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November 13, 2008

Chairman and Members of the Board of Supervisors
County of El Dorado
330 Fair Lane
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2008 NOV 13 PM 2:45
BOARD OF SUPERVISORS
EL DORADO COUNTY

RE: U.S. H50 HOV Lanes (Phase I) El Dorado Hills to Bass Lake Grade Project
Consideration of Bid Protests and Award of Contract
Board Hearing Date: November 18, 2008

Honorable Chairman and Members of the Board
Of Supervisors:

On November 18, 2008, you will consider the separate protests of two bidders, Granite Construction Company ("Granite"), and A. Teichert & Son, Inc., dba Teichert Construction ("Teichert") on various grounds enumerated in their respective letters attached to the Department of Transportation's staff report. Granite, the apparent second lowest bidder, objects to the potential award of the contract for above project to Nehemiah Construction, Inc., ("Nehemiah"), the apparent low bidder. Teichert, the apparent third lowest bidder, objects to the potential award to either Nehemiah or Granite on the grounds that both bids are non-responsive. The issues are set forth in the respective protests. At the hearing on these protests, you will take testimony from interested parties and from staff regarding the matter. At the conclusion of the hearing, staff will return to the Board to answer any questions and to provide recommendations as to each specific issue or irregularity raised.

As part of the record, staff has provided you copies of: the Nehemiah and Granite bids, pertinent provisions of the bid book, Department of Transportation fax showing the bid results, a letter dated October 31, 2008, from Nehemiah Construction Inc. to the County received post-bid opening, all bidders *Bidder's List of Subcontractors (DBE and NON-DBE) – Part II* forms received in accordance with the addendum 24 hours after bid opening, the bid protests received from Granite and Teichert, the response to bid protests received from Nehemiah and Granite, further correspondence by Nehemiah, Granite and Teichert, and Department of Transportation

staff's evaluation of the bids and the technical issues raised by the protests. Lodged with the Board Clerk are the originals of all four bids received with the bid book/specifications.

All bidders have been given an opportunity to review any and all bids received if they desire to do so. Staff has provided bidders with copies of both protests received. Both protesters were subsequently provided a copy of Nehemiah's responses to protests upon its receipt by the County.

Finally, set forth herein, is a brief restatement of the general law on mistake to assist the Board while it hears evidence and deliberates on the issues presented by the protests.

I. General Background on Competitive Bidding

A public entity is generally required to award public works contracts in accordance with competitive bidding procedures. The notice or invitation to bidders published by the public entity is in essence an offer to contract under the terms and conditions set forth in the bid plans and specifications. The bidder's proposal is the acceptance for the price set forth in that proposal. That proposal must be unequivocal such that if the bidder fails to subsequently execute the formal contract, bidder may forfeit its bid security.

In order to submit a proposal, a bidder must be "responsible" – that is, it can perform the contract as bid. The proposal submitted must also be "responsive" - the bid promises to do what the bidding instructions require. Usually a bid may be determined to be responsive or not from the face of the bid itself without additional investigation or information. Award is to the lowest responsible, responsive bidder.

Here, there is no challenge regarding whether Nehemiah or Granite is a responsible bidder. The issues raised by the protesting bidders revolve around whether the bid submitted by Nehemiah, and the bid submitted by Granite, are "responsive."

The purpose of competitive bidding is to eliminate favoritism, fraud and corruption, avoid misuse of funds and foster competition. Because of the potential for these abuses arising from irregularities, courts have strictly construed bidding requirements, and contracts awarded absent that compliance have been set aside. But appellate courts have also held that competitive bidding provisions must be read in light of the reason for their enactment such that they should be construed and administered in such a manner to accomplish such purpose fairly and reasonably with sole reference to the public interests, and above the interests of the individual bidders. Competitive bidding provisions must also be construed from a practical perspective so that the public agency can deal with problems in a sensible manner.

Thus, the basic rule of competitive bidding is that bids must conform to specifications. Bids that clearly do not conform are non-responsive and may not be accepted. A bid that substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance or irregularity is not material to the bid, could not have affected the amount of the bid or given the

bidder an advantage or benefit not allowed to other bidders. If the bid meets that latter test, the variance is considered inconsequential and may be waived.

II. The Doctrine of Mistake in Competitive Bidding

Whether in any given case a bid varies substantially or only inconsequentially from the invitation for bids is a question of fact. The question of fact to be resolved is whether the variation resulted in an unfair competitive advantage in the bidding process. *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 906.

If a bidder can use an irregularity to claim mistake, and to back out of its bid without forfeiture of its bid bond, then they have an unfair advantage such that a waiver of that irregularity may not be granted. The key is not whether the bidder seeks such relief, but rather whether such relief would be available. *Valley Crest Landscape, Inc. v. City Council of the City of Davis, et al.*, (1996) 41 Cal.App.4th 1432, 1442.

The type of mistake for which the bidder may back out without forfeiture of their bond is not limited to those that directly affect price, but includes mistakes which make the bid materially different from that intended. *Valley Crest*, supra at 1442.

In *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, the appellate court found that mistakes that could release a bidder from its bid are of the character in filling out the bid, such that the bid submitted is not what was intended (e.g., arithmetical or mathematical errors). By way of contract, relief is not available to a bidder where he has made an error in judgment, such as carelessness in inspecting the site or reviewing the plans and specifications. In that latter case, the bid submitted is what he intended to submit and therefore he may not withdraw that bid without forfeiture.

III. Conclusion

In the matter before the Board, there are several irregularities that have been asserted regarding the Nehemiah bid, and to a lesser extent to the Granite bid. They are as follows:


1. Claim that Nehemiah listed three subcontractors that it intended to use on Form II and that variance constitutes a mistake for which Nehemiah could claim mistake and withdraw its bidder's bond, thus giving Nehemiah a competitive advantage not held by other bidders;
2. Claim that Nehemiah failed to list all subcontractors;
3. Claim that Nehemiah failed to list a blasting subcontractor and cannot self perform work;
4. Claim that Nehemiah's bid is unbalanced;
5. Claims that Nehemiah and Granite's bid is unresponsive due to the manner in which they stated the percentage of work to be performed by their respective listed subcontractors;

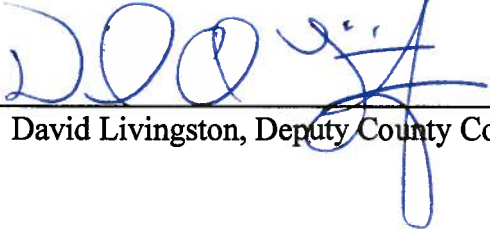
6. Claim that Granite failed to provide the addresses of its listed subcontractors.

The Board should consider each of these issues with reference to the factual circumstances presented here, and in light of the public interest and the reasons for the statutory enactments. The Board is under no obligation to waive any or all irregularities in a bid – waiver of bid irregularities is an exercise of discretion by the public agency. *MCM Const. Inc. v City & County of San Francisco* (1998) 66 Cal.App.4th 359, 374. If the Board determines that a variation exists but that it is inconsequential and did not result in an unfair competitive advantage, the Board may exercise its discretion and waive that irregularity.

Very truly yours,

LOUIS B. GREEN
COUNTY COUNSEL


By: Patricia E. Beck, Principal Asst County Counsel


By: David Livingston, Deputy County Counsel

PEB/sd