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July 12, 2024

APPEAL FROM BID PROTEST FINDINGS

Via Email

Board of Supervisors
385 N. Arrowhead Avenue
San Bernardino, CA 92415
cob@sbcounty.gov

RE: BAKER BOULEVARD AND PARK AVENUE
NO.: TX1814

Dear Board of Supervisors:

Please be advised, our office has been retained to represent Onyx Paving Company, Inc. ("Onyx Paving") in the above referenced appeal from the San Bernardino County Department of Public Works' ("County") findings on Granite Construction Company's Bid Protest.

The County's decision to reverse its prior finding that Granite's bid was non-responsive and now not only consider Granite's bid, but to change course and award the bid to Granite violate the Competitive Bidding requirements of the California Public Contract Code. Granite's bid was never publicly opened and read as required by Public Contract Code Section 10304 and the Bid Documents and thus, cannot be awarded the Contract.

Additionally, Onyx maintains that Granite's bid is non-responsive and was properly disqualified and Onyx was determined to be the lowest bidder. However, if the County now wants to retroactively deem Granite's bid responsive, the only proper course is to reject all bids and re-bid the Project.

I. AWARDING THE CONTRACT TO GRANITE VIOLATES THE COMPETITIVE BIDDING REQUIREMENTS

Pursuant to the Notice to Bidders and Special Provisions for Construction (“Bid Documents”) the Board of Supervisors of San Bernardino County were to receive sealed proposals until 10:00A.M., Thursday, June 27, 2024. The Contracts Division provided public access to bid openings via webcast or teleconference. (See Exhibit 1 – GoToMeeting Information Sheet.)

On June 27, 2024 at 2:00 P.M. Onyx Paving attended the bid opening via the GoToMeeting link. At that time, Granite’s bid was determined non-responsive and was not publicly opened or read. Onyx also attempted to go on the ePro website to view Granite’s bid and the original bid solicitation is no longer on the site. As such, Granite’s bid is not available for public viewing.

1. Granite’s bid should be rescinded because the County of San Bernardino deviated from standard procedure when it circumvents Sec. 10304 of the California Public Contracts Code and awarded bid to Granite, whose bid was compliant with Sec. 10304

California Public Contracts Code Sec. 10304 states:

All bids shall be sealed and shall be publicly opened and read at the time set forth in the solicitation, provided any person present desires the bids to be so read. No bids shall be considered which have not been received in the office of the department prior to the closing time for bids set forth in the invitations to bids. The department shall maintain confidentiality regarding each bid until the public opening and reading takes place.

By awarding Granite’s bid, which was disqualified and, pursuant to Sec, 10304, never “publicly opened and read at the time set forth in the solicitation”, the County of San Bernardino is deviating from standard procedure so is in itself a sufficient reason to nullify its award to Granite.

2. The County of San Bernardino’s decision to circumvent Sec. 10304 deviates from standard bidding requirements and gave Granite an unfair advantage

In *Eel River Disposal & Resource Recovery, Inc. v, County of Humboldt*, the Court of Appeal reversed the trial court ruling and found that the County’s decision to modify its bidding recommendations after it already accepted bids because it “deviated from strict compliance with applicable bidding requirements and gave the successful bidder an unfair advantage” because the

County's modifications. (*Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt*, (2013) 221 Cal.App.4th 209.¹)

The court in *Eel* emphasized that “the letting of public contracts universally received close judicial scrutiny” (quoting *Konica Business Machines USA v. Regents of University of California* 206 Cal.App3d at p. 456,) because deviations from strict adherence to competitive bidding standards may facilitate corruption or extravagance, or affect the amount of bids or the response of potential bidders. *Id* (citing *Schram Construction, Inc. v. Regents of University of California*, 187 Cal.App.4th at p. 1061; *Charles L. Harney, Inc. v. Durkee* (1951) 107 Cal.App.2d 570, 578.)

Here, Granite's bid was never publicly opened or read at the time of bid opening and is not available on the ePro website, thus, to award the contract to Granite would violate the competitive bidding requirements and may give the impression of impropriety.

II. GRANITE'S BID WAS NON-RESPONSIVE WAS PROPERLY DISQUALIFIED

Granite acknowledges in its Bid Protest that it “hand-delivered its bid for this Project; it did not use ePro.” Then, Granite admits that the Bid Bond was electronically signed by Isabel Barron.

Granite argues that its surety and notary's electronic signatures must be accepted as the County “chose to accept electronic signatures for bid documents” pursuant to Special Provision §2-1.33. This is misleading.

