

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
1727 30th STREET
P. O. BOX 168041
SACRAMENTO, CA 95816-8041
PHONE (916) 227-6280
FAX (916) 227-6282
TTY 711



*Flex your power!
Be energy efficient!*

June 13, 2013

Facsimile: (909) 944-3112

Joe McLoughlin, President
J. McLoughlin Engineering Co., Inc.
10641 Fulton Court
Rancho Cucamonga, CA 91730

03-4M4904
03-Yol, Sut-45,80,113-VAR
B.O. 04/17/2013

Dear Mr. McLoughlin:

The Department of Transportation (Caltrans) received the attached letter dated May 16, 2013, from Gibbs Giden, representing J. McLoughlin Engineering Co., Inc. (J. McLoughlin) in response to a nonresponsive finding on Contract No. 03-4M4904.

As you are aware, each bid is accepted and each contract is awarded based on the face of the contract. Once a bid is submitted, it cannot be changed. A basic rule of competitive bidding is that bids must conform to specifications and if a bid does not so conform, it may not be accepted. Unfortunately, McLoughlin indicated that the work to be subcontracted would be partial and on the 24hr submission, made a change to indicate that the performance of those items would be 100 percent, while leaving mobilization at 3 percent. Consequently, making a change to the scope of work, to be performed by the subcontractor.

Caltrans, in order to ensure the integrity of the bidding process, cannot make assumptions regarding the intent of the contractor, and awards contracts to those bidders who have met the requirements of the contracts and are responsive. In this case, Caltrans determined that the bid submitted by McLoughlin was nonresponsive and has not changed its position regarding the nonresponsive finding.

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

Sincerely,


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

Attachments

DEPARTMENT OF TRANSPORTATION
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*Flex your power!
Be energy efficient!*

May 10, 2013

Facsimile: (909) 944-3112

Joe McLoughlin, President
J. McLoughlin Engineering Co., Inc.
10641 Fulton Court
Rancho Cucamonga, CA 91730

03-4M4904
03-Yol, Sut-45,80,113-VAR
B.O. 04/17/2013

Dear Mr. McLoughlin:

The Department of Transportation (Caltrans) received a bid submitted by J. McLoughlin Engineering Co., Inc. (J. McLoughlin) for Contract No. 03-4M4904 on April 17, 2013. By this letter, Caltrans notifies J. McLoughlin that its bid is nonresponsive because the percentage of bid items subcontracted in column 3 is not consistent with the description of subcontracted work in column 4.

The Subcontractor List form states in part, "...Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid."

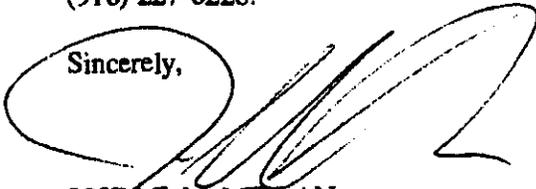
On the original submitted Subcontractor List, J. McLoughlin identified Central Striping Service Inc., (CSS) as only performing work described as Stripe (partial). However, on the 24-hour submission of the Subcontractor List submitted on April 18, 2013, J. McLoughlin identified the percentage of subcontracted work as 100 percent for Bid Items 1, 9, 12, and 31-37 to be performed by CSS. The change from partial to 100 percent constitutes an improper change to the Subcontractor List form.

Based on the above, Caltrans will proceed to award the contract to the lowest responsible bidder.

Your attention is directed to Section 3-1.02 of the Amendments to the 2006 Standard Specifications. Caltrans is not obligated to offer an extension of the award period for a nonresponsive bid. Should you wish to extend your bid while resolving a nonresponsive finding, you must send your request to the Office Engineer no later than 4:00 p.m., two business days prior to the expiration of your bid.

