

DEPARTMENT OF TRANSPORTATION

DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER, MS 43

1727 30th STREET

P. O. BOX 168041

SACRAMENTO, CA 95816-8041

PHONE (916) 227-6299

FAX (916) 227-6282

www.dot.ca.gov/hq/esc/oe

*Flex your power!
Be energy efficient!*

November 13, 2013

Facsimile: (760) 471-4860

Troy Neuenswander, Vice President
Flatiron West Construction Corp.
1770 La Costa Meadows Drive
San Marcos, CA 92078

12-0F96E4
12-Ora-5-6.2/8.7
B.O. 10/31/2013

Dear Mr. Neuenswander:

The Department of Transportation (Caltrans) received a bid submitted by Flatiron West Construction Corp. (Flatiron) for Contract No. 12-0F96E4 on October 31, 2013. By this letter Caltrans notifies Flatiron that its bid is nonresponsive.

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 24 hour Subcontractors list submitted on November 1, 2013, Flatiron added two subcontractors to the Subcontractor List that did not appear on the list submitted with the bid. Sierra Landscape was added to perform work described as Landscape and related (partial) and RJ Noble was added to perform work described as AC paving and related (partial). The addition of these two subcontractors constitutes an improper change to the Subcontractor List form which is in violation of the bidding instructions, as well as the Public Contract Code.

Caltrans is in receipt of the letters dated November 4, 2013, from Flatiron and November 5, 2013, from Smith, Currie & Hancock LLP on behalf of Flatiron alleging that Flatiron's bid is responsive. Caltrans disagrees with this position. Flatiron did not simply fail to list a subcontractor for certain work thereby agreeing to perform that work by its own forces, rather Flatiron changed its subcontractor list and added subcontractors to its 24-hour submission that were not listed on its original submission. By its own admission Flatiron made a mistake in filling out its bid forms; specifically the 24-hour submission of the subcontractor list. It is the opinion of Caltrans that this mistake was material and therefore renders Flatiron's bid non-responsive.

Based on the actions described above Caltrans will proceed to award this contract to the lowest responsive and responsible bidder, provided that all requirements have been met.

Your attention is directed to Section 3-1.04 of the Amendments to the 2010 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.

Mr. Neuenswander
November 13, 2013
Page 2

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

Sincerely,

A handwritten signature in black ink, appearing to read "John C. McMILLAN", is written over the printed name.

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

Attachments

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Flatiron Construction Corp.
1770 La Costa Meadows Drive
San Marcos, CA 92078
760-916-9100 MAIN
760-916-9101 FAX
www.flatironcorp.com

November 4, 2013

John McMillan
Deputy Division Chief
Division of Engineering
Office Engineer, MD 43
1727 30th Street
P.O. Box 168041
Sacramento, CA 95816-8041
Phone (916) 227-6299
Facsimile (916) 227-6282

Dear Mr. McMillan:

We submitted a bid for Contract Number 12-0F96E4 for "Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing" on Thursday October 31, 2013.

Our bid listed the name and the location of the place of business of each subcontractor who we intend to have perform work or labor or render service for construction.

On Friday, within 24 hours of our bid, we submitted followup information completing columns two and three of the Department's Subcontractor List form.

In looking at our original bid, we see that our followup list form identified two subcontractors who were not listed in the day of bid submittal:

- Sierra Landscape – Landscape and related (partial)
- RJ Noble – AC paving and related (partial)

Our bid did not list any subcontractors for these scopes of work. In accordance with Civil Code Section 4106, we therefore agreed to self-perform that work. Civil Code Section 4106 provides that

If a prime contractor fails to specify a subcontractor or if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is

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fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself.

Flatiron holds a Class A license and is thus properly licensed to self-perform these scopes of work. See Business & Professions Code Section 7056.

As such, Flatiron is fully licensed to self-perform this work.

Our bid is responsive in all respects.

Please contact me if you have any questions.

Troy Neuenswander
Vice President
Flatiron West

STATE OF CALIFORNIA • DEPARTMENT OF TRANSPORTATION
SUBCONTRACTOR LIST
 DES-OE-0102.2 (REV 3/2011)

Bidder Name: Flatiron West, Inc.

