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March 23, 2018

VIA EMAIL

TTF@sacsewer.com

Graham Calciano
Project Manager
SACRAMENTO REGIONAL
COUNTY SANITATION DISTRICT
10060 Goethe Road
Sacramento, CA 95827

Re: Flatiron Dragados A Joint Venture's Protest Of The Bids Submitted by Balfour Beatty Infrastructure, Inc. and Kiewit Infrastructure West Co. For the Tertiary Treatment Facilities Project – Contract # 4283

Dear Mr. Calciano:

This firm represents Flatiron Dragados A Joint Venture (“FDJV”), the lowest responsive and responsible bidder on the Tertiary Treatment Facilities Project (“Project”) for the Sacramento Regional County Sanitation District of Sacramento County, California (“District”). This letter shall constitute FDJV’s reply to the letters each dated March 21, 2018, from the apparent low bidder, Balfour Beatty Infrastructure, Inc. (“Balfour”), and the apparent second low bidder, Kiewit Infrastructure West Co. (“Kiewit”), attempting to excuse their respective failures to comply with the mandatory requirements of the Bid Documents and California law. For the reasons discussed below, neither response is sufficient, and FDJV reiterates its request that it be awarded the Project and be deemed the lowest responsible and responsive bidder.

I. BALFOUR’S BID IS NON-RESPONSIVE AND BALFOUR DOES NOT DISPUTE THAT IT GAINED A MATERIAL ADVANTAGE BY SUBMITTING THE WRONG BID FORM.

Balfour’s March 21 letter relies, in part, on two letters it submitted after the bids were opened, one dated March 2, 2018 and another undated, to argue that its failure to use the proper Bid Form is the kind of inconsequential mistake that may be waived by a public entity.¹ Left completely unaddressed in any of Balfour’s letters is FDJV’s argument that

¹ Notably, Balfour submitted to the District two letters after the bid date admitting various errors in its bid and arguing that such errors were inconsequential. Neither of Balfour’s letters were made

submitting the wrong Bid Form, one that omits an entire allowance and a specifically identified scope of work, is the kind of mistake “made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans and specifications” that allows a bidder to withdraw its bid without penalty. (Pub. Cont. Code, § 5103, subd. (d). (“Section 5103”)) Such errors confer a material advantage to bidders and therefore public entities ***must reject*** any such bid that is not withdrawn voluntarily. (*Valley Crest Landscape, Inc. v. City Council*, (1996) 41 Cal.App.4th 1432, 1442.) By failing to address Section 5103, Balfour implicitly concedes that it could have withdrawn its bid without penalty had it chosen to do so. This the correct analysis, as Balfour’s use of the wrong bid form would have allowed Balfour to withdraw its bid without penalty, and, as a result, Balfour gained a material advantage that cannot be waived by the District.

Balfour’s reliance on the holding in *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, (2014) 223 Cal. App. 4th 1181 (“*Bay Cities*”) to support its argument that including the Bid Form issued as part of Addendum 4 rather than the final Bid Form issued as part of Addendum 5 was an inconsequential mistake is also unavailing. The issue in *Bay Cities* was whether the low bidder’s failure to include both pages of the bid bond form resulted in a non-responsive bid. The *Bay Cities* Court determined that the bid bond was valid, even though it was missing the cover page, because the second page of the bid bond form included all of the necessary information to enforce the bid bond and the information from the missing cover page was already included on the portion of the submitted bid bond form (i.e., identification of the project, names and signatures of the surety and bidder). Notably, the *Bay Cities* Court ***did not*** address Public Contract Code § 5103, which sets forth the reasons a contractor can withdraw its bid without penalty, because the plaintiff had conceded that Section 5103 did not apply. Here, Section 5103 absolutely applies to Balfour’s deficient bid, and Balfour does not contest its application. Furthermore, the section of the bid that Balfour cites as acknowledging the addenda, merely states that the addenda “have been received and examined as part of these contract documents.” (§ 00 41 00, p. 2.) There is no statement that the addenda have been accepted and incorporated into the bid, and no specific listing of the additional scope or related cost added in Addendum 5. Thus, the holding in *Bay Cities* is inapplicable to this matter.

Similarly, Balfour’s reliance on another project’s bid documents to excuse its failure to list a prequalified Instrumentation and Control subcontractor on this project is irrelevant and moot. Citations to bids submitted and questions asked on a different District project that went out for bid over a year ago simply do not support Balfour’s positions in this current bid protest. In fact, it would be an abuse of discretion for the District to rely on communications involving a separate project or irrelevant bid documents.

publicly available and posted on the District’s website until after FDJV submitted its Bid Protest. As such, FDJV was never afforded the opportunity to analyze and respond to Balfour’s letters.

Finally, Balfour claims that because Helix allegedly will perform 75% of the “combined” Electrical and Instrumentation and Control items of work, its bid complies with the requirement of 75% self-performance by each subcontractor in the Bid Documents. This argument is nonsensical. The Bid Documents mandate that the “Instrumentation and Controls Subcontractor must be on the list of prequalified contractors”. (§ 00 21 13-1.05-A.2.). Thus, Balfour is obligated to use either Technical Systems, Inc or Tesco Controls, Inc. for the Instrumentation and Control item of work. Neither of these subcontractors are listed in Balfour’s bid. Rather, Balfour lists Helix for **both** the Electrical item of work and the Instrumentation and Control item of work.

Balfour’s listing of Helix for both items of work does not comply with the Bid Documents’ requirements that:

[a] listed subcontractor shall perform with the subcontractor’s own organization and with workers under the subcontractor’s immediate supervision, work of a value of not less than seventy-five percent (75%) **of the value of each item of work for which the subcontractor is listed.** (§00 21 13-1.04-C.4 [emphasis added].)

