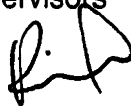




**COUNTY OF EL DORADO
DEPARTMENT OF TRANSPORTATION**



MEMORANDUM

Date: April 30, 2007
To: Members of the Board of Supervisors
From: Richard W. Shepard, Director 
Subject: **BOS Agenda - May 1, 2007 : Item 26, 07- 601
U.S. Highway 50/Missori Flat Road Interchange Phase 1A
Bid Protest**

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BOARD OF SUPERVISORS
MAY 1 2007

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The following is a summary of staff's analysis of the bid protest submitted on April 27, 2007 by Teichert Construction related to the above reference project. A copy of the bid protest is attached. Bids were received for the project on April 17, 2007 and Nehemiah Construction, Inc. submitted the low bid. The following information is in addition to the material provided to the Board as part of their agenda materials.

Teichert has protested the award of contract to Nehemiah stating that "*Nehemiah is not the lowest responsive and responsible bidder because its bid is obviously and improperly unbalanced.*" Teichert states two separate concepts to support their bid protest: that the bid is unbalance and overstates or understates bid prices; and that the alleged intent of the over and under statements is to fit within the requirement that the general contractor perform over 50% of the work. Each of these concepts are discussed in greater detail below.

The lowest responsible bidder has been held by the courts to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirement of the work:

- 1) The bids show Nehemiah's bid to be the lowest received. (uncontested)
- 2) A bidder is "responsible" if they have the fitness, quality and capacity to perform the work satisfactorily. Here, Nehemiah would have to be unqualified, unlicensed, debarred or otherwise fail to meet the qualifications to bid the project. We have researched Nehemiah and found they have a valid contractor's license and are doing comparable work on similar projects.
- 3) A bid is "responsive" to the call for bids if it promises to do what the bidding instructions demand. Responsiveness is determined from the face of the bid.

The Nehemiah bid distributes some costs differently than the engineer's estimate, either higher or lower, and than other bids. That can be said for all bids. However, there is no evidence that the distribution is unbalanced or that it leads to an artificial compliance with the 50% requirement.

i) Is the bid unbalanced?

Teichert argues that a number of the items in the County's spreadsheet demonstrate that the Nehemiah bid is unbalanced. The Department did prepare a bid summary of unit and item total prices of all bids and the engineer's estimate, and did distribute the summary to all bidders and those who inquired as public information. The Department has analyzed Nehemiah's bid with the overstated/understated premise in mind. Certain unit price pay items in Nehemiah's bid are substantially over the average of the other contractor's; however, the Department does not anticipate an unreasonable risk that the higher than average priced items will be subject to significant quantity over-runs. The items for which Nehemiah's unit prices are most in excess of the average bid are final pay items which are not subject to quantity over-run except in the event of major plan error or significant design change. We also asked the design engineer to evaluate their plan quantities with this in mind and they are confident their plan quantities and design features are properly estimated.

Teichert further alleges that to the extent that bid items artificially understated prices overrun in quantity, Nehemiah will be seriously damaged, thereby increasing the likelihood of claims and disputes. They state that "Nehemiah will be damaged because, if a bid item price for subcontract work is artificially understated, then for each added unit of that work, Nehemiah will receive in payment from the County an amount which is significantly less than the amount Nehemiah will be contractually required to pay to the applicable subcontractor."

The Department sees no substantial evidence that Nehemiah has understated the total for subcontractor work. Additionally, the Standard Specifications Section 9-1.02 SCOPE OF PAYMENT addresses this issue and states in part "The Contractor shall accept the compensation provided in the contract as payment for furnishing all labor, materials, tools, equipment, and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contract; also for loss or damage arising from the nature of the work, or from the action of the elements, or from any unforeseen difficulties which may be encountered during the prosecution of the work until the acceptance by the Director..... **No compensation will be made in any case for loss of anticipated profits.**" (emphasis added)

The Standard Specifications Section 4-1.03B (CHANGES) Increased or Decrease Quantities states in part "... If the total pay quantity of any item of work required under the contract varies from the Engineer's Estimate therefore by 25 percent or less, payment will be made for the quantity of

work of the item performed at the contract unit price therefore, unless eligible for adjustment pursuant to Section 4-1.03C, "Change in Character of Work...."

In summary, the provisions of the Contract Documents address underruns in quantity and the unit prices in the proposal are secure for quantity adjustments up to 25%, and the Department does not believe that there is a substantial risk of a quantity underrun by more than 25%.

2. Is there a misstatement of the distribution of work between the prime and the subcontractors?

Section 8-1.01 "Subcontracting" of the Standard specification does require "... the Contractor shall perform with the Contractor's own organization contract work amounting to not less than 50 percent of the original contract price..." Nehemiah represented in their bid that subcontractors will be performing 34.5% of the dollar value of work for this project.

An analysis was performed by the Department which estimated that Nehemiah's subcontracting percentage would be 34.8% utilizing the description of the work under Nehemiah's subcontractors list. This was compared to the average of all bidders for these same items which was also 34.8%. The Department has concluded that Nehemiah's bid for items of work which it proposes to subcontract, is substantially similar to the value of the same items of work proposed by the other bidders, and sees no evidence that Nehemiah has understated the prices for the total of all items of work it represents to be performed by subcontractors.

