



October 31, 2014

Via Fax, Email & Overnight Mail

Gordon N. Ball Inc.

General Engineering Contractors

Tel 925.838.5675

Fax 925.838.5915

333 Camille Avenue

Alamo, CA 94507

Earl Seaberg, Chief, Office of Contract Awards & Services
John McMillan, Deputy Division Chief
Office Engineer – MSC 43
California Department of Transportation
1727 30th Street
Sacramento, CA 95816-7005

Reference: Contract No. 03-4F3404
03-Pla, Nev-80-69.3/69.8, 8.8/R2.3
Bid Date: October 15, 2014

Subject: Protest Teichert Construction & Hansen Brothers Enterprises

Gordon N. Ball, Inc., the bidder that submitted the lowest responsive bid for the above-referenced project ("Project"), has reviewed the bids of Teichert Construction ("Teichert") and Hansen Bros. Enterprises ("Hansen"), and finds that these bids are not responsive, because these bidders failed to comply with the Instructions to Bidders relating to DBE requirements.

Caltrans' Specification Section 2-1.12B (2) states to, "Submit written confirmation from each DBE shown on the form stating that it will be participating in the Contract. Include confirmation with the DBE commitment form. A copy of a DBE's quote will serve as written confirmation that the DBE will be participating in the Contract." The Caltrans Bidder DBE Commitment Form, in the third sentence of the first paragraph of the Form, states, "Failure to submit the required DBE information will be grounds for finding the proposal nonresponsive." (emphasis added.) The lower left hand corner of this form states, "Copies of DBE quotes are required." (emphasis added.)

Teichert listed Veridico on its DBE Commitment Submittal for Bid Items I and 7, but failed to attach Veridico's quote for this project. Instead of attaching the relevant quote, if any there was, Teichert attached a quote for a different project (page 15 of the attached PDF). Consequently, Teichert's bid is non-responsive.

Hansen listed multiple firms on its DBE Commitment Submittal (Pages 1-4 of the attached PDF), but Hansen failed to attach *any* of the required quotes for the DBE firms in its DBE Commitment Submittal and GFE Submittal. Accordingly, Hansen's bid also is non-responsive.

The requirement to include quotes from subcontractors whom bidders propose to use to satisfy DBE commitments was included in the Instructions to Bidders and/or bid forms and is therefore, mandatory. Words such as "must" or "shall" are ordinarily construed as mandatory or directory, as opposed to permissive. (*Judith P. v. Superior Court* (2002) 106 Cal. App. 4th 535, 550.) Caltrans' instructions to bidders states that quotes from

DBE subcontracts "are required." The words, "are required," also indicate a mandatory obligation, especially when framed by the warning that the failure to comply will be a ground for rejection of the bid. By definition, Teichert and Hansen's bids were nonresponsive because each violated a mandatory requirement Caltrans imposed in its instructions for bidding. (*Valley Crest Landscape v. Davis* (1996) 41 Cal. App. 4th 1432, 1464 [error in listing subcontractors could not be waived]); *National Identification v. Board of Control* (1992) 11 Cal. App. 4th 1446, 1464.)

Caltrans in the past has properly rejected bids as non-responsive because of this very reason, and now, it must similarly reject Teichert and Hansen's bids in order to comply with its own bidding requirements. See, for example, bid protest of Hazard Construction dated February 14, 2013, and Caltrans (John McMillan) letter dated March 18, 2013, finding the bid of Atlas Development, Inc. to be nonresponsive, in part, for Atlas' failure to include DBE quotes (attached).

Bidders who fail to attach the requisite quote(s), or who attach the wrong quote, enjoy a competitive advantage. The non-compliant bidder could claim the required quote was mathematically different from the quote that the bidder intended to use, and withdraw the bid. As a consequence, failure to include the required bid confers a competitive benefit and constitutes a discrepancy that cannot be waived. (*Valley Crest Landscape*, 41 Cal. App. 4th at 1440 [discrepancy that allows bidder to assert grounds for withdrawal of bid confers a competitive advantage and therefore constitutes a non-waivable defect].)