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) 227-6282 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.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
Innovative Concrete Quartz Hill, CA	207	91%	Slope Paving and Concrete Channel Ditches and Related (Partial)
	208	84%	
	210	97%	
Innovative Concrete Quartz Hill, CA	211	89%	Minor Concrete and Related (Partial)
	212	84%	
	213	91%	
	214	92%	
	215	89%	
	223	91%	
	45	81%	
Coral Construction Company Wilsonville, CA	46	99%	Overhead Signs and Related (Partial)
	57	99%	
	156	98%	
	176	99%	
	177	99%	
	178	99%	
	188	99%	
	276	1.6%	
	Payco Specialties Chula Vista, CA	7	
8		99%	
10		99%	
32		99%	
39		99%	
40		99%	
41		99%	
248		99%	
247		99%	
248		99%	
249		99%	
250		99%	
251		99%	
252		99%	
253		99%	
254		99%	
255		99%	
256		99%	
276		0.75%	

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STATE OF CALIFORNIA • DEPARTMENT OF TRANSPORTATION
SUBCONTRACTOR LIST
 DES-OE-0102.2 (REV 3/2011)

Bidder Name: Flatiron West, Inc.

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Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
	38	99%	
	82	99%	
	83	99%	
	84	99%	
	85	99%	
	86	99%	
	87	99%	
	88	99%	
	89	99%	
	90	99%	
	91	99%	
	92	99%	
	93	99%	
	94	99%	
	95	98%	
	96	99%	
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	110	99%	
	111	99%	
	112	99%	
	113	99%	
	114	99%	
	115	99%	
	116	99%	
	117	99%	
	118	99%	
	119	99%	
	120	99%	
	121	99%	
	122	99%	
	123	99%	
	124	99%	
	125	99%	
	126	99%	
Sierra Landscape Development, Inc. El Monte, CA	127	99%	Landscape and Related (Partial)
	128	99%	

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STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
SUBCONTRACTOR LIST
 DES-OE-0102.2 (REV 3/2011)

Bidder Name: Flatiron West, Inc.

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) 227-6282 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.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
R.J. Noble Company Orange, CA	136	99%	AC Paving and Related (Partial)
	137	99%	
	138	99%	
	143	99%	
	276	0.56%	
Drill Tech Drilling & Shoring, Inc. Corona, CA	146	92%	Ground Anchors / Soil Nails / CIDH / Shotcrete and Related (Partial)
	147	98%	
	148	91%	
	149	90%	
	154	68%	
	155	78%	
	175	91%	
	196	99%	
	276	8.6%	
CMC Rebar Etwanda, CA	154	24%	Rebar and Related (Partial)
	182	24%	
	163	29%	
	164	31%	
	172	96%	
	173	92%	
	174	99%	
	191	14%	
	241	32%	
	242	25%	
	243	22%	
	244	22%	
	245	33%	
L. Johnson Construction, Inc. Hawthorne, CA	191	80%	Masonry and Related (Partial)
Flatiron Electric Group Chino, CA	11	96%	Electrical and Related (Partial)
	257	98%	
	258	99%	
	259	99%	
	260	99%	
	261	99%	
	262	99%	
	263	99%	
	264	99%	
	265	99%	
	266	99%	
	267	99%	
	268	99%	
	269	99%	
	270	99%	
	271	99%	
	272	99%	
273	99%		
274	99%		
275	99%		
276	3.7%		

ADA Notice

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Contract No. 12-0F96E4

FROM

Received

Nov 5 2013 05:25pm

(TUE) NOV 5 2013 17:08/ST. 17:08/No. 6852052040 P 2

SMITH, CURRIE & HANCOCK LLP
ATTORNEYS AT LAW

A LIMITED LIABILITY PARTNERSHIP THAT INCLUDES PROFESSIONAL CORPORATION(S)

Telephone: (800) 832-6946
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Ngly To:
Ernest C. Brown
Attorney at Law
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Suite 500
San Francisco CA 94111

Cell: (415) 317-1704
ecbrown@smithcurrie.com

November 5, 2013

Mr. John McMillan
Deputy Division Chief
Division of Engineering
Office Engineer, MD 43
1727 30th Street
P.O. Box 168041
Sacramento, CA 95816-8041
Phone: (916) 227-6299
Facsimile: (916) 227-6282

Via: Facsimile

Re: Contract No. 12-0F96E4 - Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing

Subject: Flatiron West, Inc.'s Low, Responsive Bid

Dear Mr. McMillan:

I am writing regarding Flatiron West, Inc.'s ("Flatiron") October 31, 2013 low bid for Contract Number 12-0F96E4 for Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing (the "Project").

