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June 6, 2022

Via Electronic Mail

Charlie Slack Jr.
CWS Construction Group Inc.
1301 Grant Avenue, Suite B
Novato, CA 94945

Jonathan T. Peel
V.P. Operations
Tricon Construction, Inc. dba Tricon
Aquatics
11419 Sunrise Gold Circle, Suite 6
Rancho Cordova, CA 95742

Re: Aquatic Facility Renovation Bid Protest

Dear Mr. Peel and Mr. Slack Jr.:

This letter responds to the bid protest submitted by Tricon Construction, Inc. (“Tricon”), dated May 12, 2022, protesting the bid submitted by CWS Construction Group, Inc. (“CWS”), the apparent low bidder, for the contract to construct the District’s Aquatic Facility Renovation Project (the “Project”). Following review and analysis of the protest, I have determined that the District is precluded from awarding the contract to CWS because of at least one nonwaivable error in its bid. Therefore, I will recommend to the District Board that they reject CWS’ bid and award the contract to Tricon as the lowest responsible, responsive bidder.

I. Legal Standards

California Public Contract Code section 20682.5, which governs the District’s award of the contract for the Project, requires that the contract be awarded, if at all, to the lowest responsive, responsible bidder. In general, issues of responsiveness are determined by looking exclusively at the face of the bid. *Great West Contractors, Inc. v. Irvine Univ. Sch. Dist.* (2010) 223 Cal.App.4th 1425, 1452-53. Therefore, allegations that go beyond the face of the bid are generally not relevant for determining responsiveness.

A bid is deemed responsive if it satisfies all requirements set forth by the agency. An agency can award the contract to a bidder who fails to conform with all applicable

requirements *only if such deviation is immaterial*. *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 904. Moreover, public agencies have the authority to reject a nonconforming bid even if the bid only deviates from applicable requirements in a minor way. *MCM Const., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 373-4. A error that affects the amount of the bid or gives an unfair advantage to a particular bidder cannot be waived. *Id.* 45 Cal.App.4th at 904. An error gives an unfair advantage to a bidder where that bidder could have sought relief from the error under Public Contract Code section 5103. *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1442; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1181. This unfair advantage exists regardless of whether the bidder seeks such relief. *Valley Crest*, 41 Cal.App.4th at 1442. “Typographical” or “arithmetical” errors made when filling out a bid, which affect the amount of the bid, are two types of errors contemplated under Public Contract Code section 5103. *Id.*

II. Analysis

Tricon asserts in its bid protest that CWS’ bid contains the following errors: (1) discrepancies between CWS’ stated total bid and the total amount of each individual item; (2) CWS’ failure to submit a schedule as required under section 2.05 of the Instructions to Bidders; (3) CWS’ lack of a C-53 specialty license as required under section 2.18(B) of the Instructions to Bidders; and (4) CWS’ failure to acknowledge addendum D on item 14 of the acknowledgement form.

At least one of these alleged errors—the discrepancy in the bid amounts—is a nonwaivable error that precludes the District from awarding the contract to CWS. Section 2.01 of the Instructions to Bidders required all bids to be on the forms provided by the District. The Bid Form required a “Bid Breakdown” for individual items, a subtotal of direct costs, and a total base bid. CWS stated on the Bid Form that its “Subtotal Direct Cost” was \$3,214,700 and its “Total Base Bid” was \$3,487,700. CWS asserted in its response to Tricon’s bid protest that its bid of \$3,487,700 was calculated correctly. However, when the cost of the individual items listed is added up, it equals \$4,654,700. As discussed above, a “typographical” or “arithmetical” error made when filling out a bid, which affects the amount of a bid, is a nonwaivable error. CWS’ error qualifies both as a “typographical” and “arithmetical” error affecting the bid amount. Therefore, the District is prohibited by law from awarding the contract to CWS.

CWS acknowledges that it failed to submit a project schedule as required under section 2.05 of the Instructions to Bidders, but asserts this omission does not provide it an unfair advantage over the other bidders. In essence, CWS argues the failure to include a

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project schedule constitutes a waivable error. Even if this error is waivable—which the District does not concede—the District has the discretion to reject a bid on the basis of a minor, waivable error. Thus, CWS’ failure to submit a project schedule, alone, authorizes the District to reject CWS’ bid as nonresponsive.

We also note that CWS does not possess a C-53 Contractor License, as required by section 2.18(B) of the Instructions to Bidders. However, we do not address this as the error in calculating the bid amount alone renders CWS’ bid nonresponsive and precludes the District from awarding the contract to CWS. Similarly, we do not address whether CWS’ failure to list Addendum D on the acceptance of addenda acknowledgment constitutes an error, and whether that error is waivable.

III. Conclusion

Based upon the foregoing, I will recommend that the District Board reject CWS’ bid as nonresponsive. District staff intends to recommend that the District Board then award the contract to Tricon. The District appreciates your interest in this project and wishes you both success in the future.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Joseph “Seph” Petta
Ladera Recreation District General Counsel

cc: Ladera Recreation District Board of Directors
Rodney Centeno, General Manager
Jonathan Wickman, Wickman Development & Construction

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