



Jennifer L. Dauer
916-492-5073 direct
916-446-2640 fax
jdauer@diepenbrock.com
www.diepenbrock.com

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May 11, 2015

VIA U.S. MAIL and EMAIL - John.McMillan@dot.ca.gov

John McMillan
Office Engineer
State of California, Department of Transportation
1727 30th Street, MSC43
Sacramento, California 95816

Re: *Response to McCullough Construction bid protest of contract award on
Contract Number 01-493704
Our File No. 3216-000*

Dear Mr. McMillan:

I am writing on behalf of my client, Mercer-Fraser Company ("Mercer-Fraser"), to provide a substantive response to the April 23, 2015 and May 4, 2015 protest filed by McCullough Construction, Inc. ("McCullough") against the award of Contract No. 01-493704 to Mercer-Fraser. McCullough has not identified any grounds on which the California Department of Transportation ("CalTrans") is required to reject Mercer-Fraser's bid. In addition, as previously detailed in correspondence by Mercer-Fraser, McCullough's own bid is materially non-responsive and unavailable for award. Because McCullough is not a potential awardee and identifies no material deviations in Mercer-Fraser's bid, Mercer-Fraser requests that CalTrans deny the protest and proceed with award to Mercer-Fraser as the lowest responsible bidder.

A bid is responsive if it promises to do what the solicitation requires. See *Valley Crest Landscape, Inc. v. City of Davis*, 41 Cal. App. 4th 1432, 1438 (1996). If a bid contains an **immaterial** deviation from what the solicitation requires, *i.e.* a deviation that could not have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders, then CalTrans has the discretion to waive the deviation. See *MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal. App. 4th 359, 374 (1998) (finding that a public entity has discretion to waive an immaterial deviation). As one court explained:

"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 is inconsequential. . . ."

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Konica Business Machs. U.S.A., Inc. v. Regents of Univ. of Cal., 206 Cal. App. 3d 449, 454 (1988) (italics in original).

In its protest, McCullough confuses the concept of whether information is **mandatory** with whether it is **material**. Mandatory information still may be immaterial if its absence does not affect the amount of the bid or otherwise give a bidder an advantage over other bidders. McCullough also apparently believes that any alleged mistake would allow Mercer-Fraser to withdraw its bid. In fact, a bid can be withdrawn for mistake only in limited circumstances, detailed in Public Contract Code section 5103, including that the mistake must make the bid "materially different than [the bidder] intended." McCullough has failed to establish the substance and/or materiality of any of the issues about which it complains, so its protest should be denied.

Further, as the *MCM* case recognized:

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] 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.

MCM, 66 Cal. App. 4th at 370 (internal quote marks omitted). McCullough's "shotgun" approach at its protest is the epitome of what *MCM* sought to avoid. CalTrans should reject McCullough's attempt to elevate minor technicalities, most of which are not even immaterial deviations, to a level supporting rejection of the lowest responsible bidder.

Responding to the first issue raised by McCullough, Mercer-Fraser's bid amount unambiguously was \$1,892,180.20, which can be confirmed from the bid form. The inadvertent incorrect amount on the DBE Commitment form does not and cannot change the bid amount, as calculated from the bid items. The alleged error is neither a deviation nor material.

In its second and third issues, McCullough argues that Mercer-Fraser did not identify the total number of subcontracts and the total value of those subcontracts. As Mercer-Fraser understands the requested information, it is available in information in the bid, so any failure to provide the information **on the form** gave Mercer-Fraser no advantage. Mercer-Fraser listed its subcontractors in its bid, as required by the Subletting and Subcontracting Fair Practices Act ("Act"). Mercer-Fraser understands the DBE Commitment form to request the number of subcontractors required to be listed under the Act, but not to require information such as materials suppliers (who are not subcontractors) or lower-tier subcontractors (who are not Mercer-Fraser's

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subcontractors).¹ Determining the number of subcontracts requires only adding the number of subcontractors (6) listed under the Act. Similarly, the value of subcontracts can be determined by reference to Mercer-Fraser's DBE Good Faith Efforts documentation, without the trucking.

Mercer-Fraser is bound to use its listed subcontractors for the identified portion of work (and, thus, value of work), as are all other bidders. That is, all bidders are bound to use subcontractors listed under the Act, and can change unlisted subcontractors, material suppliers, and lower tier subcontractors. No bidder is bound to the listed value of that work, principally because actual work volumes will differ from estimates even absent any changes. Contrary to McCullough's assertion, Mercer-Fraser had no advantage over any other bidder.

Responding to McCullough's fourth *and* sixth issues, under the Act, Mercer-Fraser must use its listed subcontractors for the work for which they are listed, including contracting with them at their bid amounts. See Pub. Cont. Code § 4107(a)(1) (failure to contract "at the price specified in the subcontractor's bid" as a ground of substitution). Mercer-Fraser's prices to CalTrans for that work are not required to match the amounts being paid to its DBEs.² As a result, McCullough is incorrect in claiming that it has identified an ambiguity, error, or deviation. Because there was no error – let alone an error making Mercer-Fraser's bid materially different from that intended – McCullough is incorrect in asserting that Mercer-Fraser could have withdrawn its bid.

McCullough's fifth issue also fails. Mercer-Fraser's dollar figure for work committed to DBEs is based on DBE bid amounts. Both the amount and the percentage are correct. McCullough's asserted modification to the amount is what is improper. Again, its attempt to manufacture an error fails.

