



Department of Engineering & Capital Projects

September 19, 2019
0735-10-SWR0293

Chad Cameron, Estimator/Project Manager
TC Construction Co., Inc.
10540 Prospect Avenue
Santee, CA 92071

SUBJECT: RESPONSE TO BID PROTEST FROM TC CONSTRUCTION CO., INC. FOR THE “PARKSIDE SEWAGE PUMP STATION UPGRADE (CIP #SWR0293)” PROJECT

Dear Mr. Cameron,

In response to TC Construction Co., Inc.’s (“TC”) protest of the apparent low bid from Blue Pacific Engineering and Construction (“BP”) as non-responsive, the City of Chula Vista (“City”) has conducted a review of BP’s bid proposal on the subject project. Following careful review of TC’s protest and BP’s bid, the City has concluded that BP’s bid was non-responsive in part due to deviations from the bid specifications and requirements. However, the City has also concluded that these deviations are immaterial and subject to waiver by the City. For the reasons stated below, the City intends waive the immaterial deviations and award the project contract to BP.

I. BACKGROUND

On August 21, 2019, the City received five (5) bids for the Project. After the public bid opening, the City identified BP as the apparent low bidder and TC as the apparent second low bidder.

As requested by TC on August 21, 2019, the City provided August 26, 2019 with the bid packets from the apparent low bidder. Thereafter, TC submitted a bid protest on August 27, 2019 as to the bid submitted by BP.

On August 29, 2019, the City informed BP of the protest and offered them the opportunity to respond. On September 3, 2019, the City received BP’s response. Please find such response enclosed herewith.

I. ANALYSIS

A bid is responsive if it promises to do what the bidding instructions demand. *Williams v. Clovis Unified Sch. Dist.* (2007) 146 Cal.App.4th 757, 764. If a bid is non-responsive a public agency may waive an immaterial deviation from the bid specifications where such deviation does not affect the amount of the bid, does not give the bidder an unfair advantage, and does not affect the bidder’s commitment if it is awarded the contract. See e.g. *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1188; *MCM Const., Inc. v. City & Cnty of San Francisco* (1998) 66 Cal.App. 4th 359, 374.

TC's letter presented four bases for its protest of BP's bid as outlined below. The City's response to each basis is also provided below:

“On Bid Package Sheet 18 “List of Contractors” It specifically states in the first paragraph: “The Bidder shall list the name and location of the place of business of ALL contractors who will perform work or labor or render services in or about the construction work or improvement or fabricate and install a portion of the work according to detailed drawings contained in the plans and specifications. The Bidder shall also reference the Worker Classification No.'s for ALL contractors, which can be found on Sheets 4 through 7 of the List of Contractors.

1. Instance #1 – Based upon this paragraph, BP listed their own Workers Classification as #11 described in page 22 “Craft: Laborer (Construction-Fence Erector-HouseMover)-San Diego Group #1. This classification only qualifies for a portion of the work that is to be completed on the project. BP failed to list any classifications for Operating-Engineers, Cement Masons, Carpenters, or Teamsters. All of which will be vital scopes of work required per the plans and specifications. Furthermore, they failed to list any subcontractors that would be performing these other classifications of work leaving a large gap in scope.

The City has determined that BP's bid was non-responsive, in part, as to the above. BP's bid indicates that it intends to self-perform 93.3% of the work, or all work for which a subcontractor was not listed in its bid proposal. As such, BP has indicated all entities that will perform work on the project and not listing other subcontractors does not render BP's bid non-responsive. As to listing of classifications, BP's bid may be non-responsive. However, in conformance with City's standard contract administration practices, BP will be required to attend a pre-construction meeting and identify all proper and necessary trades and worker classifications to complete the project. As such, to the extent this bid irregularity is non-responsive, the City finds it to be an immaterial deviation as it does not affect the amount of the bid, does not give BP an unfair advantage, and does not affect BP's commitment to complete the project.

2. Instances #2 – BP Listed National Electric Works as their subcontractor for Electrical. The Classification that they are listed for is #26 “Street Lighting, Traffic Signal, Underground Systems Journeyman-San Diego-Technician Grade 1”. This is not the correct listing for the type of work the Electrical Subcontractor will be performing. Per sheet 24 there is available area to list “Additional Classifications as Needed By Contractor” BP failed to use this area for the correct classification of work.

