**TEICHERT CONSTRUCTION**

Established 1887

May 7, 2013

VIA FACSIMILE (916) 227-6282 AND U.S. MAIL

John C. McMillan
Deputy Division Chief
Office Engineer
Division of Engineering Service
State of California
Department of Transportation (Caltrans)
1727 30th, Bidder Exchange, MS 43
Sacramento, CA 95816-8041

Subject: Contract No. 10-0V9204
10-SJ-26-1.1/4.6, 6.0/20.3
Bids Opened: March 27, 2013
Bid Protest of Teichert Construction to Award of Contract to George Reed Inc.

Dear Mr. McMillan:

Teichert Construction ("Teichert") has reviewed George Reed Inc.'s ("GRI") letter of May 2, 2013, regarding Teichert's protest of GRI's bid concerning its failure to comply with the mandatory requirements for subcontractor listing. Teichert's response to GRI's letter is as follows:

In its May 2, 2013 letter, GRI purports to reiterate Teichert's position regarding GRI's failure to comply with Caltrans' requirements for subcontractor listing, and DBE commitment submittal. However, because GRI's characterization of Teichert's position is unclear, it is important to emphasize what Teichert is and is not stating regarding GRI's subcontractor listing and DBE commitment.

Teichert is not stating that a bidder on a public work is required to list the exact (dollar for dollar) amounts advertised on subcontractor quotes in its subcontractor listing, and DBE commitment. What Teichert is stating – and what the California statutes bear out – is that a bidder's subcontractor listing and DBE commitment must be materially consistent. Similarly, a bidder must submit complete and accurate information regarding the work portions to be performed by each subcontractor listed within the time specified.

John C. McMillan
Deputy Division Chief
May 7, 2013
Page 2 of 5

California Public Contract Code (CPCC) section 4104, subdivision (a)(1), requires that bidders on public works list:

The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement . . . in an amount in excess of one-half of 1 percent of the prime contractor's total bid . . . (Emphasis added.)

CPCC section 4104, subdivision (b), further requires bidders set forth:

(b) The portion of the work that will be done by each subcontractor under this act. The prime contractor shall list only one subcontractor for each portion as is defined by the prime contractor in his or her bid. (Emphasis added.)

Section 2-1.33C Subcontractor List, in the 2010 Standard Specifications, contains Caltrans' requirements for defining portions of work on Subcontractor Lists:

The Subcontractor List must show the name, address, and work portions to be performed by each subcontractor listed. Show work portion by bid item number, description, and percentage of each bid item subcontracted. (Emphasis added.)

In its letter of May 2, 2013, GRI contends that nowhere does Section 2-1.33C state "the percentage of each bid item subcontracted must correspond to the dollar amount bid for that item", and that "there is no requirement that the percentage and dollar amounts be connected" as they relate to percentage of each bid item subcontracted. There are at least two fatal flaws in this contention:

One, while CPCC section 4104(b) and Section 2-1.33C do not include the word "connected", the value of work portions subcontracted is, and has been consistently calculated by Caltrans. Where an entire item is subcontracted, the value of work subcontracted will be based on the contract item bid price. When a portion of an item is subcontracted, the value of work subcontracted will be based on the estimated percentage of the contract item bid price.

Section 5-1.13C Subcontracting, in the 2010 Standard Specifications, in turn, contains the requirement for the *Subcontracting Request* form. The instructions for the *Subcontracting Request* form again confirm the connection between the percentage of bid item subcontracted and the dollar amount based on bid amount.

Consequently, when a bidder provides a percentage of bid item subcontracted on the Subcontractor List, the value (dollar amount) of the portion of work can, and is calculated. Thus the percentage of each bid item subcontracted is material to the bid and corresponds to the dollar amount bid for the item. The percentage listed is not merely an arbitrary number, as

John C. McMillan
Deputy Division Chief
May 7, 2013
Page 3 of 5

GRI's letter would lead us to believe with its misinterpretation of Caltrans' letter on contract no. 04-0120M4.

In Caltrans' letter addressed to MCM on contract 04-0120M4, Caltrans addresses a completely different and separate set of facts. Caltrans was responding to MCM's contention that a bidder's percentage of subcontracted work needed to reconcile with the item price on a subcontractor quote. This is not Teichert's position, and this argument has not been put forth in this protest, nor is it relevant to this protest.

Caltrans has strictly interpreted and firmly enforced how percentages on subcontractor lists are calculated. For example, on June 21, 2012, Caltrans rejected a bid by Griffith Company on Contract 06-0G2704, because Griffith Company's subcontractor list specified that it was subcontracting \$1,119,912.83. Thus, Caltrans was able to calculate the balance of the work to have a value of \$429,538.17 or 27.72 percent of the original total bid.¹

As Teichert explained in detail in its letter of April 19, 2013, GRI's Subcontractor List and DBE commitment form with respect to KRC Safety Co. Inc. ("KRC") are materially inconsistent. GRI impermissibly changed KRC's percentage of work to be subcontracted for bid item no. 3 by submitting a DBE form inconsistent with its Subcontractor List. In its Subcontractor List GRI identified the value of the work to be subcontracted to KRC for Traffic Control as \$507,407.33 (86.60% of bid item no. 3). In contrast, in its DBE commitment form (and related paperwork) GRI changed the value of work subcontracted to KRC (for bid item no. 3) to \$111,765.00 or 19.09%.