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

Sincerely,



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

Attachments

GIBBS GIDEN ATTORNEYS AT LAW

LOCHER TURNER SENET & WITTBRODT LLP

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REPLY TO LOS ANGELES OFFICE
AUTHOR'S E-MAIL: SKORNBLATT@GGTLTSW.COM
FILE NO.: 4620.002

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SETH W. EATON
SARA N. KORNBLATT
JOHN H. CONRAD
BRYAN M. GRAGG
ERIC W. SPIESS
LUKE N. EATON

OF COUNSEL
ALFRED FADEL A

RETIRED PARTNER
KENNETH C. GIBBS
(Full-Time Neutral)

May 16, 2013

VIA FACSIMILE, E-MAIL, AND U.S. MAIL

John C. McMillan, Deputy Division Chief
Mulissa Smith, Contract Branch Chief
State of California, Department of
Transportation
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, CA 95816-8041

Fax: (916) 227-6282
john.mcmillan@dot.ca.gov
mulissa.smith@dot.ca.gov

Re: **Contract No. 03-4M4904**
Response of J. McLoughlin to Bid Rejection & Request to Extend Bid Expiration

Dear Mr. McMillan and Ms. Smith:

Our office represents J. McLoughlin Engineering Co., Inc. ("J. McLoughlin"), the low bidder on California Department of Transportation ("Caltrans") Contract No. 03-4M4904 ("Contract"). On behalf of J. McLoughlin, we submit this response to your letter dated May 10, 2013, regarding the Subcontractor List form in J. McLoughlin's bid. J. McLoughlin's bid is responsive because Columns 3 (percentage) and 4 (description) of the Subcontractor List in J. McLoughlin's bid are consistent. As J. McLoughlin is the lowest responsive and responsible bidder, Caltrans should award the Contract to J. McLoughlin.

A. J. McLoughlin's Bid is Responsive Because Columns 3 and 4 of the Subcontractor List are Consistent

Your letter contends that the Column 4 description of the work subcontracted to Central Striping Service, Inc. ("Stripe (partial)") is inconsistent with the Column 3 percentages of bid items subcontracted because 100% of items 1, 9, 12, and 31-37 are being subcontracted to Central Striping. Your analysis, however, omits bid item 38, of which only 3% is being subcontracted to Central Striping. Since J. McLoughlin is only subcontracting a fraction of bid

GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP

May 16, 2013

Page 2

item 38 to Central Striping, the "partial" designation in Column 4 is accurate. If J. McLoughlin had not written "partial," and then listed item 38 at 3%, another bidder could protest the bid as nonresponsive due to the absence of the word "partial." As submitted, however, J. McLoughlin's Subcontractor List precisely and correctly describes the subcontracted work. Therefore, J. McLoughlin's bid is responsive.

Moreover, J. McLoughlin contends that any attempt to characterize bid item 38 (mobilization) in a different manner than any other bid item should be rejected. Central Striping specifically itemized mobilization in its bid to J. McLoughlin (see bid attached hereto as Exhibit A), and therefore J. McLoughlin assigned part of the mobilization bid item to Central Striping. Again, this demonstrates that Central Striping is performing part of a work bid item, and J. McLoughlin's bid is responsive.

Furthermore, even assuming for argument's sake only that the "partial" description was inaccurate (which it is not), J. McLoughlin's bid is still literally responsive. As noted in your letter, the Subcontractor List form instructions provide, in part: "Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid." J. McLoughlin did provide complete information in all 4 columns within the required time – nothing was left incomplete. Bid responsiveness measures whether the bid, as submitted, is in compliance with all of the requirements of the bid documents. To be "responsive," a bid must be in strict and full accordance with the material terms of the bidding instructions. *Taylor Bus Serv., Inc. v. San Diego Board of Educ.* (1987) 195 Cal.App.3d 1331; *MCM Constr., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359. Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information. *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432. Nothing in J. McLoughlin's Subcontractor Listing, even if taken as internally inconsistent, fails to comply with the requirements of the bid documents, which ask for (1) the percentage of the bid item subcontracted, and (2) the description of the subcontracted work. Each column has complete information, as required by the form itself. Additionally, and significantly, the information provided is absolutely internally consistent. Therefore, J. McLoughlin's bid is responsive.

Finally, your letter charges J. McLoughlin with changing its Subcontractor List form. J. McLoughlin did not change, nor did it attempt to change, its Subcontractor List. Upon bid submission, J. McLoughlin identified that Central Striping would be performing "Stripe (partial)." On the Subcontractor List submitted the day after bid submission, J. McLoughlin identified 10 bid items that will be performed 100% by Central Striping, and 1 bid item that will be performed 3% by Central Striping. This is not a change to the form. As discussed above, Columns 3 and 4 of the Subcontractor List are consistent with each other. Therefore, J. McLoughlin's bid is responsive.

GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP

May 16, 2013

Page 3

B. Even if Columns 3 and 4 are not Consistent, Any Inconsistency is a Waivable Inconsequential Irregularity

Even if this was determined to be an inconsistency, that is an immaterial deviation that can and should be waived by Caltrans. A minor and inconsequential irregularity in a bid does not require Caltrans to reject the bid as non-responsive. Given the complexity of construction projects and public bidding paperwork, there will inevitably be some variation between bids and bid documents. This raises questions of whether a variation is "material" or "immaterial" and whether variations may be waived by the awarding authority. California's courts have long held that "a public entity may waive inconsequential deviations from contract specifications in a public contract bid." *Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 900; see also, *MCM Constr., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359.

The *Ghilotti* court explained that "[t]o be considered inconsequential, a deviation must neither give the bidder an unfair competitive advantage nor otherwise defeat the goals of insuring economy and preventing corruption in the public contracting process." *Ghilotti, supra*, 45 Cal.App.4th at 900. Explained another way, an "immaterial variation" is the failure of a bidder to meet a bid requirement that does not affect the bidder's commitment if it is awarded the contract, either because (1) the requirement is merely procedural and, in the particular case, the meaning of the bid is clear; (2) the requirement is substantive but it is satisfactorily met, although not in the precise manner contemplated by the bidding documents; or (3) the requirement not met is one calling for information that relates not to the performance of the obligation but to independently verifiable facts regarding the bidder's status. In short, an "immaterial variation" will not change the bidder's performance obligations as described in the bid documents and does not provide the bidder an unfair advantage over other bidders. See, *Konica Bus. Machs. U.S.A., Inc., v. Regents of Univ. of Cal.*, (1988) 206 Cal.App.3d 449.

In the *Menefee* case, a disappointed bidder challenged award to the apparent low bidder, contending that the bid was nonresponsive because one of the pages of the bid proposal sheet had not been signed. The Court permitted the public agency to waive the defect of the unexecuted page and upheld award of the contract to the low bidder. In reaching its decision, a primary consideration of the Court was whether the low bidder obtained an unfair advantage over other bidders by failing to sign a page of its bid. If the absence of a signature would allow the bidder to avoid entering the contract, the Court reasoned, then it would have the unfair advantage of deciding whether it wanted the contract after bid opening. The Court found, however, that the bidder was bound by the terms of its bid and could not have refused to enter into the contract based on the defect in its bid. Therefore, the public agency was permitted to waive this "immaterial" defect.

Here, your letter contends that Columns 3 and 4 of the Subcontractor List are inconsistent with respect to Central Striping Service, Inc. As explained above, J. McLoughlin maintains that that the columns are in fact consistent. However, even if a determination was made that the

GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP

May 16, 2013

Page 4

columns are inconsistent, such an insignificant deviation will not entitle J. McLoughlin to seek relief from its bid under Public Contract Code section 5103, as this "mistake" was not one that made the bid materially different than intended and was not due to an error in judgment. *See, Menefee v. County of Fresno*, (1985) 163 Cal.App.3d 1175. Any perceived difference between the columns does not change J. McLoughlin's performance obligations, does not give J. McLoughlin an unfair competitive advantage, and does not relieve J. McLoughlin from being bound by the terms of its bid. In addition, it does not affect any listed subcontractor's rights. Therefore, even if Caltrans determines that the two columns on J. McLoughlin's Subcontractor List create an inconsistency (although J. McLoughlin contends they do not), Caltrans can and should waive this immaterial defect.

Moreover, there are no allegations or evidence, that this alleged inconsistency in J. McLoughlin's bid affected the amount of J. McLoughlin's bid, gave J. McLoughlin an advantage over other bidders, constituted a vehicle for favoritism, influence potential bidders to refrain from bidding, or affected the ability of Caltrans to make bid comparisons. *See, Ghilotti, supra*, 45 Cal.App.4th 897. Under California law, the analysis of whether or not to reject a bid must be based on actual, not hypothetical, considerations. *See, MCM Const., supra*, 66 Cal.App.4th 359. It is "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." *Ghilotti, supra*, 45 Cal.App.4th at 904. The only thing that would be accomplished by rejecting J. McLoughlin's bid would be to increase the cost of the Contract by more than \$145,000 (9.8%); such waste of taxpayer funds should not be tolerated.

