california engineering contractors inc.
20 Happy Valley Road, Pleasanton, CA 94566
An Equal Opportunity Employer (925) 461-1500 ♦ FAX (925) 461-0510

September 10, 2013

Via U.S. Mail and Facsimile (916) 227-6282

Mr. Earl Seaberg
MSC 43
Office Engineer Contracts Award Branch Chief
California Department of Transportation
1727 30th Street
Sacramento, CA 95816-7005

RE: Construction on State Highway in San Joaquin and Sacramento Counties Near Terminous at Mokelumne River Bridge, Project ID 1000000354, Contract No. 10-0U6104

Protest of Bid Submitted by American Civil Constructors West Coast, Inc.

Dear Mr. Seaberg:

It is our understanding that on August 23, 2013, the Department of Transportation wrote to American Civil Constructors West Coast, Inc. ("ACC") concerning Contract No. 10-0U6104. The Department's letter stated that "ACC failed to acknowledge Addendum #1" on the "signature page of its bid proposal" and that the Department "considers the addendum to be a material amendment to the contract." The Department further noted that "a bidder's failure to acknowledge a material amendment to the contract renders its bid nonresponsive."

We agree with the Department's analysis that the failure to acknowledge Addendum #1 renders ACC's bid nonresponsive. However, we are writing out of an abundance of caution because the Department offered ACC the opportunity to submit "documentary evidence that establishes that it considered and agreed to be bound by the requirements of Addendum #1." It is not clear whether ACC submitted any such evidence.

For the reasons set forth below, even if ACC has attempted to submit "documentary evidence," the Department has a legal duty to reject ACC's nonresponsive bid. Accordingly, if ACC's bid is not already rejected, please consider this letter to be a formal protest.

Evidence Outside of ACC's Bid Cannot Be Considered

A bid is responsive only "if it promises to do what the bidding instructions demand." Taylor Bus Serv. v. San Diego Bd. of Educ., 195 C.A. 3d 1331, 1341 (1987). "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." Valley Crest Landscape v. Davis, 41 C.A.4th 1432, 1440

Whether a bid actually "promises to do what the bidding instructions demand" is a matter that ordinarily must be "determined from the face of the bid." Taylor, 195 C.A.3d at 1341; Great West Contractors, Inc. v. Irvine Unified School Dist., 187 C.A.4th 1425 (2010).

There is nothing that ACC could submit that would show that its bid was responsive. ACC expresssly stated in its bid form that it had not considered any addenda. ACC completed its bid form using a null sign (Ø) to indicate that it did not have and did not acknowledge any addenda. ACC filled out its bid form as follows:

> 3. Bidder has and acknowledges the following addenda: Ø

ACC cannot change its bid form after the fact to remove this express statement that it had not considered any addenda. Valley Crest Landscape v. Davis, 41 C.A.4th 1432, 1440 (1996); Greer v. Hitchcock, 271 C.A .2d 334 (1969) (bid cannot be revised after bid opening); see Grade-Way Construction v. United States, 7 Cl. Ct. 263 (1985) (failure to acknowledge addenda cannot be cured after bid opening).

The representation in ACC's bid that had not considered any addenda is conclusive and legally cannot be contested by ACC. Evid. Code § 622; Plaza Freeway Ltd. v. First Mountain Bank, 81 Cal. App. 4th 616, 629 (2000) (statements and recitals in document executed by a party are conclusively presumed to be true).

ACC's Bid Is Nonresponsive Because ACC Did Not Acknowledge Addendum no. 1.

As the Department has pointed out, ACC's bid is nonresponsive because ACC indicated in its bid form that it had not received and did not acknowledge any addenda, despite the fact that the Department had issued an important addendum.

On or about August 1, 2013, the Department issued Addendum no. 1 to revise federal minimum wages. Addendum no. 1 specifically required that bidders acknowledge the addendum in the bid form:

> Indicate receipt of this addendum by filling in the number of this addendum in the space provided on the signature page of the *Bid* book.

Standard Specification 2-1.33 states "complete forms in the Bid book." Consistent with the instructions in Addendum no. 1, paragraph 3 of the bid form in the Bid book includes the following paragraph that each bidder must complete:

3. Bidder has and acknowledges the following addenda: _____

As discussed above, ACC did not acknowledge any addenda, completing its bid form as follows:

3. Bidder has and acknowledges the following addenda:

By definition, a bid is nonresponsive if it does not comply with requirements that addenda be acknowledged. See Menefee v. County of Fresno, 163 C.A.3d 1175 (1985).

