



November 19, 2014

To: Earl Seaberg
Contract Awards Branch Chief
Department of Transportation
Division of Engineering Services
Office Engineer MS 43
1727 30th Street
Sacramento, CA 95816

Re: Bid Protest
01-362914 Hwy 101
Bid Date: November 6, 2014

Dear Mr. Seaberg,

On Thursday, November 6, 2014, Ghilotti Construction Company bid the above referenced project. In reviewing the Bid Summary report for this project, it is clear that three of the four low bidders materially unbalanced their bid. Accordingly, Ghilotti Construction Company hereby formally protests an award of this contract to bidders one, two and four. Their bids should be deemed nonresponsive.

The Dept. of Transportation must reject bidders one, two and four as nonresponsive because they materially unbalanced their bid.

Bidders one, two and four bid item 24 TACK COAT at a unit price of \$1.00. If Caltrans double checks the engineer's quantity on this item, you will see that it is significantly under running. The engineer's quantity for this item is 290 tons. The actual quantity needed is approx. 90 tons. With this knowledge, three of the four low bidders materially unbalanced their bid by bidding \$1.00.

As stated in the Caltrans document labeled "Award of Construction Contracts" which is posted in the Award Requirements section of the Caltrans website (see attachment 'A'), bidding TACK COAT at \$1.00 gives these contractors an "economic advantage...not enjoyed by other bidders." Bidders taking the cost of this item out of their bid and selling it to the State for \$1.00 significantly increases their competitiveness over other contractors that included the actual cost for this item. Furthermore, because of this unbalancing, the State will not realize the true savings / credit when this item under runs in quantity. Some quick math shows that when this item under runs in quantity by 200 tons the State will realize a credit of \$200 from bidders one, two and four. Conversely, the State would

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realize a credit of \$100,000 if the bidders had entered the true cost for this item (200 tons x \$500, the actual cost of tack coat).

Based on this information, Ghilotti Construction Company hereby protests an award of this contract to bidders one, two and four

Thank you for considering this matter.

A handwritten signature in black ink, appearing to read "Thomas Smith". The signature is written in a cursive style with a large initial "T" and "S".

Thomas Smith
Estimating Manager
Ghilotti Construction Company, Inc

A

AWARD OF CONSTRUCTION CONTRACTS

Public works contracts are subject to numerous competitive bidding laws. Competitive bidding laws exist to protect the public from misuse or waste of public funds, provide all qualified bidders with a fair opportunity to enter the bidding process, stimulate competition in a manner conducive to sound fiscal practices and eliminate favoritism, fraud, corruption and abuse of discretion in the awarding of public contract. These competitive bidding laws exist for the benefit of the public and were not established to protect individual bidders.

A public entity has wide discretion in awarding public works contracts, as long as it exercises its discretion in good faith

Standard of Review

A "responsive" bid is one that is in strict and full accordance with all *material* terms of the bid package. Any material variations will place the bidder at risk of being rejected by the public entity as non-responsive. Material terms include: (1) terms that could affect price, quantity, quality or delivery; and (2) terms that are clearly identified by the public entity and that must be complied with at the risk of bid rejection. A test used to determine whether a bid fails to materially comply with the bidding documents is whether the failure to comply gives the bidder an economic advantage or benefit not enjoyed by other bidders.

A responsive bid may be rejected if the public entity determines the bidding company is not "responsible." A bidding company is not responsible if it has demonstrated attributes of untrustworthiness, as well as, poor quality and fitness, incapacity and inexperience to satisfactorily perform the public works contract. A bidder is responsible if it can perform the contract as promised. Determining "responsibility" is a complex process, which is often based on information received outside of the bidding process.

Notice & Opportunity to Respond for Unsuccessful Bidders

Upon determination that a low bid is nonresponsive Caltrans notifies the bidder of its findings and determination. Absent clear material evidence from the bidder that their bid complies, the determination stands.

Before rejecting the lowest bidder on the basis of non-responsibility, Caltrans notifies the bidder of the evidence supporting its findings and affords the bidder an opportunity to rebut this evidence and demonstrate that it is qualified to perform the work.

Abuse of Discretion

An unsuccessful bidder may seek a writ of mandate to invalidate a public body's award of a contract if it can show that the award is an abuse of discretion. The unsuccessful bidder must demonstrate the awarding agency abused its discretion in awarding the contract. Abuse of discretion can be shown by demonstrating the public entity acted illogically, capriciously, or arbitrarily.