



SALAMIRAD, MORROW,
TIMPANE & DUNN LLP
ATTORNEYS AT LAW

17901 Von Karman Avenue Suite 500
Irvine, CA 92614
(949) 537-3800 (949) 537-3822 (f)

One Sansome Street Suite 3500
San Francisco, CA 94104
(415) 946-8991 (415) 946-8993 (f)

2127

June 29, 2015

VIA EMAIL
AND U.S. MAIL

CITY OF LOS ANGELES
RECEIVED

sshahrestani@portla.org
Shaun Shahrestani
Chief Harbor Engineer, Construction Division
The Port of Los Angeles
425 S. Palos Verdes Street
P.O. Box 151
San Pedro, CA 92733-0151

JUN 30 2015

CONSTRUCTION DIVISION
HARBOR DEPARTMENT

X15-3307

Re: Port of Los Angeles Berths 171-173 Environmental Site Remediation ("Project")

Dear Mr. Shahrestani:

We represent Sukut Construction, Inc. ("Sukut") the lowest responsible bidder on the above-referenced Project. This letter shall constitute Sukut's formal protest of the bid submitted by GGG Demolition, Inc. ("GGG") to the City of Los Angeles ("City") for the Project. GGG's bid must be rejected because it contains numerous mathematical, clerical and other errors and is therefore non-responsive. Under well-established California law, the City cannot waive or disregard these errors because they provided GGG with an illegal competitive advantage by allowing GGG to withdraw its bid under Public Contract Code section 5103.

1. SUMMARY OF BIDS

After advertising for bids pursuant to California's competitive bidding laws, the City received the following bids for the Project:

GGG Demolition	\$20,125,627
Sukut Construction	\$20,277,510
Shimmick	\$20,999,000
Griffith Company	\$21,034,718
Parsons	\$21,287,690
Magnus Pacific	\$21,409,487
El Capitan	\$24,558,930
Pacific States Environmental	\$25,398,935

Because the GGG bid must be rejected, Sukut should be awarded the contract as the lowest responsible bidder.

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2. SUMMARY OF CALIFORNIA LAW

Under California's competitive bidding statutes, a contract must be awarded to the lowest "responsive and responsible" bidder. To be responsive, a bid must conform to the material terms of the bid package. City of Inglewood v. Los Angeles County Civic Center Authority, (1972) 7 Cal.3d 861; Menefee v. County of Fresno, (1985) 163 Cal.App.3d 1175. Konica Business Machines, (1988) 206 Cal.App.3d 449, 456-457; Associated Builders & Contractors, Inc. v. Metropolitan Water Dist., (1997) 59 Cal.App.4th 1503, 1507 ("lowest responsible bidder does not mean lowest cost bidder").

A bid that differs materially from the bid specifications must be rejected. Stimson v. Hanley, (1907) 151 Cal. 379. Typically, the material terms of a bid are those that affect price, quantity, quality, or delivery and those terms that the bid package clearly identifies as mandatory. Pozar v. Department of Transp., (1983) 145 Cal.App.3d 269 (emphasis added).

Mistakes that provide the bidder with an opportunity to withdraw its bid under *Public Contract Code* ("PCC") § 5103 cannot be waived by the awarding body because the faulty bid gives the bidder an unfair competitive advantage over other bidders. Ghilotti Construction Company v. City of Richmond, (1996) 45 Cal.App.4th 897, 900; Konica Business Machines USA, Inc. v. Regents of the University of California, *supra*; Menefee, *supra*.

In MCM Construction, Inc. v. City & County of San Francisco (1998) 66 Cal.App.4th 359, a case with similar facts, the court held that the awarding body was without power to waive the bidder's failure to state accurate dollar amounts of work to be performed by subcontractors because the non-responsive bidder could seek withdrawal of its bid without forfeiting bid security, and thus obtained an unfair advantage not available to other bidders.

Here, the GGG bid is non-responsive because it contains multiple errors and inaccuracies that cannot be waived by the City. Therefore, the GGG bid must be rejected.