A failure to acknowledge bid addenda cannot be waived. First, if a bid does not acknowledge addenda, it is impossible to determine what the terms will be in a contract that is formed by acceptance of the bid. Met Electrical Testing, Inc. 60 Comp. Gen. 321, B—201146, 81 CPD ¶ 202 (1981) (bid that failed to acknowledge addenda could not be accepted "because the terms of the resulting contract are not clear since the written bid acknowledges the terms of the solicitation but not relevant amendments.")

"It is a long and well-established rule that where contracts are required to be let upon public bidding, the proposals and specifications inviting such bids must be sufficiently detailed, definite and precise so as to provide a basis for full and competitive bidding upon a common standard." Baldwin Lima Hamilton Corp. v. Superior Court 208 C.A.2d 803, 810 (1962); Ertle v. Leary, 114 Cal. 238 (1896). Accordingly, a failure to acknowledge addenda in a bid cannot be waived because to do so would circumvent the requirement that all bids be based on a common standard: the bidding requirements, including all addenda.

Second, a contractor who submits a bid that fails to acknowledge addenda enjoys a competitive advantage. From the face of its bid, a contractor that fails to acknowledge addenda can argue that it made a mistake in that its price was based on the contract documents without one or more of the addenda. This gives such a contractor an opportunity to withdraw its bid for mistake after the bid opening. Met Electrical Testing, Inc., 60 Comp. Gen. 321, B—201146, 81 CPD ¶ 202 (1981). Bidders who acknowledged all addenda would not enjoy this advantage. As a consequence, a failure to acknowledge addenda confers a competitive benefit and constitutes a discrepancy that cannot be waived. Valley Crest Landscape v. Davis, 41 C.A.4th 1432, 1440 (1996) (bid discrepancy that allows bidder to assert grounds for withdrawal of bid, after bids are opened, confers a competitive advantage and therefore constitutes a nonwaivable defect.)

Third, it is not possible to cure a defective bid by agreeing after the bid opening to acknowledge all of the addenda. Grade-Way Construction v. United States, 7 Cl. Ct. 263 (1985) (failure to acknowledge addenda cannot be cured after bid opening); Greer v. Hitchcock, 271 C.A .2d 334 (1969) (bid cannot be revised after bid opening.)

Caltrans' Longstanding Policy Requires Rejection Of Bids That Do Not Acknowledge Addenda

On other projects, the Department has rejected bids that did not acknowledge addenda. ACC's bid is even more defective than other bids rejected by the Department because ACC did not just fail to fill out the paragraph that calls for addenda to be listed. Instead, ACC filled in the blank and expressly represented that it had not received and did not acknowledge any addenda.

It would be arbitrary and capricious for the Department to consider ACC's bid when it has repeatedly determined that a bid is nonresponsive if a bidder fails to acknowledge a material amendment. 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, 7 Cal. 3d 861, 867 (1972). To fail to enforce the Department's specifications and bidding documents uniformly would be arbitrary, capricious, and grounds for setting aside an award of the contract. Id.

Conclusion

ACC has patently violated the Department's bid requirements by representing in its bid that it had not received and did not acknowledge Addendum no. 1. ACC's bid therefore must be rejected as nonresponsive. ACC cannot seek to modify its bid, after the fact, to remove the statements in its bid that it does not acknowledge any addenda.

We therefore respectfully request that the Department uphold California Engineering Contractors, Inc.'s protest and award Contract No. 10-0U6104 to our company, which submitted the lowest responsive bid. Thank you for your careful attention to this protest, and please feel free to contact me if you have any questions.

Very truly yours,

CALIFORNIA ENGINEERING CONTRACTORS, INC.

cc: American Civil Constructors West Coast, Inc.

california engineering contractors inc.

Facsimile Cover

Date: September 10, 2013	From: Saif Lodhi
Company: Caltrans	20 Happy Valley Road Pleasanton, CA 94566
Attention: Mr. Earl Seaberg	Tel. No: (925) 461-1500
Fax No: 916-227-6282	Fax No: (925) 461-0510
Tel. No:	No. of pages including cover: 5

Reference:

Bid Protest for Caltrans Contract 10-0U6104