

2024-08-20 CC AGENDA PACKET
PUBLIC COMMUNICATION RELATED TO ITEM B8 - PW 23-08

From: John Paul Cosico <jcosico@feldmanandassoc.com>
Sent: Monday, August 19, 2024 3:37 PM
To: *ALL CITY CLERKS <ALLCITYCLERKS@elsegundo.org>; Rivera, Floriza <frivera@elsegundo.org>
Cc: jvazquez@hensleylawgroup.com <jvazquez@hensleylawgroup.com>; Mark Feldman <mfeldman@feldmanandassoc.com>; Dash Construction <info@dashconstructioncompany.com>
Subject: Dash / City of El Segundo PW 23-08

Good afternoon,

Please find attached another correspondence regarding the above-referenced matter.

Also, we request that this matter be taken off the agenda for the 8/20/24 meeting so that the parties can have more time to resolve this dispute. Kindly let us know if you are amenable to this request.

Best Regards,

John Paul Cosico, Esq.



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August 19, 2024

VIA EMAIL

City of El Segundo Public Works Department
Floriza Rivera
Principal Engineer
350 Main Street
El Segundo, CA 90245
frivera@elsegundo.org

Re: Dash Construction Company, Inc. / City of El Segundo
Project: FY 24-25 Pavement Rehabilitation Project (“Project”)
Bid No.: PW 24-08
Awarding Body: City of El Segundo (“City”)

Dear Ms. Rivera:

As you know, this law firm represents Dash Construction Company, Inc. (“Dash”).

Addendum No. 1 to PW 24-08: FY 24-25 PAVEMENT REHABILITATION PROJECT states that: “As evidence that the BIDDER has read this Addendum, the BIDDER **must** acknowledge same in the space provided below and **submit this Addendum with the Proposal**. Failure to provide such acknowledgement **shall** render the proposal as non-responsive and subject to rejection.” On August 8, 2024, Dash Construction Company, Inc., through its counsel, submitted a Bid Protest Letter (“Bid Protest”) arguing that LCR Earthwork & Engineering, Corp.’s (“LCR”) failure to acknowledge Addendum No. 1 renders its bid non-responsive pursuant to the above-referenced language.

I. THE CITY CANNOT WAIVE A MANDATORY REQUIREMENT IN THE BID DOCUMENTS

On August 15, 2024, counsel for Dash called Assistant City Attorney Joaquin Vazquez to discuss Dash’s Bid Protest. Mr. Vazquez stated that it is the City’s position that the words “subject to rejection” in Addendum No. 1 allows the City to award the Project to LCR Earthwork & Engineering, Corp. (“LCR”) because the aforementioned language makes the rejection of a bid “discretionary.” At the very least, Mr. Vazquez’s interpretation of the above language is incorrect. At most, Mr. Vazquez’s interpretation would result in an abuse of discretion by the

City of El Segundo. Should the City award the Project to LCR, Dash will have no choice but to file with the Superior Court a writ of mandate to vacate the award of a public works contract to LCR.

California's competitive bidding laws require that a public works contract be awarded to the "lowest responsible bidder." *California Public Contract Code* § 10108. There are two requirements which must be satisfied for a bidder to be determined to be the lowest responsible bidder: (1) the awarded bidder's bid must be "responsive"; and (2) the awarded bidder must be "responsible." It is well-established that a bid is responsive if it conforms to the public agency's specifications for the contract. *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1188. Furthermore, "a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted *if the variance cannot have affected the amount of bid or given the bidder an advantage or benefit not allowed other bidders* or, in other words, if the variance is inconsequential." *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1440-1441. (Emphasis added).

Here, Addendum No. 1 states that "As evidence that the BIDDER has read this Addendum, the BIDDER **must** acknowledge same in the space provided below and **submit this Addendum with the Proposal**. Failure to provide such acknowledgement **shall** render the proposal as non-responsive and subject to rejection." The plain language of Addendum No. 1 suggests that failure to acknowledge the Addendum renders a bidder's proposal non-responsive. Per California law, a non-responsive bidder cannot be the lowest responsible bidder.

