delta between the bid with and without the bid items 78-85 was \$89,700.00. The amount is less than .3% of the bid by National Demolition Contractors, Inc. The amount of .3% cannot be said to have rendered the bid by National Demolition Contractors, Inc. materially different than what it had intended the bid to be. National Demolition Contractors, Inc., was not entitled to withdraw its bid.

The variance between the bids of National Demolition Contractors, Inc., and Griffith Company is \$1,476,754. This translates into the Griffith Company bid being 4.6% higher than that of National Demolition Contractors, Inc. There does not appear to be a justification to pay more for the same scope of work.

Public Policies Involved

The competitive bidding process is deliberately made to be prophylactic. No proof of actual corruption or adverse effect upon the bidding process is required. Only a potential for abuse needs to appear. As *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 C4th 161, 173-76, explains:

[T]he purposes of competitive bidding ... are 'to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public' [citations] and to stimulate advantageous market place competition [citation].

Board of Harbor Commissioner
The Port of Los Angeles
October 23, 2019
Page 5

* * *

[T]he general rule [is] that bidding requirements must be strictly adhered to in order to avoid the **potential for abuse** in the competitive bidding process. (*Konica Business Machines U.S.A. v. Regents of University of California* (1988) 206 CA3d 449, 456, 253 CR 591 [strict adherence with bidding requirements is applied "[even where] it is certain there was in fact **no corruption or adverse effect upon the bidding process, and even where deviations would save the [public] entity money**".]) [emphasis added]

See also Pub. Cont. Code § 100 and *Miller v. McKinnon* (1942) 20 C2d 83, 88, 124 P2d 34, where a taxpayer was permitted to challenge the award of a public works contract that appeared to violate the competitive bidding requirements, and the court noted:

The competitive bidding requirement is founded upon a salutary public policy declared by the legislature to protect the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds.

If you need any further information, please contact me.

Very truly yours,
Kamine Law PC


Marcia Haber Kamine

MPHK:hs
Enclosure
Cc: DCA Helen Sok