

**KAMINE LAW PC**  
CONSTRUCTION ATTORNEYS  
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June 6, 2014

Sent by FAX (916) 227-6282  
and by FedEx

John C. McMillan  
Deputy Division Chief  
Office of Engineering  
Division of Engineering Services  
Department of Transportation  
P.O. Box 168041, MS-43  
Sacramento, CA 95816-8041

Re: Contract No. 11-408504  
11-SD-125-9.7/12.1  
Project Id. 1100020531  
Construction on State Highway in San Diego County  
Near San Diego and In Lemon Grove  
From Elkelton Place Undercrossing to  
Troy Street Over Crossing  
In District 11 on Route 125  
Bid Protest and  
Appeal of Determination of Non-responsiveness

Dear Mr. McMillan:

We represent Ferreira Coastal Construction Co. [FERREIRA] who is the lowest responsible responsive bidder on the referenced project. This letter is intended to be:

- (1) A protest against any award of that contract to any bidder other than FERREIRA.
- (2) A request under Gov. Code §54954.1 for mailed notice of all meetings of the awarding authority at which any issues pertaining to the award of that contract are on the agenda for the meeting. If there is any fee for this service, please telephone that information to us immediately so we can promptly pay the fee.
- (3) A request to be informed (by telephone or fax) as soon as any staff reports or recommendations concerning any issues pertaining to

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the award of that contract are available to the public, so we can immediately inspect those reports or recommendations.

(4) A request to address the awarding authority before or during consideration of any issues pertaining to the award of that contract, which opportunity is guaranteed by Gov. Code §54954.3(a).

If this letter is not sufficient to accomplish any of these purposes, please let us know immediately what else is required so we can comply. If we do not hear from you, we will proceed on the basis that this letter is sufficient.

Grounds for Bid Protest

An award of the contract to any bidder other than FERREIRA would violate the competitive bidding laws, standards and practices applicable to California public works contracts, for the reasons discussed below.

1. **FERREIRA'S BID IS RESPONSIVE TO THE INVITATION TO BID**

FERREIRA has been advised by the Department of Transportation [CALTRANS] that FERREIRA'S bid on the referenced project is being rejected as non-responsive. The basis for the decision was that Ferreira did not include the quote from Diversified Landscape Company [DIVERSIFIED], the listed UDBE with its bid.

CALTRANS is wrong in its assessment that FERREIRA'S failure to submit the quote from DIVERSIFIED has rendered FERREIRA bid non-responsive.

Public Contract Code §10108 requires CALTRANS to solicit bids in writing and award the work to the lowest responsible bidder or reject all bids. FERREIRA is the lowest responsible monetary bidder at \$1,195,278.

A responsive bid is one that conforms **in all material respects** with the bid requirements and the contract documents. (Emphasis added.) [*Taylor Bus Service, Inc. v. San Diego Board of Education* (1987) 195 CA3d 1331, 1341.]

FERREIRA'S failure to submit the quote from DIVERSIFIED did not render FERREIRA'S bid non-responsive because the purpose of the quote is to provide Caltrans with written confirmation that DIVERSIFIED would be participating in the contract. [Section 2-1.12B(2), *UDBE Commitment Submittal*.] CALTRANS has this confirmation.

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FERREIRA listed DIVERSIFIED as a subcontractor on the Subcontractor List, page 5 of its bid. FERREIRA listed DIVERSIFIED for the following Bid Items: 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 23(F), 25(F), 26(F), 27(F), 28(F) and 37.<sup>1</sup> The description of the work is "Landscaping."

The DBE Commitment form<sup>2</sup> lists the bid items for DIVERSIFIED as: 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 23(F), 25(F), 26(F), 27(F), 28(F) and 37. The item of work is "Landscaping." In other words, the Subcontractor List description for DIVERSIFIED and the DBE Commitment form identifying DIVERSIFIED specify the exact same scope of work. The only difference is that the DBE Commitment form sets forth the amount of DIVERSIFIED's work at \$214,748.30.

Public Contract Code §4107 mandates:

A prime contractor whose bid is accepted may not:

- (a) Substitute a person as a subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority . . . may . . . consent to the substitution of another subcontractor in any of the [listed] situations.

Thus, FERREIRA must use DIVERSIFIED as a subcontractor for the amount specified unless relieved by CALTRANS. The absence of the quote from DIVERSIFIED with the bid does not change this obligation for FERREIRA to use DIVERSIFIED as a subcontractor for the specified scope of work. Caltrans articulated concerns were satisfied. Since the failure to supply the quote was not material and FERREIRA complied with the invitation to bid in all material respects, FERREIRA's bid was responsive

2. **THE ABSENCE OF THE QUOTE FROM DIVERSIFIED DID NOT GIVE FERREIRA AN UNFAIR COMPETITIVE ADVANTAGE**

FERREIRA did not garner an unfair competitive advantage in not submitting the form. [See *MCM Construction v. City and County of San Francisco*, 66 Cal.App.4th at 373-374 holding that a bid is non-responsive if the bidder had an unfair competitive advantage.]

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<sup>1</sup> See Attachment 1, Bid Page 5.

<sup>2</sup> See Attachment 2, Bid Page 9.