Special Provision §2-1.33 specifically relates to bids submitted via ePro. Indeed, that sections provides:

2-1.33, “BID DOCUMENT COMPLETION AND SUBMITTAL”:

ePRO

Bids must be received by the designated date and time. An electronic bid can be submitted through the San Bernardino County Electronic Procurement Network (ePro) <https://epro.sbcounty.gov/epro/>. Submittals in ePro will be opened from the system's “encrypted lock box” and evaluated as stated in this solicitation. If the bid is submitted through ePro, the bid may also be withdrawn OR retrieved, adjusted, and re-submitted by the bidder at any time prior to the scheduled deadline for submission of the bid. Paper responses

¹ The court in *Eel* imputed the requirements set forth in Sec. 10506.4(c) which applies to the Regents of University of California to apply to all public bidding requirements, requiring entities awarding bids to “adopt and publish procedures and required guidelines for evaluating the qualification of the bidders that ensure the best value selections... are conducted in a fair and impartial manner.” § 10506.4. Bidding details of program, CA PUB CONT § 10506.4.

will also be accepted at the location identified in the solicitation and can be withdrawn at any time prior to the scheduled deadline for submission of the bid. **If the bid is submitted through ePro, the bidder acknowledges that its electronic signature is legally binding.**

(Emphasis added.)

The key here being, only if the bid is submitted through ePro. Granite's bid was, admittedly, not.

Nevertheless, even if Granite was to submit its bid through ePro, section 2-1.34 "Proposal Guaranty" clearly states (In Bold and Underlined) the requirements of the original bid security namely;

If the bid is submitted through the ePro, bidder shall scan the bid security (bid bond) and submit the scanned copy with the bid submittal in ePro. **In addition, bidder shall mail or submit in person the original bid security, in a separate sealed envelope labeled "Bid Bond" with the title of the work and the name of the bidder clearly marked on the outside... Any bid/proposal that fails to include an original paper submission of the bidder's security in a separately sealed mailed or otherwise submitted envelope shall be considered nonresponsive.**

(Emphasis in original.)

Here, Granite attempts to circumvent the original bid bond requirements, by bootstrapping into an unrelated provision. Nowhere in the bid documents does it say that an electronic signature can replace the original bid security. Indeed, Granite never adhered to the County of San Bernardino's requirements of using ePro. When looking at the "Notice of Bidders", the meaning, understanding, and comprehension of "electronic signature" within the "Notice of Bidders" is attached to the use of ePro. The stipulation and requirement of ePro does not undermine the competitive bidding process.

Granite's submission of an electronic signature was not compliant with the requirements set forth by the County of San Bernardino and therefore, is "non responsive" and was properly disqualified.

III. IN THE ALTERNATIVE, THE CONTRACT SHOULD BE SET-ASIDE AND RE-BID

Even where the statutory provisions setting forth the mode of contracting are silent as to the right to reject all bids, the courts will recognize that right where the invitation for bids contains an express reservation of the right to reject all bids. (*Laurent v. City and County of San Francisco*)

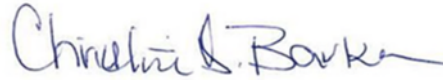
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(1950) 99 Cal. App. 2d 707.) Where a public body has expressly reserved the right to reject all bids, it may do so for any reason and at any time before it accepts a bid, and the courts will not interfere with the exercise of that right however arbitrary or capricious. (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal. App. 3d 145.)

Based upon the above, Onyx Paving respectfully requests the County withdraw its Findings on Granite's Bid Protest and reinstate the Notice of Intent to Award the Contract to Onyx Paving or, in the alternative, set aside the contract and re-bid the project.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP

A handwritten signature in blue ink that reads "Christine D. Barker". The signature is written in a cursive style with a long horizontal flourish at the end.

Christine D. Barker

CDB

EXHIBIT 1



Department of Public Works

- Flood Control
- Operations
- Solid Waste Management
- Special Districts
- Surveyor
- Transportation

www.SBCounty.gov

Brendon Biggs, M.S., P.E.
Director

Noel Castillo, P.E.
Assistant Director

Trevor Leja
Assistant Director

PUBLIC BID OPENINGS

Effective Immediately and Until Further Notice, the Contracts Division will provide public access to bid openings via webcast or teleconference following the instructions below.

As scheduled in the Project Bid document and at
<https://epro.sbcounty.gov/epro>

To view bid openings/pre-bid meetings for all projects:

<https://global.gotomeeting.com/join/434769549>

To listen to the audio portion of the bid opening:

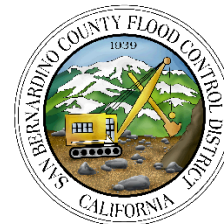
1. Dial: (872) 240-3212
2. Access Code: 434-769-549
3. To exit the teleconference, simply hang up your phone.

Bid Results

Will be posted within 48 hours

To obtain Bid Results, go to the County's Procurement website at:

<https://epro.sbcounty.gov/epro>



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