The analysis described above demonstrates that the cumulative sum of anticipated subcontract items for Nehemiah is similar to the average of all contractor's for those same items of work. Individual items certainly do vary from the individual item average; however, the sum of all anticipated subcontract items does not appear to be understated.

3. Teichert alleges that the County should reject the bid under Caltrans Standard Specifications section 2-1.10, and the contract should be awarded to Teichert as the lowest responsive and responsible bidder.

Caltrans Standard Specifications Section 2-1.10 states:

"2-1.10 DISQUALIFICATION OF BIDDERS

"More than one proposal from an individual, firm, partnership, corporation, or combination thereof under the same or different names will not be considered. Reasonable grounds for believing that any individual, firm, partnership, corporation or combination thereof is interested in more than one proposal for the work contemplated may cause the rejection of all proposals in which that individual, firm, partnership, corporation or combination thereof is interested. If there is reason for believing that collusion exists among the bidders any or all

proposals may be rejected. **Proposals in which the prices obviously are unbalanced may be rejected.**”(emphasis added.)

This section simply states that an unbalanced bid “may” be rejected. There is no requirement within this provision that requires a bid be rejected .

Attached is the bid summary showing the unit prices put forth by all bidders. Nehemiah’s bid does distribute costs differently from other bidders over many of the items. The Department carefully analyzed the bid to determine if there was a substantial risk or detriment to the County in awarding a contract to Nehemiah Construction. We do not see significant evidence that the contract is front loaded (High prices for work to be performed early in the schedule). We do not see significant evidence of overrunning quantities with higher unit prices. We do not see evidence that the overall subcontractor work is understated, and we do not see significant evidence of alleged understated items supporting successful claims.

It is very common for Contractor’s to distribute costs for items, risk, overhead and profits differently. As an example, some contractor’s put the cost for shoring an excavation into a structure excavation item, while others attribute this cost to the unit price of concrete for the structure. Some place anticipated costs for traffic control in Traffic Control Systems, and others attribute it to the individual items such as K-rail, delineators and barricades.

As a consequence, staff has concluded that the Nehemiah bid is responsive on its face, and we recommend award of the contract to Nehemiah Construction.

Enclosure



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April 27, 2007

VIA FACSIMILE, U.S. MAIL AND EMAIL

County of El Dorado
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Attn: Richard Shepard, P.E., Director
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Placerville, CA 95667

RECEIVED
APR 30 2007
EL DORADO COUNTY
DEPT. OF TRANSPORTATION

Re: Bid Protest of Teichert Construction
Project: Missouri Flat Road Overcrossing, Phase 1A

Dear Mr. Shepard:

We are attorneys for A. Teichert & Son, Inc. dba Teichert Construction.

As you know, Teichert submitted the second-lowest monetary bid for the above-referenced project, and the lowest monetary bid was submitted by Nehemiah Construction, Inc. Teichert hereby protests any award of the contract for the project to Nehemiah. Nehemiah is not the lowest responsive and responsible bidder because its bid is obviously and improperly unbalanced. Accordingly, Nehemiah's bid should be rejected pursuant to Caltrans Standard Specification section 2-1.10, and the contract should be awarded to Teichert as the lowest responsive and responsible bidder.

A number of items in the enclosed County-supplied spreadsheet demonstrate that Nehemiah's bid is obviously unbalanced. As you can see from your spreadsheet, it is readily apparent that Nehemiah has artificially and materially overstated the unit prices for bid items of work to be performed by Nehemiah and has artificially and materially understated the unit prices for subcontract work.

Although isolated instances of unbalanced item prices are present in many bids, the unbalanced prices in Nehemiah's bid are far outside the norm, extreme in amount, and also designed to achieve an improper purpose. In particular, the pattern of unbalancing which can be seen on the face of Nehemiah's bid is designed to mislead the County concerning the percentage of project work to be performed by Nehemiah with its own forces, as opposed to the percentage of work to be subcontracted by

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Nehemiah. As the County probably knows, Nehemiah – unlike the other three bidders – is primarily a bridge builder. Accordingly, Nehemiah must have found in preparing its bid that it could not meet the 50% requirement if its bid accurately reflected the value of its subcontracted work.

If the County were to award the contract to Nehemiah, the unbalanced bid item prices in Nehemiah's bid quite probably will work to the detriment of the County in two ways. First, for the overwhelming majority of bid items that are not "final pay" items, to the extent that bid items with artificially overstated prices overrun in quantity, the County will pay an unreasonable premium price for each added unit of work. Second, to the extent that bid items with artificially understated prices overrun in quantity, Nehemiah will be seriously damaged, thereby increasing the likelihood of claims and disputes. (Nehemiah will be damaged because, if a bid item price for subcontract work is artificially understated, then for each added unit of that work, Nehemiah will receive in payment from the County an amount which is significantly less than the amount Nehemiah will be contractually required to pay to the applicable subcontractor.)

If Nehemiah provides any written response to this protest, please send a copy to me by facsimile or email. Additionally, please let me know when and how Teichert's protest will be determined by the County.

Thank you for your attention to this matter.

Very truly yours,

André K. Campbell

AKC:njr

Enclosure

cc: Elizabeth B. Diamond, P.E.
John Kahling, P.E.
Adam Bane
Teichert Construction
Attn: Clyde Hamilton
Robert W. O'Connor, Esq.
(via facsimile)