



COMMUNITY DEVELOPMENT SERVICES

DEPARTMENT OF TRANSPORTATION

<http://www.edcgov.us/DOT/>

#37

PLACERVILLE OFFICES:

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CONSTRUCTION & MAINTENANCE:

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924 B Emerald Bay Road, South Lake Tahoe, CA 96150
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~~New York Creek Trail East - Phase 2 Project~~ Bid Protest Response

The County of El Dorado, Department of Transportation (Transportation) advertised the Pony Express Trail Slipout Project (Project) and received 3 bids from:

- 1) Schreder and Brandt MFG, Inc. for \$907,249.28
- 2) Steelhead Constructors, Inc. for \$914,781.0
- 3) MKD Construction, Inc. for \$929,839.00

The Engineer's Estimate for the Project was \$753,247.00

The All Bidders Letter for the Project was issued on Friday, July 6, 2018 which stated Transportation would be recommending the Project be awarded at the July 24, 2018 Board meeting to the lowest bidder, Schreder and Brandt MFG, Inc. (S&B) for being the lowest responsive, responsible bidder.

The two-day bid protest period began when the All Bidders Letter was sent and ended July 10, 2018 at 5:00 p.m. One bid protest was received from Steelhead Constructors, Inc. (Steelhead) on July 10, 2018 (attached). Steelhead's bid protest states the following reasons S&B's bid should be rejected:

- 1) The Bidder's Bond was not signed by the Surety and is therefore invalid;
- 2) S&B submitted a 15-G DBE commitment form with their bid stating they would not meet the Project DBE goal. They also submitted their good faith effort documentation. Within the 5 business days allowed by the Contract and 49 CFR 26, S&B re-submitted their DBE commitment form stating they would now meet the goal. Steelhead claims the re-submittal is a material deviation that may not be waived.
- 3) Steelhead claims that the re-submittal could provide a competitive advantage by facilitating bid shopping and allowing the bidder to withdraw the bid.

Transportation's responses to Steelhead's protest are as follows:

- 1) *The Bidder's Bond was not signed by the Surety and is therefore invalid;*

Transportation has determined this item of Steelhead's bid protest has no merit based on case law from 1923 (Pacific Mill & Timber Co. v. Massachusetts Bonding & Ins. Co. (1923) 192 Cal 278, 284) which confirms that the surety is liable on the bond even if not signed by the principal: "Thus, where the liability of the principal in

a bond is fixed by contract, or by operation of law, his failure to sign the bond does not affect the liability of his sureties thereon." As S&B's bidder bond was signed by the surety, the bond is an acceptable and binding document.

2) *S&B submitted a 15-G DBE commitment form with their bid stating they would not meet the Project DBE goal. They also submitted their good faith effort documentation. Within the 5 business days allowed by the Contract and 49 CFR 26, S&B re-submitted their DBE commitment form stating they would now meet the goal. Steelhead claims the re-submittal is a material deviation that may not be waived.*

Transportation does not feel it is a material deviation for S&B to re-submit their DBE information. Nothing in the Contract states that a revision or correction to the DBE forms cannot be submitted within the 5 business days if the DBE forms were submitted at time of bid. In fact, Transportation has allowed revisions and/or requested additional information to the DBE forms submitted with bids in the past.

The intent of the 5 business day submittal timeline is not to allow new quotes to be obtained. It is to allow sufficient time for bidders to put together all DBE paperwork, which can be a massive effort.

S&B's verbal position was that they didn't realize trucking companies needed to be listed on the DBE forms as they are not subcontractors. Once they realized that the DBE trucking company does need to be submitted, they provided the revision with a quote dated on the day of bid. This would have been acceptable if the quote was indeed received prior to bid.

3) *Steelhead claims that the re-submittal could provide a competitive advantage by facilitating bid shopping and allowing the bidder to withdraw the bid.*

The DBE trucking company quote received with the DBE form 15-G revision was dated on bid day and would have been acceptable if received prior to bid. Transportation has in the past rejected a bidder as non-responsive for providing DBE quotes that were dated after bid opening (Ice House Road BPMP Project).