Finally, it is not possible to cure a defective bid that fails to attach a required quote by agreeing after the bid opening to so do. Eliminating requirements in favor of one bidder, and not another, introduces an improper and unfair element of subjectivity into the bid process. (*City of Inglewood-LA County Civic Center v. Superior Court* (1972) 7 Cal.3d 861, 867.) To fail to enforce the contract documents uniformly would be arbitrary, capricious, and grounds for setting aside an award of the project. (*Id.*)

For the reasons set forth above, Teichert and Hansen's bids contain material irregularities and omissions which render their bids nonresponsive. Their bids must be rejected.

An Illegal Award To A Bidder Other Than Gordon N. Ball, Inc. Carries Consequences

Caltrans may only award a contract to the lowest responsible bidder that submits a responsive bid. A contract awarded to a bidder other than Gordon N. Ball, Inc. would be illegal and void. (*Valley Crest Landscape, Inc. v. Davis* (1996) 41 Cal.App.4th 1432; *Monterey Mechanical v. Sacramento Regional County Sanitation City* (1996) 44 Cal.App.4th 1391.)

Payment of any funds to another bidder also would violate the California Constitution. Section 10 of Article XI of the Constitution provides that "a local government body may not ... pay a claim under an agreement made without authority of law."

A concerned taxpayer, as well as Gordon N. Ball, Inc., may bring an action to enjoin payments on a contract awarded to another bidder and to require the return to the City of

any such payments. (*Rubino v. Lolli* (1970) 10 Cal.App.3d 1059; *Miller v. McKinnon* (1942) 20 Cal. 2d 83.) The public policy underlying competitive bidding is so strong that a court is required, on its own initiative, to order the return of payments even if the parties to a lawsuit do not request such an order. (*Greer v. Hitchcock*, (1969) 271 Cal.App.2d 334.)

Conclusion

For the foregoing reasons, Gordon N. Ball, Inc.'s protest should be sustained and the project should be awarded to Gordon N. Ball, Inc. as the lowest responsible bidder.

Gordon N. Ball, Inc. is an experienced and qualified contractor with an impeccable history and reputation. Gordon N. Ball, Inc. and the Caltrans have worked together successfully on a number of projects, and Gordon N. Ball, Inc. hopes to continue that track record of success here.

We would appreciate your advising us of any meetings or hearings that may be held to discuss this protest so we may attend, and/or advise us of the intent of the Department relative to the award of the project, so that Gordon N. Ball, Inc. can be given the opportunity to present evidence and argument as the law requires. (*City of Inglewood*, 7 Cal.3d at 867.)

Please feel free to contact me if you have any questions or would like to discuss this matter further. We look forward to receiving Caltrans' determination of the protest.

GORDON N. BALL, INC.



Hal Stober
President

cc: Teichert Construction, 4401 Duluth Ave., Rocklin, CA 95765
Hansen Brothers Enterprises, PO Box 1599, Grass Valley, CA 95945

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

Take necessary and reasonable steps to ensure that DBEs have opportunity to participate in the Contract (49 CFR 26).

2-1.12B Disadvantaged Business Enterprise Goal

2-1.12B(1) General

Section 2-1.12B applies if a DBE goal is shown on the *Notice to Bidders*.

To ensure equal participation of DBEs provided in 49 CFR 26.5, the Department shows a goal for DBEs.

Make work available to DBEs and select work parts consistent with available DBE subcontractors and suppliers.

Meet the DBE goal shown on the *Notice to Bidders* or demonstrate that you made adequate good faith efforts to meet this goal.

You are responsible to verify that the at the bid opening date the DBE firm is certified as DBE by the CA Unified Certification Program.

All DBE participation will count toward the Department's federally-mandated statewide overall DBE goal.

Credit for materials or supplies you purchase from DBEs counts toward the goal in the following manner:

1. 100 percent if the materials or supplies are obtained from a DBE manufacturer.
2. 60 percent if the materials or supplies are obtained from a DBE regular dealer.
3. Only fees, commissions, and charges for assistance in the procurement and delivery of materials or supplies, if they are obtained from a DBE that is neither a manufacturer nor regular dealer. 49 CFR 26.55 defines "manufacturer" and "regular dealer."

You receive credit toward the goal if you employ a DBE trucking company that performs a commercially useful function as defined in 49 CFR 26.55(d)(1)-(4), (6).

2-1.12B(2) DBE Commitment Submittal

Submit DBE information under section 2-1.33.

Bidders other than the apparent low bidder, the 2nd low bidder, and the 3rd low bidder are not required to submit the DBE commitment form unless the Department requests it. If the Department requests a DBE commitment form from you, submit the completed form within 4 business days of the request.