3. GGG'S BID IS NON-RESPONSIVE

A. The LABVN/Local Business Enterprise Affidavit

The City's Local Business Preference program "allows for LBE bidders to receive an 8 percent preference for any contract opportunity that is competitively awarded. [...] The maximum preference shall not exceed \$1,000,000." GGG applied a \$1,000,000 reduction as a Local Business Preference on page 00030-68 of its bid. However, on June 9, 2015, GGG submitted a sworn and notarized LABVN/Local Business Enterprise Affidavit ("Affidavit") declaring unequivocally that GGG is not an LBE. If GGG is not an LBE, then it is not entitled to the reduction and is no longer the lowest bidder. If GGG is an LBE, then its bid is not accurate or responsive.

Similarly, the Affidavit indicates that GGG is a certified WBE. However, the City of Los Angeles Bureau of Contract Administration website (www.bca.lacity.org/index) does not list GGG

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as a certified WBE in its directory – instead, a “single company” search reveals that GGG’s request for certification was denied by the City on September 11, 2014.

Finally, the contract requires Very Small Business Enterprise (VSBE) participation of no less than three percent (3%). See Spec. 2727, Page 00012-2. By its Affidavit, GGG declares that it is not an VSBE. Of course, GGG could comply with the VSBE requirement with qualifying first-tier subcontractors. However, GGG certifies in its Subcontractor/Supplier Information Form (13A) that none of its subcontractors are VSBE. Therefore, on its face, the GGG bid is non-responsive.

Based solely on the Affidavit, the GGG bid is non-responsive and must be rejected. As discussed below, the bid errors and inaccuracies were not limited to the Affidavit.

B. There Are No Less Than Nine (9) Clerical or Mathematic Errors In The GGG Bid

Although it is common to see an isolated clerical or mathematical error in a bid proposal, even a single such error may warrant the rejection of a bid because, as discussed above, a bidder gains an unfair advantage if a clerical or mathematical mistake in its bid would give the bidder a right to withdraw its bid. PCC § 5103; MCM Construction, Inc. v. City & County of San Francisco (1998) 66 Cal.App.4th 359 (City was without power to waive bidder’s failure to state accurate dollar amounts of work to be performed by subcontractors as required by the bid specification because the non-responsive bidder could seek withdrawal of its bid without forfeiting bid security and thus has unfair advantage not available to other bidders). The mistake only needs to make the bid “different than he or she intended it to be.” PCC § 5103(c). Any mistake in pricing, easily satisfies the requirements of PCC § 5103 and any low bid containing such a mistake may be rejected.

Here, *remarkably*, the GGG bid contains no less than nine (9) clerical or mathematical errors, all of which result in the total price submitted by GGG to be inconsistent with the unit prices set forth for the individual bid items.

The following chart provides the quantity, unit price and total value included in GGG’s bid, followed by the actual or accurate value of the item if you simply multiplied the stated quantity by the unit price:

Item No.	Quantity	Unit Price	Total in Bid	Actual
9	60,000	5.32	320,112	319,200
16	128,000	57.88	7,408,890.86	7,408,640
18	103,000	1.13	116,817	116,390
19	885,000	3.50	3,097,707.80	3,097,500
20	130,000	2.33	303,397.60	302,900
21	32,000	2.64	84,511.20	84,480
26	24,000	30.40	1,884,543.33	729,600
28	421,000	0.27	114,090.35	113,670
34	8,100	89.77	727,161.30	727,137

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Construction Division
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GGG could have sought relief under PCC § 5103 based on one, several or all of the above identified mathematical or clerical mistakes. The mistakes, therefore, provide GGG with an illegal competitive advantage. This fact alone requires that the City reject the GGG bid under the holding in MCM Construction, Inc.¹


4. CONCLUSION

Public Contract Code section 1103 defines a responsible bidder as "a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract." By its bid, GGG has not demonstrated any of these attributes. At best, GGG has established a disregard for strict compliance with specifications and an inability to accurately calculate its costs. At worst, the GGG bid reflects an effort to create an unfair bidding advantage if GGG was not satisfied with the bid spread. Either way, the non-waivable mistakes, errors and inaccuracies render the bid non-responsive. Therefore, the GGG bid must be rejected and the City should award the contract to Sukut as the lowest responsible bidder.

