BROSS
CHESTER BROSS CONSTRUCTION COMPANY
Western Division

August 12, 2013

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
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ATTN: Mr. John C. McMillan
Deputy Division Chief

Subj: 10-0T1604 STATE HIGHWAY ROUTE 26 IN SAN JOAQUIN COUNTY NEAR BELLOTA FROM 0.3 MILES WEST OF SANDSTONE CREEK BRIDGE TO SHELLY ROAD
FEDERAL PROJECT NO. ACHSSTP-P026(028)E

Re: FORMAL PROTEST OF BID SUBMITTED BY RGW CONSTRUCTION INC., TEICHERT CONSTRUCTION, AND GEORGE REED INC.

Dear Mr. McMillan,

Please consider this letter to be a formal protest of the bid submitted by RGW Construction Inc., (RGW), the apparent low bidder, Teichert Construction (Teichert), the second bidder, and George Reed Inc., (GRI), the third bidder, in connection with Contract No. 10-0T16D4. Chester Bross Construction is presently the Fourth (4th) lowest bidder on the subject project. The bids turned in by RGW, Teichert, and GRI are nonresponsive and therefore must be rejected based on the Department's bidding requirements, strictly enforced policies and governing applicable Federal Regulations.

The RGW, Teichert, and GRI bids are Mathematically Unbalanced

Upon review of the bid summary listings as provided on the Caltrans website, it is clear that RGW, Teichert and GRI have submitted mathematically unbalanced bids. Title 23 of the Code of Federal

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regulations, Section 635.102 provides that a bid is mathematically unbalanced if the bid contains "lump sum *or unit bid items* which do not reflect reasonable costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other direct costs." The bids submitted by RGW, Teichert and GRI are all three mathematically unbalanced to even the most casual review. Though minor differences are apparent between the three, primary emphasis should be placed on the unbalancing evident on bid item numbers 3 Traffic Control System, 33 Remove Base and Surfacing, and item 40 Imported Borrow (CY). The fact is that the unit prices submitted for bid item 40 by all three contractors do not reflect the contractor's reasonable costs, let alone a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other direct costs. Further, on the prices submitted by RGW and GRI, the unit prices submitted for bid item 33 does not reflect reasonable costs, or a reasonable proportionate share of profit, overhead or direct costs. Additionally, bid item number 3 on the bid sheets submitted by Teichert and GRI are clearly inflated numbers most likely utilized to conceal wrongly allocated profits, costs etc. It may be noted that though there are minor differences in each of the three bids in question, all three demonstrate the same blatant unbalancing.

The RGW, Teichert, and GRI bids are Materially Unbalanced Due to the Risk Caltrans will Pay Unreasonably High Prices for Contract Performance

In determining whether a bid is materially unbalanced, Caltrans is required to consider the risks to the government associated with the unbalanced pricing in making the award decisions, and whether a contract will result in unreasonably high prices for contract performance. FAR § 15.404-1(G)(2). A bid should be rejected if Caltrans determines that the unbalanced bid poses an unacceptable risk to the government. FAR § 15.404-1(g)(3).

The risk that the government will pay for work not completed is extremely high on this project as a direct result of the unbalancing prevalent and so very obvious on all three bids in question. This can be clearly noted by extremely low, unit prices, extremely high lump sum prices, and higher than expected prices on final pay items. RGW, Teichert and GRI did not bid according to the plans and specifications provided by Caltrans as they are required to do. Instead, they identified items that they believed would not need to be performed according to the plans, under bid said items, and hid the full or necessary value of the work called for in the plans in other bid items. This is clearly evident on the Teichert and GRI bids, but more carefully camouflaged by RGW by being spread more carefully on numerous other final pay or lump sum items. This ensures that if the work is not performed, as RGW, Teichert and GRI anticipate, they will avoid sharing the cost savings with Caltrans.

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The Department must ask itself, for bid items grossly underbid, did the bidding contractor actually bid according to the plans and specifications. The answer is clearly no. There is no way for Caltrans to evaluate the supposed base and surfacing removal or imported borrow amounts per the bids submitted by RGW, Teichert or GRI when either $0.01 or $1.00 per CY is bid. The seriousness of this is clear when one considers what happens if the opposite occurs, if the actual amount of either item exceeds the 125% provision of the Standard Specifications, RGW, Teichert and GRI would be entitled to their actual costs and Caltrans would have no ability to analyze the actual costs incurred because a reasonable value was not used for these bid items.

Caltrans must further ask itself, if item 33 or item 40 are reduced in the course of the work, how does Caltrans benefit? The most glaring issue in the way of the prices provided for items 33 and 40 is the lack of Caltrans' ability to avail themselves of any cost savings for these items. If the assumptions made by the three lowest bidders is correct, then the proper method would be to place the reasonable value of the cost of each item and not mask those items with unbalanced bids, allowing for protected hidden profit dollars to the contractor while effectively negating the ability for Caltrans to share in any cost savings by way of a Cost Reduction Incentive Plan (CRIP) which would be in the best interests of the Department and in keeping with governing specifications.