Submit written confirmation from each DBE shown on the form stating that it will be participating in the Contract. Include confirmation with the DBE commitment form. A copy of a DBE's quote will serve as written confirmation that the DBE will be participating in the Contract.

2-1.12B(3) Good Faith Efforts Submittal

If you have not met the DBE goal, complete and submit the Good Faith Efforts Documentation under section 2-1.33 showing that you made adequate good faith efforts to meet the goal. Only good faith efforts directed toward obtaining participation by DBEs are considered.

If your DBE commitment form shows that you have met the DBE goal or if you are required to submit the DBE commitment form, you must submit good faith efforts documentation within the specified time to protect your eligibility for award of the contract in the event the Department finds that the DBE goal has not been met.

The Department may consider DBE commitments of the 2nd and 3rd bidders in determining whether the low bidder made good faith efforts to meet the DBE goal.

**** Transmit Conf. Report ****

P.1
CALTRANS CONTR AWARDS Fax 916-227-6282

Mar 18 2013 03:39pm

Fax/Phone Number	Mode	Start	Time	Page	Result	Note
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STATE OF CALIFORNIA - BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN Jr., Governor

DEPARTMENT OF TRANSPORTATION
 DIVISION OF ENGINEERING SERVICES
 OFFICE ENGINEER, MS 43
 1727 30th STREET
 P. O. BOX 168641
 SACRAMENTO, CA 95816-8041
 PHONE (916) 227-6280
 FAX (916) 227-6282
 TTY 711



*Flex your power!
Be energy efficient!*

March 18, 2013

Facsimile: (858) 453-6034

Jason A. Mordhorst, Vice President
 Hazard Construction Company
 P.O. Box 229000
 San Diego, CA 92192-9000

11-403704
 11-SD-163-5.8/6.4, 8.5/8.8
 B.O. 1/24/13

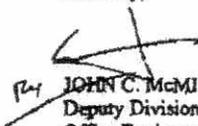
Dear Mr. Mordhorst:

The Department of Transportation (Caltrans) received the attached letter dated February 14, 2013, from Hazard Construction Company (Hazard), protesting Atlas Development, Inc.'s (Atlas) DBE Commitment form. The protest states that Atlas failed to provide copies of DBE quotes and did not make a good faith effort to meet the stated contract goal as required by the specifications. Hazard requests that Caltrans find Atlas nonresponsive and award the contract to Hazard.

After a review of the submitted DBE Commitment form, Caltrans finds that Hazard's protest has merit and will proceed to award the contract to the lowest responsible bidder.

If you have any questions, please contact Melissa Smith, Contract Awards Branch Manager, at (916) 227-6228.

Sincerely,


 JOHN C. McMILLAN
 Deputy Division Chief
 Office Engineer
 Division of Engineering Services

Attachment

Received

Feb 14 2013 03:13pm

858

HAZARD CONSTRUCTION

04:17:57 p.m. 02-14-2013

1/2



Phone (858) 587-3600
 Fax (858) 453-6034
 6465 Marindustry Place
 San Diego, CA 92121
 hazardconstruction.com
 License No. 750542 A/B

February 14, 2013

Department of Transportation
 Division of Engineering Services
 Office Engineer, MS 43
 1727 30th Street
 Sacramento, CA 95816
 Attn: John C. McMillan

Re: Bid Protest of Apparent Low Bidder
 Caltrans Contract 11-403704

Dear Mr. McMillan:

Hazard Construction ("Hazard") has reviewed the bid forms and DBE Commitment Form as submitted by the apparent low bidder, Atlas Development, Inc. ("Atlas") and asks that Caltrans find Atlas non-responsive due to failure to meet to properly meet the 8% DBE goal and failure to submit a good faith effort to attain the 8% DBE goal.

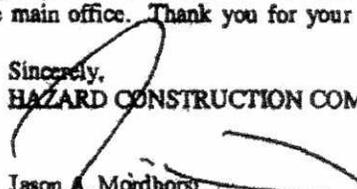
The Caltrans Bidder - DBE Commitment Form, the third sentence of the first paragraph of the Caltrans Bidder - DBE - Commitment Form states "Failure to submit the required DBE information will be grounds for finding the proposal nonresponsive." (*emphasis added*) The lower left hand corner of this form states "Copies of DBE quotes are required." (*emphasis added*)

Because Atlas failed to submit a good faith effort and failed to provide copies of DBE quotes to substantiate the dollars claimed in their DBE Commitment Form, as required by the specifications, their bid must be found non-responsive.