However, counsel for the City of El Segundo relies on the "subject to rejection" part of Addendum No. 1 in his argument that rejection of LCR's bid is discretionary. This argument ignores the rest of the sentence and well-established law in the State of California. The Addendum, which is a material modification of the bid documents, clearly states that a failure by a bidder to acknowledge the Addendum **shall** render that bidder's proposal non-responsive. The "subject to rejection" language does not make the mandatory provision discretionary.

Furthermore, LCR's failure to acknowledge Addendum No. 1 gives LCR an advantage over other bidders by affording it the possibility of avoiding its obligation to perform by withdrawing its bid without forfeiting its bid security under Public Contract Code § 5103. Additionally, LCR's failure to acknowledge Addendum No. 1 conferred a competitive advantage. LCR gained valuable time during the bidding process by not acknowledging Addendum No. 1. Even a few minutes make a significant difference in the bidding process. By failing to acknowledge Addendum No. 1, LCR was able to spend more time finalizing its numbers and obtaining lower numbers from subcontractors and suppliers. Accordingly, the irregularities in LCR's bid conferred a competitive advantage and cannot be waived. (See *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432; *Konica Business Machines USA, Inc. v. Regents of the Univ. of Calif.* (1988) 206 C.A.3d 449, 456-457).

It is irrelevant whether LCR intended or actually took advantage of the situation that it has created by submitting a bid that violated the City's requirements and California law. Because the possibility exists that LCR possibly *might* have benefited, if it had chosen to do so, the irregularities cannot be waived. (See *Eel River Disposal & Resource Recovery, Inc. v County of Humboldt* (2013) 221 C.A.4th 209, 239).

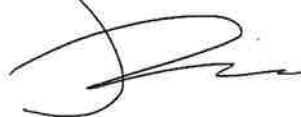
For the reasons stated above, the City cannot waive this material variance by LCR and must reject LCR's bid as non-responsive.

Attached is a letter from another law firm that is known for representing public entities in the state of California. Here, legal counsel agreed that failure to provide documents that "must be submitted with the bid" is an irregularity not subject to waiver by the District. Similarly, Addendum No. 1 contains both the words "shall" and "must," which are compulsory words, not discretionary.

II. DASH REQUESTS THAT THIS MATTER BE TAKEN OFF THE AUGUST 20, 2024, MEETING AGENDA

Dash Construction Company, Inc. requests that the City take this matter off the August 20, 2024, meeting agenda in order to provide the parties more time to resolve this dispute. Please let me know as soon as possible if you are willing to grant this request.

Very Truly Yours,



John Paul Cosico, Esq.
for FELDMAN & ASSOCIATES, INC.

Encl: July 22, 2013 Letter from Atkinson Andelson
Cc: Client
Mark A. Feldman, Esq.
Joaquin Vazquez, Esq.

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ATKINSON, ANDELSON, LOYA, RUUD & ROMO

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OUR FILE NUMBER:
005195.00163.
11418214.1



July 22, 2013

VIA EMAIL AND FIRST CLASS MAIL

Travis R. Eagan, Esq.
FELDMAN & ASSOCIATES, INC.
11030 Santa Monica Blvd., Suite 109
Los Angeles, CA 90025

**Re: Modernization at Benton Middle School Project
Norwalk-La Mirada Unified School District**

Dear Mr. Eagan:


Our firm represents the Norwalk-La Mirada Unified School District ("District") on the above-referenced Project. Please direct all future communications regarding this Project to our attention. I am writing in response to your two letters dated July 22, 2013 requesting the District deem the bid submitted by ACC Contractors, Inc. ("ACC") responsive. After reviewing the relevant documents and after discussions with the District, it is District staff's recommendation to award the contract for the above-referenced Project to Harik Construction as the lowest responsive responsible bidder in accordance with Public Contract Code section 20111 at the regularly scheduled Board meeting on July 22, 2013.

The fact that ACC failed to submit the required DVBE documents with its bid is an irregularity that is not subject to waiver by the District. There are several references in the bid documents noting that all required DVBE documents must be submitted with the bid.

The District thanks ACC's for its interest in the Project. Please contact me if you have any questions or comments. Nothing in this letter shall be construed as a waiver of the District's rights or remedies which are expressly reserved.

Sincerely,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO



Hugh W. Lee

HWL/mbq

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Travis R. Eagan, Esq.

July 22, 2013

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cc: Cindy Jimenez (via e-mail)