1. Flatiron's Bid and PC 4100 Subcontractor List.

The Project's bidding instructions required that bidders "list each subcontractor [who will] perform 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.)." Standard Specifications § 2-1.33C. In short, the Project's bidding protocol required that all bids include the name and place of business of each subcontractor the bidders intend to use to perform work, supply labor, or render construction services for the Project exceeding that price threshold.

Mr. John McMillan
November 5, 2013
Page 2

Bidders were required to later update that information to include the bid items and percentage of those bid items that each subcontractor would perform within 24 hours of bid opening if the information was not provided at bid time. See Special Provisions 2-1.33C and Public Contract Code § 4104(A)(2)(A).

On Bid Day, Flatiron's bid supplied a lump-sum price for the Project and a list of subcontractors. Under its Class A contractor's license, it is able to perform all the tasks set forth in the California Department of Transportation's ("Department") Invitation to Bid.

2. Flatiron's Bid was Complete and Responsive as a Matter of Law.

Under long established California state law cited below, Flatiron thereby agreed to perform all of the work for the Project. It further agreed to self-perform all aspects of the Project for which subcontractors were not listed. This included a commitment to perform the work designated as "Landscape and related", and "AC paving and related" in the Prime Contract.

There is no question that Flatiron submitted a responsive bid for the job. The Public Contract Code specifically states that when a contractor does not identify a subcontractor for a specific bid item, it automatically commits to self-perform those bid items. See Pub. Cont. Code § 4106.

After the submission of its bid, Flatiron asked for a copy of its subcontractor listing. This is a typical request because a general contractor rarely makes a physical copy of the bid or subcontractor submission in the last few minutes before the bid is submitted. In Flatiron's experience this request is granted as a matter of course so the contractor can verify its submission.

In this case, the Department's representative was hesitant to provide a copy of Flatiron's own bid sheet to the company when it was requested. Instead, Flatiron was told that the Department would not provide a full copy of the submitted bid list and provided only one page from Flatiron's submission. There was no explanation why the Department would withhold a publicly available bidding document from Flatiron, especially its own bid.

Within 24 hours of submitting its bid, Flatiron completed and submitted columns two and three of the Department's Subcontractor List form.

Flatiron was fully responsive with regard to providing all of the requested information for the subcontractors it listed on bid day.

Mr. John McMillan
November 5, 2013
Page 3

3. Flatiron's Post-Bid Submission Provided all Required Information.

The day after the bid, Flatiron provided voluminous information on various bidders for the job. Unfortunately, it also included information on two subcontractors who were not listed on bid day: Sierra Landscape; and RJ Noble. This minor mistake is traceable to the Department not providing Flatiron with a copy of the subcontractor list it submitted with its bid.

In any case, the inclusion of these extra names did not affect Flatiron's bid in any way. Flatiron was not entitled to use these subcontractors because Flatiron had not listed them. Flatiron's bid that had been submitted the previous day was unequivocal in its commitment to self-perform those items. As such, those extra names were extraneous to the original, properly submitted bid, not material, and had no legal effect on the validity of the low, responsive bid submitted the previous day.

4. Flatiron's Bid Was Fully Responsive to the Request for Bids.

It is important to realize that Flatiron provided the Department with a complete, unequivocal and responsive bid on bid day. The submission of extra information the next day did not change that state of affairs.

The inclusion of extra information cannot be seen as unresponsiveness. If anything, the supplying of additional information regarding subcontractors that were considered but not listed was "over-responsive" on the part of Flatiron. Again, it had no legal effect.

A bid is responsive if it promises to do what the bidding instructions demand. *D.H. Williams Const., Inc. v. Clovis Unified School Dist.*, (2007) 146 Cal.App.4th 757, 764 (citing *Taylor Bus Service v. San Diego Bd. of Educ.*, (1987) 195 Cal. App. 3d 1331). Flatiron's bid promised to do everything the bidding instructions demanded rendering it completely responsive.

5. The California Subletting Act does not Protect Unlisted Subcontractors.

The California Subletting and Subcontracting Fair Practices Act (the "Act") is intended to protect subcontractors actually listed by the general contractor on bid day. The Act does not provide any relief or penalty for subcontractors that are not listed on bid day. A State policy that acceptable bids are thereafter rejected based upon the submission of information on unlisted subcontractors would lead to the Department rejecting the low bid on many projects every year. We are not aware of any regulation, statute or policy that supports such a position.