For the reasons set forth herein, J. McLoughlin's bid should be deemed responsive. We therefore request that Caltrans proceed with award of the Contract to J. McLoughlin, the lowest responsive and responsible bidder.

In addition, J. McLoughlin hereby requests that Caltrans extend J. McLoughlin's bid while resolving this finding regarding bid responsiveness.

Very truly yours,



Sara J. Komblatt
for GIBBS GIDEN LOCHER TURNER
SENET & WITTBRODT LLP

Enclosure

cc: J. McLoughlin Engineering Co., Inc. (via email only)

05/16/2013 THU 8:57 **Received**
FAX

May 16 2013 09:00am

006/008

EXHIBIT A

APR-17-2013 12:23

CSS JML

P.01/02



California LIC #403896 CLASS C32
 Hawaii LIC #C-11288
 Nevada LIC #0059913
 Oregon LIC #118214
 Small Business Enterprise #0020572

QUOTATION

TO: Contractors
 OWNER: CALTRANS
 LOCATION: RTE 45, 80, 113
 PROJECT #: 09-4M4904

QUOTED BY: Dan Spence, Estimator
 BID DATE: 4/17/2013
 BID TIME: 2:00 PM

ITEM NO.	ITEM DESCRIPTION	UNITS	UDM	UNIT PRICE	TOTAL AMOUNT
1	LEAD COMPLIANCE	1	LS	1,100.00	1,100.00
9	REMOVE YELLOW THERMOPLASTIC TRAFFIC STRIPE (HAZARDOUS WASTE)	7,450	LF	0.80	5,960.00
12	REMOVE THERMOPLASTIC TRAFFIC STRIPE	15,500	LF	0.40	6,200.00
31	4" THERMOPLASTIC TRAFFIC STRIPE	19,800	LF	0.40	7,840.00
32	6" THERMOPLASTIC TRAFFIC STRIPE	760	LF	0.70	532.00
33	8" THERMOPLASTIC TRAFFIC STRIPE	760	LF	0.80	608.00
34	THERMOPLASTIC PAVEMENT MARKING	310	SF	8.00	2,480.00
35	4" THERMOPLASTIC TRAFFIC STRIPE (BROKEN 36-12)	7,470	LF	0.25	1,867.50
36	4" THERMOPLASTIC TRAFFIC STRIPE (BROKEN 17-7)	410	LF	0.25	102.50
37	PAVEMENT MARKER (RETROREFLECTIVE)	400	EA	4.00	1,640.00
38	MOBILIZATION	1	LS	3,000.00	3,000.00
					TOTAL \$ 31,530.00

SEE PAGE 2 OF 2 FOR SPECIFIC TERMS AND CONDITIONS RELATING TO THIS QUOTATION.
 THIS TRANSMISSION CONSISTS OF TWO PAGES. IF THE TRANSMISSION IS NOT LEGIBLE PLEASE CONTACT OUR OFFICE.

ACCEPTED BY: _____
 TITLE: _____
 P.O # OR CCO #: _____

100

APR-17-2013 12:23

CSS JML

P. 02/02



California LIC #403896 CLASS C32
Hawaii LIC #C-11288
Nevada LIC #0039913
Oregon LIC #118214
Small Business Enterprise #0020572