The City has determined that BP's bid was non-responsive as to the above. However, in conformance with City's standard contract administration practices, BP will be required to attend a pre-construction meeting and identify all proper and necessary trades and worker classifications to complete the project. As such, to the extent this bid irregularity is non-responsive, the City finds it to be an immaterial deviation as it does not affect the amount of the bid, does not give BP an unfair advantage, and does not affect BP's commitment to complete the project

3. Instance #3 –BP Listed Parada Painting as their subcontractor for Coatings. The Classification that they were listed for is #16 “Parking and Highway Improvements (Striping, Slurry and Seal Coat Operations-Laborer)-Southern California-Group 1. This is also not the correct Listing for the type of work that the Coating subcontractor will be performing. Again, per sheet 24 there is available area to list “Additional Classifications as Needed By Contractor” BP failed to use this area for the correct classification of work.

The City has determined that BP's bid was non-responsive as to the above. However, in conformance with City's standard contract administration practices, BP will be required to attend a pre-construction meeting and identify all proper and necessary trades and worker classifications to complete the project. As such, to the extent this bid irregularity is non-responsive, the City finds it to be an immaterial deviation as it does not affect the amount of the bid, does not give BP an unfair advantage, and does not affect BP's commitment to complete the project

4. Instance #4 – BP on page 18 for the “Prime Contractor” failed to list the Bid Schedule Line Item No(s) as well as the % of Line Item No(s) Performed. This is part of the required sections to be filled out and BP has failed to complete the document correctly.”

The City has determined that BP's bid was non-responsive as to the above. However, BP's bid indicates that it intends to self-perform 93.3% of the project and identifies subcontractors to complete the remaining 6.7% of the project. As such, to the extent this deviation is non-responsive, the City finds it to be immaterial as it does not affect the amount of the bid, does not give BP an unfair advantage, and does not affect BP's commitment to complete the project

II. CONCLUSION

For the reasons set forth above, the City concludes that bid submitted by BP is non-responsive, in part, for the failure to include or provide certain information requested by the bid documents. However, after review, the City has concluded that the bidding irregularities are immaterial deviations that may be waived by the City. As such, the City intends to waive those irregularities and proceed with award of contract to the apparent low bidder, BP.

We thank you for your interest in the project and hope that you will continue to monitor the City's website for future CIP bid opportunities.

If you have any further questions regarding this matter, please contact me at (619) 691-5143.



ROSINA CONSTANZA, P.E.
SENIOR CIVIL ENGINEER

Cc: Jose Luis Gomez, Principal Civil Engineer
Michael McDonnell, Deputy City Attorney
Blue Pacific Engineering and Construction, 7330 Opportunity Road, Suite A, San Diego, CA 92111

Attachment: Blue Pacific and Construction's Response to Bid Protest

Luis Pelayo

From: James Danaher <jdanaher37@yahoo.com>
Sent: Tuesday, September 03, 2019 12:44 PM
To: Luis Pelayo
Cc: Shahram - Blue Pacific Engineering; Richard Egan
Subject: SWR293: Written response to Bid Protest, Parkside Sewage Pump Station Upgrade
Attachments: TC Construction Bid Protest SWR293.pdf; Request Letter of Response SWR293.pdf

Warning:
External
Email

September 3, 2019

Via E-Mail (LPelayo@chulavistaca.gov)

Luis Pelayo, P.E.
Associate Civil Engineer
City of Chula Vista
Department of Engineering & Capital Projects

Dear Mr. Pelayo:

The minor issues listed in the bid protest letters are either immaterial or meritless. The alleged variances did not have any effect on the amount of the bid or give Blue Pacific Engineering & Construction ("BP") an advantage or benefit not allowed other bidders and should not be cause for finding BP's bid to be non-responsive.

Bid responsiveness determines whether the bid, as submitted, is in compliance with all of the requirements of the bid documents. To be "responsive," a bid must be in full accordance with the "material" terms of the invitation for bids. Given the relative complexity of capital improvement projects, there will inevitably be some variation between bid proposals and the bid documents. This raises issues of whether a variation is "material" or "immaterial" and whether variations may be waived by the awarding authority.