While Flatiron must subcontract with those subcontractors identified in its bid, it has no obligations to any subcontract not listed on bid day. Pub. Contr. Code § 4107. Flatiron therefore has no obligation towards any extraneous subcontractors who were inadvertently identified in its follow-up list of subcontractor information. The fact they were under consideration prior to bid is of no legal or practical effect. Inclusion of those two additional subcontractors in Flatiron's follow-up list is merely extraneous information.

Mr. John McMillan
November 5, 2013
Page 4

6. A Bid with Extraneous Material is Still Responsive.

The addition of surplus information regarding subcontractors that Flatiron did not actually list in its bid is a harmless error. It has no legal or material effect on Flatiron's bid or the subcontractors who have been listed for the work.

Neither the Notice to Bidders nor the Public Contract Code provides that a bid becomes non-responsive merely because it includes extraneous information. And, the law of California is that the inclusion of such surplus information does not render the bid non-responsive. See, e.g., *Cypress Sec., LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1015 (City properly found that a bidder submitting three pricing models in its bid instead of one did not make bid nonresponsive) and *D.H. Williams, supra*.

In *D.H. Williams*, the general contractor listed an unlicensed bidder on its subcontractor listing. *Id.*, at 765. The court overruled the public agency's conclusion that the bid was unresponsive, the *D.H. Williams* court explained that the inclusion of the unlicensed subcontractor in its bid did not render the bid non-responsive because there, as here, the contractor was "fully ready to perform the [] work itself". *Id.*, at 767.

In this situation, the mention of two extraneous subcontractors occurred an entire day after the submission of Flatiron's binding and enforceable bid. It had no effect on the previously submitted bid because Flatiron was, as in *D.H. Williams*, "... fully ready to perform the work itself". In this case, Flatiron did not even list these subcontractors on bid day. The bid-day list is the list that matters under the Act.

As the Department is fully aware, such a minor informality may be waived by the public entity without prejudicing unsuccessful bidders. In this case, it was a harmless and immaterial error.

The inclusion of information on two extra subcontractors in Flatiron's "day after bid" informative list did not have any impact on its commitment to self-perform or the validity of Flatiron bid to do this work.

As the responsive, low bidder, Flatiron should be awarded the contract. Please contact me if you have any questions.

Best Regards,



Ernest C. Brown, Esq., PE
Partner
Smith Currie & Hancock LLP

SMITH, CURRIE & HANCOCK LLP

244 California Street, Suite 500

San Francisco, CA 94111

800- 800-832-6946 (Phone)

415-276-1754 (Facsimile)

FACSIMILE TRANSMITTALTO: Mr. John McMillanADDRESS: Division of Engineering, Office Engineer, MD 43, 1727 30th Street, P.O. Box 168041FACSIMILE: 916-227-6282 TELEPHONE: _____FROM: Ernest Brown, Esq., P.E.TOTAL NUMBER OF PAGES 5, INCLUDING THIS COVER SHEETDATE: November 5, 2013**COMMENTS:****Re: Contract No. 12-0F96E4 - Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing**

Please see the attached November 5, 2013 letter regarding Flatiron West, Inc.'s Low, Responsive Bid

Thank you,
Jay R. Houghton, Esq. (415-249-0869)

The information contained in this facsimile message is intended only for the use of the individual(s) named above and is privileged and confidential. Any dissemination, distribution or copy of this communication other than to the person(s) named above is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message (and any copies) to the sender named above. Thank you.

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

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

Nov 13 2013 05:06pm

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STATE OF CALIFORNIA—CALIFORNIA STATE TRANSPORTATION AGENCY

EDMUND G. BROWN Jr., Governor

DEPARTMENT OF TRANSPORTATION

DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER, MS 43

1727 30th STREET

P. O. BOX 168041

SACRAMENTO, CA 95816-8041

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Be energy efficient!*

November 13, 2013

Facsimile: (760) 471-4860

Troy Neuenswander, Vice President
Flatiron West Construction Corp.
1770 La Costa Meadows Drive
San Marcos, CA 92078

12-0F96E4
12-Ora-5-6.2/8.7
B.O. 10/31/2013

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