Should you require any additional information to assist you in making this determination, please do not hesitate to call me. In the event that the City is not inclined to reject the GGG bid based on this correspondence, Sukut respectfully requests an opportunity to present this matter to the Board.

We look forward to your favorable decision.

Very truly yours,


SALAMIRAD, MORROW,
TIMPANE & DUNN LLP

Ali Salamirad

cc: Robel Afewerki, Project Construction Manager (rafewerki@portla.org)
Christopher Morrow, Esq., Salamirad, Morrow, Timpane & Dunn LLP
Client

¹ The single mathematical or clerical error in the GGG bid for "item 26" reflects a variance of \$1,154,943.30. That is, multiplying the quantity contained in the GGG bid (24,000) by the unit price (\$30.40) totals \$729,600; however, GGG inserted \$1,884,543.33 in its bid. It appears that this mistake is the result of GGG using the wrong/original bid form for item 26; however, that is mere speculation and the reason for GGG's clerical or mathematical error is irrelevant in this case.

July 13, 2015

Salamirad, Morrow, Timepane &
Dunn LLP, Attorneys at Law
12901 Von Karman Avenue, Suite 500
Irvine, CA 92614

Attention: Ali Salamirad

SUBJECT: BID PROTEST
BERTHS 171-173 ENVIRONMENTAL SITE REMEDIATION
SPECIFICATION NO. 2727

This is in response to your letter dated June 29, 2015, in which you protested the bid submitted by GGG Demolition, Inc. (GGG), the apparent lowest bidder, for the Berths 171-173 Environmental Site Remediation project on behalf of your client, Sukut Construction, Inc.

The Port of Los Angeles (Port) staff, in consultation with the Office of the City Attorney, has reviewed your protest, and has concluded that it has no merit based on the following:

- Although GGG checked the box for Non-LBE instead of LBE, GGG is a Local Business Enterprise (LBE) and qualifies for the LBE credit. GGG provided their headquarters building location in their bid, which is in the city of Orange, California which qualifies GGG for the LBE credit.
- Although the WBE information is requested from the bidders, being a WBE is not a requirement for award of the contract. However, we have confirmed that GGG is in fact a WBE.

- GGG complied with the mandatory Small Business Enterprise (SBE) and very Small Business Enterprise (VSBE) participation levels requirement in its bids. SBE and VSBE suppliers and vendors qualify for meeting the required participation levels. As required by the bid documents, the information regarding SBE/VSBE was provided by GGG within four days after the bid, and we have confirmed that GGG meets the SBE and VSBE participation levels requirement.
- We have also determined that clerical and mathematical errors in GGG's bid do not materially change the result of the bids or give GGG competitive advantage to withdraw its bid.

None of the errors would result in a higher bid being submitted by GGG—to the contrary, using your examples, GGG would have been entitled to submit a lower overall bid. There was no competitive advantage to GGG, nor disadvantage to any other bidder—the variances are inconsequential. The unit prices submitted by GGG in its bid verify GGG to be the lowest bidder. The bid documents provide that in case of error in extension of prices, the unit price will govern. We will recommend that the Board of Harbor Commissioners award the contract to GGG at their meeting on August 6, 2015 at 8:30 am at the Port Administration Building located at 425 S. Palos Verdes St, San Pedro, CA 90731. You are welcome to attend the Board meeting and voice your concerns during the award of this contract.

If you have any questions or require additional information, please contact the undersigned at (310) 732-3670.

Sincerely,



SHAUN SHAHRESTANI
Chief Harbor Engineer
Construction Division

SS:lh/lm
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cc: Sukut Construction, Inc.
bcc: City Attorney