After receiving Steelhead's protest, Transportation followed up with the DBE trucking company to assure that their quote was received prior to S&B's bid submittal. Unfortunately, Transportation found this not to be the case. The trucking company verbally confirmed that S&B did not request a quote until the day after bid opening. The trucking company provided an email response to S&B showing that the bid was received by S&B on the day after bid opening (attached). The reason given for why the quote was dated on bid day was that it was a rate sheet that was put together and provided to all prime bidders on the Quest planholders list for this Project. The DBE trucking company erroneously sent the quote without updating the quote date.

Per Caltrans Standard Specifications Section 2-1.12B(1), the prime contractor is responsible to verify at bid opening the DBE firm is certified as a DBE by the California Unified Certification Program and possess the work codes applicable to the type of work

the firm will perform on the Contract. This could not have occurred as the quote was received after bid. Furthermore, Public Contract Code Chapter 4, "Subletting and Subcontracting Fair Practices Act" section 4101 states, "The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils." If quotes received after the time of bid are accepted by Transportation, bid shopping may occur to the detriment of the public, the project, and all parties involved. Additionally, on past project DBE evaluations, Transportation has rejected DBE quotes that were dated after bid date and that DBE was not included towards the DBE commitment percentage. Therefore, S&B's revised DBE forms cannot be accepted.

Transportation considered accepting S&B's bid with the DBE forms submitted at time of bid. However, those forms showed that S&B did not meet the DBE goal and the Good Faith Efforts form 15-H that was submitted did not contain any backup information and did not demonstrate that S&B took all necessary and reasonable steps to achieve the DBE goal in accordance with 49 CFR 26 Appendix A.

In conclusion, Transportation recommends rejecting Schreder & Brandt's bid as non-responsive and award the Project to Steelhead Constructor's, Inc. as being the lowest responsive, responsible bidder.



July 10, 2018

County of El Dorado
Department of Transportation
Attn: Brian Franklin
2850 Fairlane Court
Placerville, CA 95667

Re: Pony Express Trail Slipout
Contract No. 2726
PW No. 18-31214
CIP No. 78718

Subject: **Bid Protest**

Mr. Franklin,

Steelhead Constructors, Inc. (SCI) protests award of the above referenced project to Schreder & Brandt MFG, Inc. (S&B).

The County's "All Bidders Letter", received via email July 09, 2018, finds S&B the apparent lowest responsive, responsible bidder.

Section 2-1.34 requires a bidder's security equal to at least 10 percent of the bid amount.

S&B's Principle failed to sign their bidder's bond; therefore S&B's bidder's bond is non-binding.

No other form of bidder's security meeting the requirements of Section 2-1.34 was included in S&B's bid. S&B's bid must be found non-responsive.

S&B has an unfair bidding advantage as they could have abandon their bid without recourse had they not liked the outcome.

Furthermore, S&B included in their bid dated 06/28/2018 a completed and signed copy of Exhibit 15-G Construction Contract DBE Commitment form and a filled out copy of Exhibit 15-H DBE Information-Good Faith Efforts form.

The documents submitted on bid day (06/28/2018) show S&B claimed a total DBE participation amount of 7.8% (\$79,760) and filled out the DBE Information-Good Faith Efforts as not applicable.

On 07/03/2018, S&B subsequently resubmitted new Exhibit 15-G and Exhibit 15-H forms. The new documents show an increased claimed total DBE participation amount of 12.2% (\$124,760) and a defective Good Faith Effort.

2940 INNSBRUCK DR~REDDING~CA~96003~PO BOX 997~PALO CEDRO~CA~96073

TELEPHONE 530~226~6400 FACSIMILE 530~226~6401

www.steelheadconstructors.com

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The bid requirements are clear, Exhibits 15-G and 15-H may be submitted at the time of bid or no later than 4 p.m. on the 5th business day after bid opening.

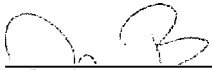
S&B elected to submit these documents at the time of bid.

