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2006 SEP 15 PM 5: 04

RECEIVED  
BOARD OF SUPERVISORS  
EL DORADO COUNTY

August 23, 2006

Via Facsimile PDF  
& First Class Mail

Cindy Keck  
Clerk, El Dorado County Board of Supervisors  
El Dorado County Government Center  
330 Fair Lane  
Placerville, CA 95667

RECEIVED  
BOARD OF SUPERVISORS  
EL DORADO COUNTY

2006 AUG 24 AM 7: 57

Re: Bid Protest of Yubacon, Inc.  
*Final Cover 13.6 Acre Class III Old Landfill Area .*  
*Union Mine Disposal Site*

Madame Clerk:

We represent Yubacon, Inc., the lowest responsible bidder on the above referenced project. We are informed that the County inexplicably rejected Yubacon's bid as "non-responsive" and decided to award this public contract to Doug Veerkamp. The Veerkamp price was roughly \$300,000 higher than Yubacon's bid. The County's decision is not supported by the law and raises serious questions regarding the impartiality and favoritism. By this letter, Yubacon demands that the County take all necessary actions to award the contract to Yubacon. **At the very least, the County should reject all bids and relet the project. Anything short of immediate action will result in Yubacon taking legal action to protect its rights.**

The facts as we understand them are straightforward. Yubacon submitted its bid and offered to perform the entire scope of project work for roughly \$300,000 less than Veerkamp. The County alleges that Yubacon's bid was non-responsive because it contained an improper piece of correction tape. The bid documents, however, allow the County to waive immaterial irregularities. Indeed, the law allows the County to waive all irregularities that would not allow the contractor to withdraw its bid under a claim of mistake.

COPY SENT TO BOARD MEMBERS  
FOR THEIR INFORMATION

DATE 8/24/06

C. Counsel  
CAO  
Env Mngmt

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It is well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the error does not affect the amount of the bid or give the bidder an advantage that other bidders did not have. Ghilotti Construction Co. v. City of Richmond (1996) 45 Cal.App.4th 897, 904-905 (citing 47 Ops.Cal.Atty.Gen. 129, 130 (1966)). Therefore, bids must be evaluated from a practical point of view, giving due consideration to the public interest being served. Ghilotti, 45 Cal.App.4th at 908-909 ("***disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, and cancel the low bid on minor technicalities***").

This practical approach to evaluating bid protests has been adopted by our Supreme Court:

As one leading treatise explains: The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to ***secure the best work or supplies at the lowest price practicable, and they are for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.*** . . . Competitive bidding provisions must be read in the light of the reason for their enactment, or they will be applied where they were not intended to operate and thus deny municipalities authority to deal with problems in a sensible, practical way.

Domar Electric, Inc. v. City of Los Angeles (1994)9 Cal.4th 161, 173; Dougherty v. Folk (1941)46 N.E.2d 307, 311 (***it is inconceivable that inconsequential departures will not appear on bid forms and these minor deviations are not actionable***).

With this right to waive immaterial irregularities, comes a responsibility. The County cannot apply a fine-tooth comb to weed out responsible low bids based on technical and immaterial deviations. To allow the County to do so would open the door to favoritism, corruption and fraud – exactly what the public contract laws were implemented to protect against.

Because the alleged deviation in Yubacon's bid did not affect the amount of the bid or give it an advantage that other bidders did not have, the deviation is inconsequential. The County had the express and implied right to waive the immaterial irregularity and refused to do so – choosing instead to enter into a contract under which

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the public is required to finance an additional \$300,000 in construction costs. The County's conduct violates California law, and deprives Yubacon of its right to perform this public contract.

The County should know that a contract awarded to a contractor other than Yubacon is illegal and void. Monterey Mechanical Co. v. Sacramento Regional County Sanitation District (1996) 44 Cal.Ap.4th 1391. In addition, payment of any funds to another bidder would violate the California Constitution. Section 10 of Article XI of the Constitution provides that "a local government body may not . . . pay a claim under an agreement made without authority of law." Yubacon will bring an action to enjoin any such payments on a contract awarded to another bidder and to require the return of any such payments to the County. Rubino v. Lollo (1970) 10 Cal.App.3d 1059; Miller v. McKinnon (1942) 20 Cal.2d 83.

Yubacon is a highly qualified local contractor that has performed work for the County for years. Yubacon has assembled a highly qualified team for this project that looks forward to working with the County and serving the taxpayers.

We expect that the County will examine the facts and legal issues carefully and grant this bid protest. Yubacon provided the County with the lowest responsive bid, and should be allowed to perform the contract. Should the County wish to consider awarding the contract to another bidder, we request that the County hold a full, open hearing to address the issues in this matter. Because our office is in Southern California, we ask that the County provide at least forty-eight hours notice of the date and time of the hearing to allow us to make the necessary arrangements.

We look forward to hearing from you.

Respectfully,

WATT, TIEDER, HOFFAR  
& FITZGERALD, L.L.P.

  
Ali Salamirad

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