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In *Menefee v. County of Fresno* (1985) 163 CA3d 1175, 1180-81, the Court held that:

[The] waiver [of an irregularity] should not be allowed if the irregularity would give the bidder an unfair advantage by allowing him to withdraw his bid without forfeiting the bid bond. Thus, we should ask – what would have happened if [the bidder] had refused to enter into a contract and sought to recover its bid bond? If [the bidder] could use the [discrepancy in the bid] to avoid a contract, then [the bidder] had an unfair advantage – the opportunity to back out – not given to other bidders [whose bids did not have that discrepancy].

The issue in determining the responsiveness of a bid is whether the bidder would be liable on the bid bond if it attempted to back out. In other words would FERREIRA garner an unfair competitive advantage because its bid bond would not be forfeited if it withdrew its bid. [*Ghilotti Construction Company v. City of Richmond* (1996) 45 CA4th 897, 912, *fn.* 6; *MCM Construction, Inc. v. City and County of San Francisco* (1988) 66 Cal.App.4<sup>th</sup> 359, 375.] The answer is clearly no.

Public Contract Code §5101 provides for the relief of bidders because of mistake in the bid. Public Contract Code §5103 codifies the proof required of the bidder in order to be relieved of its bid for mistake:

- a mistake was made;
- the bidder gave the public agency written notice of the mistake within 5 working days after bid opening;
- the mistake made the bid materially different than the bidder intended it to be; and
- the mistake was not due to an error in judgment or carelessness.

FERREIRA's failure to submit the DIVERSIFIED quote does not provide it with the protection of Public Contract Code §5101 and relief from its bid without forfeiture of its bid bond. Ferreira's bid should not be considered non-responsive because Ferreira did not have an unfair competitive advantage over any other bidder.

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3. FERREIRA'S SHOULD NOT BE REJECTED AS NON-RESPONSIVE BECAUSE THE QUOTE FOR THE LISTED UDBE WAS NOT IN THE BID PACKAGE SUBMITTED

Section 2-1.12B(2), *UDBE Commitment Submittal* provides:

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

Based upon Section 2-1.12B(2), *UDBE Commitment Submittal*, the purpose of the quote is to "serve as written confirmation that UDBE will be participating in the Contract." FERREIRA has provided proof to CALTRANS that DIVERSIFIED will be participating in the contract because Diversified is a listed subcontractor. As already discussed above, FERREIRA is committed to DIVERSIFIED participation in the Contract because DIVERSIFIED is a listed subcontractor. FERREIRA commitment to subcontract with DIVERSIFIED is mandated by Public Contract Code §4107. Thus, providing the quote would be superfluous. FERREIRA has satisfied CALTRANS justification for demanding the quote.

Public Policies Involved

The competitive bidding process is deliberately made to be prophylactic. No proof of actual corruption or adverse effect upon the bidding process is required. Only a potential for abuse needs to appear. As *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 C4th 161, 173-76, 36 CR2d 521, 885 P2d 934, explains:

[T]he purposes of competitive bidding . . . are 'to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public' [citations] and to stimulate advantageous market place competition [citation].  
\* \* \*

[T]he general rule [is] that bidding requirements must be strictly adhered to in order to avoid the **potential for abuse** in the competitive bidding process. (*Konica Business Machines U.S.A. v. Regents of University of California* (1988) 206 CA3d 449, 456, 253 CR 591 [strict adherence with bidding requirements is applied "[even where] it is certain there was in fact **no corruption or adverse**

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**effect upon the bidding process, and even where deviations would save the [public] entity money".)** [Emphasis added]

See also Pub. Cont. Code § 100 and *Miller v. McKinnon* (1942) 20 C2d 83, 88, 124 P2d 34, where a taxpayer was permitted to challenge the award of a public works contract that appeared to violate the competitive bidding requirements, and the court noted:

The competitive bidding requirement is founded upon a salutary public policy declared by the legislature to protect the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds.

The Option to Reject All Bids

Your attorney may inform you that you have the right to reject all bids and to readvertise this project again at a later date. That step should only be taken when cogent and compelling reasons force you into it. As was explained over 60 years ago, in *Massman Construction Co. v. U.S.* (1945) 102 Ct.Cl. 699, 718, 60 F.Supp. 635, cert. den. 325 U.S. 866, 89 L.Ed 1985, 65 S.Ct 1403: "To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons."

Conclusion

For the foregoing reasons, there is no justification to award to any bidder other than FERREIRA on the referenced contract. If you need any further information, please contact me.

Very truly yours,

by   
Marcia Haber Kamine

MPHK:hs  
Encl.

ATTACHMENT 1

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**SUBCONTRACTOR LIST**  
DES-COE-07022 (REV 3/2011)

Ferreira Construction Co., Inc.  
Bidder Name: dba Ferreira Coastal Construction Co.

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub. Cont. Code §4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-8282 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.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
Diversified Landscape Co. 21790 Bundy Canyon Road Wildomar, CA 92595	13, 14, 15, 16, 17 18, 19, 20, 21 22, 23, 24(F), 25(F), 26(F), 27(F), 28(F), 37	100%	Landscaping

ADA Notice: For individuals with sensory disabilities, this document is available in alternate formats. For information call (916) 694-8410 or TDD (916) 864-3860 or write Records and Permit Management, 1120 N Street, MSB-01, Sacramento, CA 95814.

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ATTACHMENT 2