Many variations do not render a bid non-responsive. An immaterial variation may be waived by the public agency and should be in the instant matter. An "immaterial variation" is the failure of a bidder to meet a bid requirement that does not affect the bidder's commitment if it is awarded the contract, either because (1) the requirement is merely procedural and, in the particular case, the meaning of the bid is clear (such as the attachment of an addendum); (2) the requirement is substantive but it is satisfactorily met, although not in the precise manner contemplated by the bidding documents; or (3) the requirement not met is one calling for

information that relates not to perform obligation but to independently verifiable facts regarding the bidder's status. In short, an "immaterial variation" will not change the bidder's performance obligations as described in the bid documents and does not provide the bidder an unfair advantage over other bidders. *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175.

In *Menefee*, a disappointed bidder challenged a contract award to the apparent low bidder, contending that the bid was non-responsive because one of the pages of the bid proposal sheet had not been signed. The court permitted the public agency to waive the defect of the unexecuted page and upheld award of the contract to the low bidder. In reaching its decision, a primary consideration of the court was whether the low bidder obtained an unfair advantage over other bidders by failing to sign a page of its bid. If the absence of a signature would allow the low bidder to avoid entering the contract, the court reasoned, then it would have the unfair advantage of deciding whether it wanted the contract after bid opening. The court found, however, that the bidder was bound by the terms of its bid and could not have refused to enter into the contract based on the defect in its bid. Therefore, the public agency was permitted to waive this "immaterial" defect. And the same should be done here.

None of the alleged defects in BP's bid are grounds to find the bid non-responsive.

Instance #1 – BP will classify its workers pursuant to the DIR Scope of Work provisions. To that end, BP does not utilize subcontractors for Operating Engineers, Cement Masons, etc. since these skills are covered under BP employee skill sets. This alleged defect – to the extent one even exists - does not change BP's performance obligations as described in the bid documents and does not provide BP an unfair advantage over other bidders. Thus, it is immaterial.

Instances #2 and #3 – Both of these alleged defects are not substantive and do not change BP's performance obligations as described in the bid documents and do not provide BP an unfair advantage over other bidders. Thus, they are equally immaterial.

Instance #4 – This alleged defect is meritless. BP explicitly indicates that it will be performing all bid schedule line items not listed under its subcontractors' enumerated electrical and coatings bid schedule items. (See "All non-subcontracted work".) Nothing here changes BP's performance obligations as described in the bid documents or provides BP an unfair advantage over other bidders. Thus, it is also immaterial.

Because these purported defects are immaterial and do not provide BP with an unfair advantage over its competitors, it is completely within the City's discretion to waive them. The City should exercise its discretion here accordingly.

Sincerely,
James C. Danaher

Law Office of James C. Danaher
3615 Kearny Villa Road, Suite 203
San Diego, CA 92123

Tel: (619) 549-0698 E-mail: jdanager37@yahoo.com

----- Forwarded Message -----

From: Richard <Richard@bluepacificeng.com>
To: James Danaher <jdanager37@yahoo.com>
Sent: Thursday, August 29, 2019, 02:09:56 PM PDT
Subject: FW: SWR293: Request for written response to Bid Protest

From: Luis Pelayo <LPelayo@chulavistaca.gov>
Sent: Thursday, August 29, 2019 2:02 PM
To: Richard <Richard@bluepacificeng.com>
Cc: Rosina Constanza <rconstanza@chulavistaca.gov>
Subject: SWR293: Request for written response to Bid Protest

Richard,

As we discussed I am attaching the following:

- Request for letter of response
- TC Construction Bid Protest

Please send me a response by **September 4, 2019**.

If you have any questions or need further information regarding this matter, please contact me.

Thank you,



Luis Pelayo P.E. | Associate Civil Engineer | City of Chula Vista | Engineering & Capital Projects

276 Fourth Ave. Chula Vista, CA 91910

T : 619-476-5387 | F : 619-691-5171 | E : lpelayo@chulavistaca.gov