QUOTATION

TO: Contractor
OWNER: CALTRANS
LOCATION: ATE 45, 80, 113
CONTRACT #: 08-4M608

COMPANY: _____
ACCEPTED BY: _____
DATED: _____

SPECIAL PROVISIONS: ALL ITEMS OR NONE UNLESS NEGOTIATED PRIOR TO BID TIME.	
THE BELOW TERMS AND CONDITIONS ARE INCORPORATED AS PART OF THE SUBCONTRACT AGREEMENT.	
<ol style="list-style-type: none"> 1. Bonds are not included. Bondable at 2%. 2. Central Striping Service, Inc. is signatory to the Laborers' of Northern California, Southern California, Nevada and the Painters of Hawaii. 3. Unless otherwise noted and agreed to in writing by Central Striping Service, Inc., prior to time of bid, no items may be excluded from the subcontract/purchase order. 4. Backcharges: Contractor acknowledges that Central Striping Service, Inc. will not accept, nor be held liable for any backcharges, including Liquidated Damages, without prior written mutual agreement. 5. This quotation shall remain valid for 30 calendar days from the date of bid, and shall become part of any and all subcontract agreements and/or purchase orders related to this project, unless otherwise agreed upon in writing. 6. Central Striping Service, Inc. requires an executed subcontract agreement, purchase order or signed quote prior to start of work. 7. The parties acknowledge and agree the provisions of these Terms and Conditions precede any language in the subcontract agreement. 8. Overtime, Double Time or Holiday Time is not included in this proposal. Contractor agrees to pay, in addition to items quoted, for any premium time incurred. 10. Contractor installed temporary delineation or pavement markers shall be offset a minimum of 2" from permanent alignment. 11. Changeable message boards are not included, unless otherwise noted. 12. Contractor agrees to provide a written progress schedule 30 days in advance of our scheduled work and acknowledges any changes to the progress schedule may require additional advance notification for mobilization to perform our work. 13. This quotation does not include installing permanent delineation items while other operations are in progress on the jobsite. Contractor to provide clean pavement surfaces, and unobstructed access to the jobsite. 14. All work associated with the SWPP and/or WPCP is excluded. 15. Notification and/or signing to residents or businesses is excluded. 16. Items not specifically identified in this quote are excluded. 17. Contractor agrees to provide a source of clean water should any of our items require it. 18. Central Striping Service, Inc. is not responsible for lighting beyond our vehicles, equipment and personnel. 19. Contractor to provide a secured enclosure of our haz-mat bins/drums. 20. Payment Terms: <ul style="list-style-type: none"> ° Retention is not to be taken and held on our items of work. ° Net 30 or per California Prompt Payment Statutes. 21. Traffic Control is <u> </u>, is NOT <u>X</u> Included for our items of work, unless otherwise noted. 22. Traffic Control Plan is not included. 23. CSS, Inc. requires approximately 5 shifts of Traffic Control to complete our work. 24. <u>2</u> Ea. Move-ins are included. \$<u>1,500.00</u> Ea. Additional Move 	

GIBBS GIDEN ATTORNEYS AT LAW

LOCHER TURNER SENET & WITTBRODT LLP

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REPLY TO LOS ANGELES OFFICE

FACSIMILE TRANSMISSION

FROM: Sara H. Kornblatt, Esq.

DATE: May 16, 2013

PAGES (incl. cover sheet): 8

RECIPIENT	COMPANY	FAX NUMBER	TELEPHONE
John C. McMillan Mulissa Smith	State of California	(916) 227-6282	
CLIENT/MATTER:	Name: J. McLoughlin Engineering/Caltrans Bid		
	No.: 4620.002		
ATTACHEO PLEASE FINO:	Correspondence of today's date (w/encl.)		

- FOR YOUR FILES
- FOR YOUR REVIEW
- FOR YOUR INFORMATION
- IN ACCORDANCE WITH YOUR REQUEST
- PLEASE COMMENT
- PLEASE TELEPHONE ME
- ALSO SENT VIA E-MAIL
- PLEASE HANOLE

CONFIDENTIALITY NOTICE: This message and the documents accompanying this facsimile are legally privileged, confidential, and exempt from disclosure under applicable law. The information is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, please be advised that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this information is strictly prohibited. If this communication has been received in error, please notify us by telephone immediately to arrange for the return of the original documents to us. Thank you.

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

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

Jun 13 2013 05:32pm

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
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Caltrans, in order to ensure the integrity of the bidding process, cannot make assumptions regarding the intent of the contractor, and awards contracts to those bidders who have met the requirements of the contracts and are responsive. In this case, Caltrans determined that the bid submitted by McLoughlin was nonresponsive and has not changed its position regarding the nonresponsive finding.

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

Sincerely,


JOHN C. McMILLAN
Deputy Division Chief
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Division of Engineering Services

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