The substitution of DBE information is a material deviation that may not be waived by a public entity (*Valley Crest Landscape, Inc. v City Council, (1996) 41 Cal.App.4th 1432, 1442*). The substitution of DBE information could provide a competitive advantage by facilitating bid shopping and allowing the bidder to withdraw the bid (*MCM Construction, Inc. v City and County of San Francisco, (1988) 66 Cal.App.4th at 375*). A bid containing a material deviation must be rejected as non-responsive.

SCI requests the County change its finding of S&B's bid to non-responsive in consideration of the information provided above and proceed with recommending award to Steelhead Constructors, Inc., the lowest responsive, responsible bidder.

If you have any questions or need additional information please contact SCI at (530) 226-6400.

Respectfully,
STEELHEAD CONSTRUCTORS, INC.



Justin Babcock
Project Manager



Brian Franklin <brian.franklin@edcgov.us>

Fwd: FW: Trucking Quote - Pony Express Trail

1 message

Jennifer Rimoldi <jennifer.rimoldi@edcgov.us>
To: Brian Franklin <brian.franklin@edcgov.us>

Thu, Jul 19, 2018 at 1:21 PM

Jennifer Rimoldi
Assistant Engineer
Office Engineer Unit**County of El Dorado**
Department of Transportation
2850 Fair Lane Court, Building C
Placerville, CA 95667
(530) 621-7592 / FAX (530) 626-0387
jennifer.rimoldi@edcgov.us

----- Forwarded message -----

From: <jennifer@wcwaterandtrucking.com>
Date: Thu, Jul 19, 2018 at 12:23 PM
Subject: FW: Trucking Quote - Pony Express Trail
To: Jennifer Rimoldi <jennifer.rimoldi@edcgov.us>

Hi Jennifer --

Sorry, I got sidetracked. Here is that email. The request for quote came in by phone around noon that same day. Please let me know if you have any questions.

Thank you,

Jennifer Gemignani

West Coast Water & Trucking, Inc.

3941 Park Dr. Suite #20-231

El Dorado Hills, CA 95762

Office: (916) 358-8697

Fax: (916) 358-8699

Email: jennifer@wcwaterandtrucking.com

~ Certified DBE. WBE and SBE ~

From: jennifer@wewaterandtrucking.com <jennifer@wewaterandtrucking.com>
Sent: Friday, June 29, 2018 3:18 PM
To: alyssa@schrederandbrandt.com
Cc: 'jason' <jason@wewaterandtrucking.com>
Subject: Trucking Quote - Pony Express Trail
Importance: High

Hi Alyssa –

Jason asked me to send you over our trucking quote for the Pony Express Trail project, please find a copy attached. I apologize you did not receive a quote on bid day, however your company was not showing on any of the plan holders lists.

Please feel free to contact Jason or myself if you have any questions regarding this quote, I hope we have the opportunity to work together.

Thank you,

Jennifer Gemignani

West Coast Water & Trucking, Inc.

3941 Park Dr. Suite #20-231

El Dorado Hills, CA 95762

Office: (916) 358-8697

Fax: (916) 358-8699

Email: jennifer@wewaterandtrucking.com

~ Certified DBE, WBE and SBE ~



Trucking Quote_Pony Express.PDF

166K

LAW OFFICE OF DAVID J. MURRAY
DAVID J. MURRAY, ESQ.

354 E. 5th STREET
CHICO, CA 95928
Phone (530) 896-1144
Fax (530) 896-1146

SENT VIA EMAIL TO AVOID DELAY

July 17, 2018

El Dorado County Community Development Services
Department of Transportation
Brian Franklin, Senior Engineer
2860 Fairlane Court
Placerville, CA 95667

Re: Ponv Express Slipout, Contract Number 2726, PW No. 18-31214, CIP No. 78718

Dear Mr. Franklin:

This letter is in response to the bid protest lodged by Steelhead Constructors, Inc against my client, Schreder & Brandt Mfg, Inc. It is my understanding that Schreder & Brandt Mfg, Inc is the lowest responsible bidder for the above-captioned project. I offer the following reply.