Hazard Construction hereby protests any award to Atlas because they are non-responsive due to failure to comply with Section 2-1.02 DISADVANTAGED BUSINESS ENTERPRISES, sixth paragraph which states "Meet the DBE goal shown in the Notice to Bidders or demonstrate that you made adequate good faith efforts to meet this goal." We ask that Caltrans award the contract to Hazard, the true apparent low bidder, having met all of the requirements of the contract.

If you have any questions regarding any of these matters or need further clarification, please do not hesitate to call myself at the main office. Thank you for your attention to this matter.

Sincerely,
 HAZARD CONSTRUCTION COMPANY


 Jason A. Mordhorst
 Vice President

cc: Bid File
 Attachment

Received

Feb 14 2013 03:14pm

858

HAZARD CONSTRUCTION

04:18:24 p.m. 02-14-2013

2/2

Low (In Bid Book)

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
CALTRANS BIDDER - DBE - COMMITMENT
 DBE-CB-0102.108 (REV 08/2012)

Low Bidder

This information may be submitted with your bid proposal. If it is not, and you are the apparent low bidder or the winner of DBE low bidder, it must be submitted and made public as specified in Section 7 of the Special Provisions. Failure to submit the required DBE information will be grounds for forfeiting the proposed contract.

CONTRACT NO. 11-403704

DBE AMOUNT: 1,279,835.22

DBE OPENING DATE: 1/24/13

BIDDER'S NAME: Atlas Development

DBE GOAL FROM CONTRACT: 8%

DBE FIRM CONTRACTOR CERTIFICATION:

CONTRACT ITEM NO.	ITEM OF WORK AND DESCRIPTION OF SERVICES TO BE SUBCONTRACTED OR MATERIALS TO BE PROVIDED	FOR CALTRANS USE ONLY	NAME OF DBE <small>(Must be certified on the date this bid opened - include Caltrans certification #, DBE address and phone number) (Indicate bid and issue for subcontractors)</small>	DOLLAR AMOUNT DBE*
<u>14,18,50-56,59</u>	<u>Pavement Markers/Striping</u>		<u>Fayer Associates Inc. 1140 W. 2nd Ave. Suite 100 - 11th St. (310) 424-9207 DBE # 302</u>	<u>36,570.00</u>
<u>23</u>	<u>Excavation Haul Away</u>		<u>Bradley Trucking, Inc. (916) 324-7100 605 Maple Ave. Berkeley, CA 94702 DBE # 302</u>	<u>206,913.00</u>
<u>44,46,47,48</u>	<u>Concrete Barrier Rebar</u>		<u>Watts & Kiser 1745 Manning Ave. #101 CA 95711 (415) 621-8375 DBE # 302</u>	<u>60,087.91</u>

IMPORTANT: Identify all DBE firms being claimed for credit, regardless of the reason of the FIRM. The DBE (subcontractors and their respective firms) of work listed above must be certified, where applicable, with the material and name of work in the "Subcontractor List" submitted with your bid. Copies of the DBE quotes are required.

Total Certified Participation: 303,570.91

23.71%

- DBE prime contractors must enter their certification number and indicate all work to be performed by DBEs including work performed by its own firms.
- If 100% of item to not be performed or furnished by DBE, describe exact portion of item to be performed or furnished.
- See Section 100 "Disadvantaged Business Enterprise" in Section 7 "Bidding" of the special provisions to determine a credit allowed for DBE firms.

Signature of Bidder: M. Atafi

Date: 1/24/13 (619) 200-0902 (Area Code) Tel. No.

Name to Contact: Mark Atafi (Firm Name or Title)

Submit to:

8800 45
 OFFICE ENGINEER
 DEPARTMENT OF TRANSPORTATION
 1727 NORTH STREET
 SACRAMENTO, CA 95816 2008

ADA Notice: For individuals with sensory disabilities, this document is available in alternate formats. For information call (916) 664-3412 or TDD (916) 664-6800 or write Records and Public Management, 1129 N Street, 225-02, Sacramento, CA 95814.