Two, the defects in GRI's bid are not the type of bid defects that can be waived by Caltrans. If GRI were to contend that it made a mistake in filling out its bid forms by failing to properly fill out the percentages on its subcontractor listing, or DBE commitment, GRI would have an unfair advantage because each of those defects in its bid constitutes a "mistake" within the meaning of California Public Contract Code section 5100 *et seq.* Under Public Contract Code section 5103, a bidder can obtain relief from its bid if "[a] mistake was made," the mistake made the bid "materially different than he or she intended it to be," and the mistake "was made in filling out the bid and not due to error in judgment or carelessness in inspecting the site of the work, or in reading the plans and specifications." As detailed above, GRI could argue it made a mistake regarding the percentages in its bid to Caltrans. These mistakes gave GRI options not available to other bidders, *i.e.*, an option to have flexibility with the work portions stated in its subcontractor list compared to the value of its stated first tier DBE subcontractor commitment; and the option to either seek award at its apparent bid price or to withdraw its bid on the grounds of mistake.

The Court of Appeals' decision in *Valley Crest Landscape v. City of Davis*, 41 Cal.App.4th 1432 (1996) is directly on point with respect to this issue. In *Valley Crest*, the bidder's mistake was in stating the percentages of work to be performed by its listed subcontractors. The *Valley Crest* court held:

¹ A copy of the Department's 06-0G2704 is attached to this letter for your facility of reference.

John C. McMillan
Deputy Division Chief
May 7, 2013
Page 4 of 5

Misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical error. It makes the bid materially different and is a mistake in filling out the bid. As such, under Public Contract Code section 5103, [the low bidder] could have sought relief by giving the County notice of the mistake within five days of the opening of the bid. That [the low bidder] did not seek such relief is of no moment. The key point is that such relief was available. Thus, [the low bidder] had a benefit not available to the other bidders; it could have backed out. Its mistake, therefore, could not be corrected by waiving an 'irregularity.' *Id.* at 1442. (Emphasis added.)

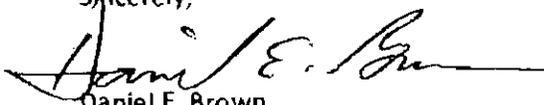
GRI may argue that the holding in *Valley Crest* is inapplicable because GRI has not actually submitted a claim of mistake to Caltrans. However, as stated by the Court of Appeal, above, the rule requiring rejection applies whether or not the bidder has, in fact, claimed mistake and sought relief. Rather, "the key point is that such relief was available," which provided GRI with "a benefit not available to the other bidders ..." In other words, what really matters is that GRI could have changed the value of work subcontracted to KRC, or that it "could have backed out." Since GRI could have changed the value of work subcontracted to KRC, or that it could have backed out, "[i]ts mistake ... could not be corrected by waiving an 'irregularity.'"

Summary

The work portion listed by GRI for KRC in its Subcontractor List is materially inconsistent with its DBE commitment. The form and specs require work portions listed for subcontractors to be consistent where applicable. Certainly the dollar amounts listed in the DBE commitment are one of the items of work that is required to be consistent with the work portions in the Subcontractor List. GRI's failure to properly complete the Subcontractor List and Caltrans Bidder - DBE - Commitment forms gave GRI a competitive advantage not afforded to other bidders. GRI had an unfair competitive advantage, in that by electing to change and identify a different percentage of work for KRC in its DBE form from what it listed on bid day, GRI had additional time to prepare its bid and obtain the most favorable subcontractor pricing that other bidders did not have.

Accordingly, for the reasons stated in Teichert's letter dated April 19, 2013, and for the reasons stated above including Caltrans' own bid procedures, Teichert respectfully requests that Caltrans reject GRI's bid as non-responsive and award the contract to Teichert as the lowest responsive and responsible bidder.

Sincerely,



Daniel E. Brown

Estimating Manager of Teichert Construction

John C. McMillan
Deputy Division Chief
May 7, 2013
Page 5 of 5

eb
Attachment

cc:
G. Johns, T. Corvello -- Teichert Construction

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*Flex your power!
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June 21, 2012

Facsimile: (661) 393-9525

Lucas J. Walker, Assistant Manager
Griffith Company
1128 Carrier Parkway Avenue
Bakersfield, CA 93308

06-0G2704
06-Ker-58-M108.9
B.O. 6/19/12

Dear Mr. Walker:

Griffith Company (Griffith) submitted a bid on contract 06-0G2704 on June 19, 2012. By this letter, the California Department of Transportation (Caltrans) notifies Griffith that its bid is nonresponsive because it failed to comply with Caltrans Standard Specification § 5-1.13 SUBCONTRACTING, which states in part:

“...perform work equaling at least 30 percent of the value of the original total bid with your employees and with equipment you own or rent, with or without operators.”

Griffith's original total bid is \$1,549,451.00. Griffith's subcontractor list specifies that it is subcontracting \$1,119,912.83. The balance of \$429,538.17 is 27.72 percent of the original total bid.

Based on the above, Caltrans finds your bid is nonresponsive and will 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 offer 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 Tammy Thomas, Contract Awards Branch Chief, at (916) 227-6228.

Sincerely,

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

Attachment



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FAX COVER SHEET

TO: Office Engineer

COMPANY: State of California-Dept. of Transportation

FAX NUMBER: (916) 227-6282

PHONE NUMBER: N/A

FROM: Dan Brown
Estimating Manager

DATE: May 7, 2013

PAGES: 7 including Cover Sheet

RE: Contract No. 10-0V9204
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