Steelhead Constructors, Inc's protest is based on two claims. Each claim will be addressed in the order asserted in their protest.

The first protest claim is that, "S&B's Principle (sic) failed to sign their bidder's bond: therefore S&B's bidder's bond is non-binding."

Examination of the bid bond submitted by Schreder & Brandt Mfg, Inc reveals that it was signed and notarized by the obligor, which in this case is the surety. It is the surety, not the principal that is bound by the bid bond. The bid bond does not have a signature line for Schreder & Brandt Mfg, Inc because the signature of the principal is not necessary to make the bid bond binding.

In Bay Cities Paving & Grading, Inc. v. City of San Leandro (2014) 223 Cal.App.4th 1181 at 1189, a case that dealt solely with the issue of whether a bid bond was binding, the court stated:

"These considerations must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. **It certainly would amount to a disservice to the public if a losing bidder [Steelhead Constructors, Inc] were to be permitted to comb through the bid proposal or license application of the low bidder [Schreder & Brandt Mfg, Inc] after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be**

adverse to the best interests of the public and contrary to public policy. [Citation.]” (*Ghilotti, supra*, 45 Cal.App.4th pp. 908–909, 53 Cal.Rptr.2d 389.). (Emphasis added.)

In *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1190, the court found that, “the material provided in G & B's original bid, which included the second page of its bid bond, was sufficient to establish that G & B satisfied the bid security requirement by actually obtaining the required bid bond from an approved surety. The City's standard bid bond was, as the trial court phrased it, a “form document” which required only a few insertions by the specific bidder.⁵ The first page, i.e., the page that was originally missing, contained only three blank places for the insertion of additional information: (1) the name of the principal (i.e., the bidder), (2) the name of the surety, and (3) the date of the submission of the bid.”

“The idea that somebody might attempt to avoid a contractual obligation is not evidence that he has an actual competitive advantage. Indeed, any of the bidders for this project could conceivably have disavowed its contract with the surety that issued its bidder's bond by arguing that the bond was unenforceable for one reason or another. This speculation aside, the City in this case made a factual determination that the omitted page from G & B's original bid package did not create an actual unfair advantage because the information that was submitted established compliance with the bid bond requirement. Appellant cannot undermine that factual determination by relying solely on speculation.” *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1196. This is the same thing that Steelhead Constructors, Inc is attempting to do here, rely on pure speculation that the bid bond was voidable, instead of the actual facts.

“As we have already explained, every bidder has the opportunity to attempt to avoid liability under a bid bond by denying its validity. By contrast, an actual competitive advantage arises only when a bid defect establishes an actual ground for a successful bidder to withdraw its bid without incurring liability under its bond.” *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1197.” Here, there is no evidence that Schreder & Brandt Mfg, Inc could have withdrawn its bid without incurring liability under its bond. Steelhead Constructors, Inc’s claim that, “S&B’s bidder’s bond is non-binding” lacks any factual or legal merit.

Steelhead Constructors, Inc’s second protest claim is that, “the substitution of DBE information is a material deviation that may not be waived by a public entity.” Steelhead Constructors, Inc then cites *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, as support for its protest. But the *Valley Crest* case was not decided because of DBE requirements. The *Valley Crest* case dealt with a prime contractor, North Bay, that was required by the City of Davis to self-perform at least 50% percent of the job itself when in fact its subcontractors were going to perform 83% of the work. The prime contractor also failed to list any DBE contractors. The court held that because there was a major change in the actual percentages of work performed by the subcontractors and because the prime contractor was going to perform less than 50% of the work, there was a material deviation that warranted rejection of the North Bay bid.

Here, there are no such facts. Schreder & Brandt Mfg, Inc has not changed any of the percentages of any of its subcontractors. Schreder & Brandt Mfg, Inc has simply added the name of the trucking company to its existing DBE list. This is neither a change or an addition to the bid documents because trucking companies are normally not listed in any bid documents.