The regulations are enacted to protect the State and consequentially other bidders to avoid this method of bidding when a contractor determines construction omissions or quantity errors have been made by the agency. You will note that RGW, Teichert and GRI will most likely not be able to cite a regulation or specification that supports their not bidding according to plans when they anticipate being able to perform less work than is expected. They will however, most likely try and convince the Department that the clear unbalancing will not carry with it a negative impact to the State and in fact, the State was able to realize the incredible savings on bid day. Chester Bross will concede that some savings to the State were most assuredly realized by Caltrans on bid day but in fact there is no true way for Caltrans or any entity to validate, quantify or identify said savings. This fact then becomes speculation based savings provided by a desperate bidder, most likely going on to outline minimal risk increases on the part of the Department. The fact is that by RGW, Teichert and GRI attesting to these afore mentioned savings on bid day, zero risk increases by the Department and so forth, the bidder, in so doing will have effectively admitted to the allegations of this protest. If questioned by the Department, RGW, Teichert and GRI will most likely also point out percentage differentials as a means of desperate justification as if to say that they are permitted to violate the restrictions for unbalanced bids on some of the items as long as it does not become too high of an amount or a percentage of the overall

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bid. Fairness, integrity and honesty in the bid process while following all express requirements should not be replaced with manipulation, deception, and unreasonableness.

The RGW, Teichert, and GRI bids are Materially Unbalanced Due to the Risk of Front End Loaded Payments

A mathematically unbalanced bid may be found materially unbalanced when it results in advance payments to the contractor. FAR § 52.214-19(d). Here, the risk that RGW, Teichert and GRI front end loaded its bid items, effectively ensuring advance payments for work not yet completed is most assuredly factual though expressly unacceptable. The three bids in question were unbalanced for a reason, we can make a plausible assumption that RGW, Teichert and GRI unbalanced their bids for three primary reasons, to capitalize on cost and profit dollars for work not performed thereby turning these dollars into profit, front end loading the estimate to ensure positive cash flow through advance payments on work that has not yet, and indeed may never be performed, and finally to ensure the lowest possible apparent bid total for comparison on bid day. The State cannot be sure where the excess amount of dollars was hidden and therefore, the risk that Caltrans will make advance payments to RGW, Teichert and GRI for work not yet performed is too great. As such, and in keeping with governing regulations, specifications and Caltrans past precedence, the bids submitted by RGW, Teichert and GRI should therefore be rejected as materially unbalanced.

The RGW, Teichert, and GRI bids are Materially Unbalanced Due to the Reasonable Doubt that their bids will Result in the Lowest Overall Cost to the Government

A bid is materially unbalanced if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid. FAR § 52.214-19(d). As previously noted, RGW, Teichert and GRI significantly underbid certain bid items that they believed could be completed without performing all of the work called for by Caltrans' plans and specifications. Thus, it is reasonable to assume that it hid the full amount, or a greater portion of the work in other bid items. Therefore, if the work is not performed, the three low bidders would effectively avoid sharing the cost savings with Caltrans.

In contrast, Chester Bross Construction bid these items according to the specifications and plans provided by Caltrans as all bidders are required to do. Therefore, if it is determined some of the work anticipated is not actually necessary, Chester Bross Construction will share with the State the cost

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savings by way of a Cost Reduction Incentive Plan (CRIP) or other means available that are in keeping with governing regulations, and specifications.

Further, unbalanced bids can have a significant impact on both the administration of a project and a project's ultimate cost. Part of the bidding process is to allow the agencies to see the prices paid for materials and labor for various work items. This allows Caltrans to conduct the work, but more importantly, it allows Caltrans to be flexible in modifying the work if changes in methods, conditions and scheduling are required. This is not possible based upon an unbalanced bid.

For Change Orders, all of the costs of the contractor will be submitted for these items with no reference to the original bid amounts and agency will see them for the first time far into the project. Thus, any Change Orders for those items in which RGW, Teichert or GRI has underbid the cost will result in lengthy negotiations, thereby delaying incorporation of the changed work with the owner likely paying an inflated price for the change. Moreover, it simply is not known for which bid items RGW, Teichert or GRI inflated the price. Therefore, a Change Order has the very real potential to result in Caltrans paying an inflated price for the changed work.

Ultimately, it is the project, the State and the traveling public that will suffer by delayed completion and increased cost from addressing these issues and their consequences, including the cost of litigation. As such, and based in no small part on the points brought forth herein, there is reasonable doubt that the bids submitted by RGW, Teichert and GRI will result in the lowest overall cost to the Government. Therefore, the bids submitted by RGW, Teichert and GRI should be rejected as both mathematically and materially unbalanced.

The RGW, Teichert, and GRI bids are Materially Unbalanced Due to the Threat they pose to the Integrity of the Bidding Process

The threat to the integrity of the bidding process is made clear when one asks, if RGW, Teichert or GRI had made a calculation error for any of the above bid items, could either of them have declared a mathematical error and be relieved of their bid? Any of the three lower bidders could have probably sustained a claim of error for any of these items had they determined that they made a gross mistake with their methodology. This affects the competitiveness of the bidding process because, in essence, RGW, Teichert and GRI were given a free look at the other bids *before* declaring an error. This emboldens the bidder who would adopt these methods. Chester Bross Construction is in no way

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alleging that this was the motive of RGW, Teichert or GRI here, but just the potential being present in an unbalanced bid is enough to make the bid nonresponsive according to the regulations.

Conclusion

Based on the information presented herein, governing regulations and specifications, the bids provided by RGW, Teichert and GRI should be rejected as mathematically and materially unbalanced. Therefore, it is respectfully and formally requested that the Department uphold and validate Chester Bross Construction's bid protest and award the contract to our company, which submitted the lowest responsive and responsible bid for Contract No. 10-0T1604.

Thank you for your attention to this matter and please feel free to contact me if you have any questions.

Very truly yours,

Shawn N. Simmons
Western Division Manager

Via FedEx to the address above
Via Facsimile to (916) 227-6282

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