Seventh, McCullough identified no ambiguity about whether M&S Environmental will perform bid item 30 or 32. Under the Act, Mercer-Fraser correctly identified M&S as performing bid item 32, the work for which Mercer-Fraser is bound by law to use M&S. The portion of M&S' work described on the DBE Commitment form – "Hydroseed" – also is consistent with item 32 for "hydroseed," not item 30 for "shoulder backing." Moreover, the bid by M&S, which is included in Mercer-Fraser's DBE documentation, reflects that M&S bid on item 32, and did not bid on item 30. The inadvertent listing of M&S on the DBE Commitment form for item 30 instead of 32 does not change, and

¹ McCullough seems to have a different understanding of the information required by the form. Mercer-Fraser respectfully suggests that CalTrans may want to clarify its intent for future procurements.

² Contrary to the allegations in McCullough's sixth issue, the fact that Mercer-Fraser's price to CalTrans is lower than S.T. Rhoades' bid confirms that they will perform 100% of their bid items, as opposed to indicating that they will perform less than all of the work for which they are listed.

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cannot rationally be understood to change, the work on which M&S bid and for which Mercer-Fraser listed and committed to use M&S under the Act.

Eighth, with respect to "work category codes," Mercer-Fraser's listing of DBEs under the Act and in the DBE Commitment form each identifies the "portion" of work that the DBE will perform. Mercer-Fraser also attached the DBE bids and specified the bid items that each DBE would perform, as required. The work category codes provide CalTrans with no additional information. Further, the work category codes can be confusing, and many DBEs do not accurately or completely identify the work category codes that they can perform on the UCP website. See, e.g., **Exhibit A** (S.T. Rhoades' UCP listing, including several work codes but omitting for other work that it is capable of performing). Given CalTrans' experience with the codes, and from the specific descriptions of the work required with the bids, CalTrans likely is better able than bidders or even the DBEs themselves to accurately identify the appropriate code from a description of the work. In short, the lack of the codes does not give Mercer-Fraser any advantage over any other bidder because the critical information of identifying the work that the listed DBE will perform on the project is contained in the bid.

Finally, Mercer-Fraser noted an understanding from prior contacts with McCullough that they do not bid as a subcontractor. Whether or not that understanding is correct, McCullough does not argue, and cannot establish, that Mercer-Fraser did not act in good faith in its DBE outreach. Thus, this issue is irrelevant and should be disregarded.

McCullough does its best to comb through Mercer-Fraser's bid after the fact and to try to convince CalTrans to reject that bid on minor technicalities. As in *MCM*, CalTrans should reject that attempt. McCullough's first, fourth, fifth, sixth, seventh, and ninth issues establish no deviation from the requirements of the solicitation. On its second, third and eighth issues, McCullough cannot establish that any deviation was material because the necessary information was included in the bid, and/or could be readily derived from information in the bid. For these reasons, Mercer-Fraser requests that CalTrans waive any deviations as immaterial and award the contract to Mercer-Fraser.

Thank you for your consideration of these matters.

Very truly yours,

DIEPENBROCK ELKIN LLP



Jennifer L. Dauer

JLD/sa

cc: Charlie Anderson (via e-mail)

Exhibit A

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Search Returned 1 Records

Mon May 11 16:24:18 PDT 2015

Query Criteria

Firm/DBA Name: s.t. Rhoades

Firm Type: DBE

Firm ID	37693
Firm/DBA Name	S.T. RHOADES CONSTRUCTION, INC.
Address Line1	8585 COMMERCIAL WAY
Address Line2	
City	REDDING
State	CA
Zip Code1	96002
Zip Code2	
Mailing Address Line1	P O BOX 494520
Mailing Address Line2	
Mailing City	REDDING
Mailing State	CA
Mailing Zip Code1	96049
Mailing Zip Code2	
Certification Type	DBE
E Mail	steve@strhoadesinc.com
Contact Name	STEVE RHOADES
Area Code	(530)
Phone Number	223-9322
Fax Area Code	(530)
Fax Phone Number	223-9222
Agency Name	DEPARTMENT OF TRANSPORTATION
Counties	02; 03; 04; 05; 06; 08; 09; 11; 12; 14; 17; 18; 23; 25; 26; 29; 31; 32; 34; 45; 46; 47; 51; 52; 53; 57; 58;
Districts	01; 02; 03; 09; 10;
DBE NAICS	237110; 237310; 237990; 238110; 238910;

ACDBE NAICS

Work Codes C1200 CDNSTRUCTION AREA SIGNS; C1201 TRAFFIC CONTROL SYSTEM; C1531 PLANE ASPHALT CONCRETE; C1901 ROADWAY EXCAVATION; C1910 GRADING; C2066 TEMPORARY EROSION CONTROL; C2201 FINISHING ROADWAY; C2602 AGGREGATE BASE; C3600 PENETRATION TREATMENT & PRIME COAT; C3701 SEAL COAT; C3901 ASPHALT CONCRETE; C3910 PAVING ASPHALT (ASPHALT CONCRETE); C3930 PAVEMENT REINFORCING FABRIC; C8001 TEMPORARY FENCING; C8852 SWPPP Planning;

Licenses A General Engineering Contractor; C31 Construction Zone Traffic Control Contractor;

Trucks

Gender

M

Ethnicity

NATIVE AMERICAN

Firm Type

DBE

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