Trucking companies operate on an hourly rate basis. There is no proposal or contract with the trucking company like you would have with a listed subcontractor. Further, the bid specifications specifically allow submission of DBE documents up to five days after bid opening. The bid specifications do not prohibit revisions to the DBE documents within the five day post bid opening period. Therefore, the idea that submission of additional DBE is somehow a “material deviation” from the bid specifications lacks foundation and calls for pure speculation.

The general rule is that public works contracts must be awarded to the lowest responsible bidder. Steelhead Constructors, Inc’s reliance on the MCM Construction case as support for the idea that the County must reject Schreder & Brandt Mfg, Inc bid is mistaken. In fact, the same appellate court limited its earlier holding in the MCM Construction case:

“Finally, **appellant mistakenly relies on this court's decision in *MCM*.** *supra*, 66 Cal.App.4th 359, 78 Cal.Rptr.2d 44. That case involved a public contract for a construction project at the San Francisco Airport. The city rejected as non-responsive a bid submitted by MCM and awarded the contract to a company that had submitted a higher bid. (*Id.* at p. 366, 78 Cal.Rptr.2d 44.) MCM filed a petition for a writ of mandate arguing, among other things, that the city abused its discretion by refusing to waive allegedly immaterial defects in its bid. (*Ibid.*) The trial court denied the writ petition and this court affirmed. In our *MCM* decision, we provided two independent reasons for concluding that the city did not abuse its discretion by refusing to waive defects in the MCM bid. (*MCM, supra*, 66 Cal.App.4th at p. 373, 78 Cal.Rptr.2d 44.) First, even if the deviations in that bid were immaterial, the city was not required to exercise its discretion by waiving those defects. As we explained, “[a]n agency has discretion to waive immaterial deviations from bid specifications and may accept the bid under certain conditions. The point of discretion is that the agency may properly act in either direction. It may waive or refuse to waive such deviations.” (*Id.* at p. 374, 78 Cal.Rptr.2d 44.)” Bay Cities Paving & Grading, Inc. v. City of San Leandro (2014) 223 Cal.App.4th 1181, 1198-99 [167 Cal.Rptr.3d 733, 746].

Steelhead Constructors, Inc appears to claim that Schreder & Brandt Mfg, Inc’s bid is non-responsive. “A bidder is responsible if it can perform the contract as promised. [Citation.] A bid is responsive if it promises to do what the bidding instructions require. [Citations.]” Bay Cities Paving & Grading, Inc. v. City of San Leandro (2014) 223 Cal.App.4th 1181, 1187 [167 Cal.Rptr.3d 733, 737]. “[a] deviating bid must be set aside despite the absence of corruption or actual adverse effect on the bidding process” only if the deviation is ‘capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders.’ [Citations.] (*Ghilotti, supra*, 45 Cal.App.4th at p. 908, 53 Cal.Rptr.2d 389.)” Bay Cities Paving & Grading, Inc. v. City of San Leandro (2014) 223 Cal.App.4th 1181, 1188 [167 Cal.Rptr.3d 733, 737-38]. Here, we have no threat of corruption or bidding up the price of the project. Likewise, the number of bids or response of potential bidders was not affected.

A review of Schreder & Brandt Mfg, Inc’s bid reveals there was no bid shopping which is the evil that Public Contract Code section 4104 was enacted to prevent. Further, there was no competitive advantage given to Schreder & Brandt Mfg, Inc over any other contractor. Any claim to the contrary calls for pure inadmissible speculation and conjecture.

In conclusion, there is no legal reason to deny acceptance of Schreder & Brandt Mfg. Inc's low bid. In fact, the El Dorado County Community Development Services Department has an affirmative duty to its citizens and taxpayers to award construction projects to the lowest bidder. See Public Contract Code Sections 20161 to 20162.

Sincerely,

LAW OFFICE OF DAVID J. MURRAY

A handwritten signature in black ink that reads "David J. Murray". The signature is written in a cursive style with a large, stylized initial "D".

David J. Murray
DJM/lla