By listing Helix as the contractor for two separate items of work, Balfour represented that Helix would perform at least 75% of **each** item of work with its own forces, not 75% of the “combined” total. Balfour cannot create its own bid requirements by claiming that these two items of work were “combined”. Rather, Balfour is obligated to follow the District’s ***mandatory*** instructions and list two separate contractors. Nor can Balfour rely on FDJV’s bid to argue that Helix will self-perform at least 75% of the work for both items. Not only did FDJV list both subcontractors separately, confirming that each subcontractor will self-perform at least 75% of its particular item of work, but FDJV’s total price for the combined Electrical and Instrumentation and Control items of work is different than the combined price listed in Balfour’s bid, rendering any comparison irrelevant and moot. Balfour failed to comply with the Bid Documents and the District must find that Balfour’s bid is nonresponsive.

II. KIEWIT’S LETTER FAILS TO JUSTIFY THE DISTRICT EXCUSING KIEWIT’S MATERIAL ERRORS IN ITS BID DOCUMENTS

Kiewit makes little or no effort to directly address the points raised in FDJV’s Bid Protest, instead excusing its failure to comply with the requirements of California law and the Bid Documents by claiming that it can rely on the District’s pre-existing knowledge base to supplement Kiewit’s incomplete bid. The bidding requirements in the Public Contract Code and the Bid Documents exist to protect the public by preventing bid shopping, avoiding opportunities of favoritism, and ensuring that all bidders compete on a level playing field.

Kiewit concedes that Helix Electric/TSI is not a licensed contractor and was not prequalified as either an Electrical subcontractor or an Instrumentation and Control subcontractor. Instead, Kiewit argues that it intended its Proposed Subcontractor Form to be understood as listing Helix Electric as the Electrical subcontractor and “TSI” as the Instrumentation and Control second tier subcontractor and that it omitted the required information for TSI because TSI is a lower tier subcontractor of Helix Electric.

Kiewit’s attempt to wave away its obligations ignores the mandatory nature of these Bid Documents’ requirements. The Bid Documents mandate that the “Electrical Subcontractor, and Instrumentation and Control Subcontractor ***must*** be on the list of prequalified contractors”. (§ 00 21 13-1.05-A.2.). Section 00 21 13-1.04-C requires that the bidders “***shall***” list the Contractor’s State License Board number, along with other information for every subcontractor listed on the bid form, that “Contractors ***shall*** list only one subcontractor for each portion of work in the bid,” and that “[a] listed subcontractor ***shall*** perform” at least 75% of the value of each item of work with its own forces. (Emphasis added.) These are mandatory, not optional, requirements.

Kiewit admittedly did not list Technical Systems, Inc. and its requisite information on its bid form. Kiewit’s attempt to skirt this requirement by claiming that TSI stands for Technical Systems Inc. and that Technical Systems Inc. is a second tier subcontractor that is not required to be listed. In making these arguments, Kiewit ignores the fact that if a subcontractor is listed on the bidder’s form the bidder is required to provide that subcontractor’s correct and actual name, its Contractor’s State License Board number, its business address, its DIR Registration number, and the subcontract amount. None of this required information was included in Kiewit’s bid.

Even accepting its arguments, Kiewit still listed two separate subcontractors for two separate items of work on a single line on the Proposed Subcontractor Form, a practice prohibited by California law because it frustrates the purpose of the Subletting and Subcontracting Fair Practices Act. (See *Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co.* (1976) 56 Cal.App.3d 361, 365-366). Kiewit’s only response to this is that the District “knows what ‘electrical contractors’ are” and “knows what ‘instrumentation contractors’ are.” While FDJV does not doubt this is true, this is likely true any time multiple contractors and scopes of work are listed on the same line yet the practice is still barred because it frustrates the purpose of the Subletting and Subcontracting Fair Practices Act. By conflating the two items of work into a single line, with a single listed value, Kiewit also frustrates the purpose of the requirements in the Bid Documents that each subcontractor provides at least 75% of the value of each item of work it is listed for by making it impossible to determine the value of Helix Electric’s item of work.

Nor does Kiewit address its listing of “TSI” only by its initials without any of the identifying information required by California law or the Bid Documents. As noted in the

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Bid Protest, contractors listing subcontractors by their initials is one of the reasons the California Legislature amended the Subcontracting and Subletting Fair Practices Act to require the CSLB license number, which would specifically identify a particular subcontractor.

Finally, by providing an incomplete subcontractor listing, both Balfour and Kiewit have the opportunity to now bid shop post bid. It should not be lost on the District that FDJV's bid amount for the Electrical and Instrumentation and Control items of work were \$10,000,000 lower than Balfour's bid and \$12,800,000 lower than Kiewit's bid. By allowing Balfour and Kiewit to flout the listing requirements, the District would be allowing either Balfour or Kiewit to shop the Instrumentation and Control scope of work post bid between the pre-qualified contractors, which is in violation of California law.

III. FDJV REQUESTS THAT ITS BID PROTEST BE GRANTED AND THAT IT BE AWARDED THE CONTRACT FOR THE PROJECT.

Based upon the foregoing, FDJV requests that the District grant FDJV's bid protest, reject the bids from Balfour and Kiewit, and award the Project contract to Flatiron Dragados A Joint Venture, the lowest responsive and responsible bidder on the Project. FDJV's bid is under the Engineer's Estimate, and FDJV looks forward to partnering with the District to successfully complete the Project.

Sincerely,

SMTD LAW LLP

A handwritten signature in blue ink, appearing to read 'C. Morrow', is written over a light blue circular stamp.

Christopher Morrow