

August 1, 2024

via electronic mail to:
BoardMeetingComments@cob.sbcounty.gov

County of San Bernardino
Board of Supervisors
385 N. Arrowhead Avenue
San Bernardino, CA 92415

RE: Bid Opening: **June 27, 2024**
Project: **Baker Boulevard and Park Avenue (the “Project” or “Contract”)**
Baker Blvd from 0.86 miles West of SH127 to 2.60 miles East;
Park Ave from Baker Blvd to 0.25 miles North
Work Order: **TX814**
Area: **Baker**
Road No.: **150500-010; 640175-010**

SUBJECT: **Written response regarding Onyx Paving letter and public comments**

In accordance with the provisions outlined for public comments to the Board of Supervisors (“Board”), Granite Construction Company (“Granite”) submits this response to the public comments made by Onyx Paving Company, Inc. (“Onyx”) in a July 12, 2024 letter to the Board.

Granite would like to reaffirm the points made in our original protest letter dated July 2, 2024 and the County of San Bernardino’s (“County”) response dated July 10, 2024 (both attached for reference). Nothing contained within the letter submitted by Onyx has rendered any point in our original letter invalid. Further, we would like to draw attention to several points made within the letter submitted by Onyx Paving.

There are several instances within Onyx’s letter, where they allege the bid “was not publicly opened,” which is not true. Granite’s bid was publicly opened along with the other bids received for that Project. San Bernardino County opened the bid and verified the contents publicly.

Part of Onyx’s argument is that the bid was not available for public viewing. As a matter of practice, public agencies generally do not make the bid documents submitted by bidders available for viewing on the internet. With that said, these are public documents, which can be requested per the provisions of Government Code § 6250. Apparently, Onyx chose not to avail itself of this opportunity. Resting on its failure to timely requests the documents at issue, Onyx now implies there is something underhanded at play, suggesting an “impression of impropriety.” This allegation is an unfounded and simply not the case.

Onyx cites California Code, Public Contract Code - PCC § 10304 contending the County deviated from procedure. Nothing contained within PCC § 10304 mandates that bids must, without a request from the public, be read publicly. PCC § 10304 clearly states that they are read “provided any person present desires the bids to be so read.” The County did not violate any provisions within this code when the bids were accepted by the Agency.

Onyx cites *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt*. *Eel River* is a non-construction, garbage disposal company bid solicitation case that involved a bid process which awarded the contract to the entity scoring the highest under certain criteria set forth in a competitive RFP process. Such was not the bid process here. *Eel River* holds that under “competitive bidding,” of the “qualified” or “responsible” bidders, the awarding entity is bound under Pub. Resource Code § 49201, subd. (c) to award the contract to the lowest bidder. In *Eel River*, the county board not only changed certain criteria after the bids were unsealed, but it did so by introducing a previously unknown bid factor that disadvantaged all bidders except the awardee. Such facts do not exist here. There was no change of any “factors” and there was no change in the bid instructions or responsiveness criteria. Further, there was no unfair advantage provided to Granite, and Granite’s electronic signatures in no way disadvantaged the other bidders, including Onyx.


Onyx repeatedly states that the bid bond was not “original.” As expressed in Granite’s July 2, 2024 letter, Granite’s bid was an original, hand-delivered, legally binding and valid document. Further, Granite complied with the instructions exactly as written.

To conclude, as outlined in our July 2, 2024 letter, Granite complied with the bidding instructions and is legally enforceable, as was acknowledged in the County’s July 10, 2024 letter. As such, we ask the Board to continue to move forward with award to Granite as recommended by County staff.

If there are any questions, please don’t hesitate to reach out to me at (760) 578-3138 or joe.richardson@gcinc.com. Thank you for your attention to this matter.

Sincerely,

GRANITE CONSTRUCTION COMPANY



Joseph P. Richardson
Regional Chief Estimator

cc: Aaron Gest, Esq., County Counsel (COSB)
Andy Silao, P.E., Chief Contracts Division (COSB)
Jordy Murray, Deputy General Counsel (Granite)

July 2, 2024

via FedEx Overnight Mail

via electronic mail to:

Andy Silao, Engineering Manager, asilao@dpw.sbcounty.gov
Aaron Gest, Esq., County Counsel, aaron.gest@cc.sbcounty.gov

County of San Bernardino
Department of Public Works
825 E. Third Street, Room 147
San Bernardino, CA 92415

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SUBJECT: **Objection to Declaration of Non-Responsiveness and Bid Protest of Granite Construction Company**

In accordance with Section 3-1.04 Contract Award, Granite Construction Company (“Granite”) submits this objection and protest to the County of San Bernardino (“County”), in response to the County’s determination that Granite’s bid for the above-referenced Contract is non-responsive. To the contrary, as described herein, Granite’s bid was responsive—it was complete, accurate, and authentic; and as the lowest bidder, Granite must be awarded this Contract. Award to any other bidder would be illegal.

Grounds for Bid Protest

1. **Background Facts**

Since the COVID-19 lockdowns of 2020, Granite has used, company-wide, electronic signatures and notaries within its bid documents of over 20,000 bids. This includes the submittal of seven (7) prior bids to the County.¹ None of these bids were not read or found to be non-responsive due to the use of the electronic signatures and notaries, until the County’s bid opening on June 27, 2024.

Pursuant to the County’s special provisions for the Project, bidders were required to either submit bids through ePro or hand deliver the bids to the County. (Special Provision, § 2-1.33.) All bidders were

¹ Projects:

- (1) REBID Santa Ana River Trail Phase III Bid Date: 9/1/22;
- (2) Project Name: REBID Needles Highway Segment 1B Bid Date: 6/30/22
- (3) Santa Ana River Trail - Phase III Bid Date: 4/21/22
- (4) Needles Highway - Segment 1B Bid Date: 4/14/22
- (5) West Channel Improvements Project Bid Date: 3/17/22
- (6) Barstow Landfill Phase 1B Liner Construction Bid Date: 1/20/22
- (7) Snowdrop Road Project Bid Date: 2/16/21

required to submit the original bid security/bid bond either via mail or hand delivery. (Special Provision, § 2-1.34.) However, the Special Provisions did not state that the original bid security/bid bond could not have electronic signatures. (*Ibid.*) Further, the Special Provisions state that “the bidder acknowledges that its electronic signature is legally binding.” (Special Provision, § 2-1.33.)

Granite hand-delivered its bid for this Project; it did not use ePro. Joseph P. Richardson, Regional Chief Estimator, an authorized signer on behalf of Granite, signed the bid documents by hand. Mr. Richardson’s signature on the furnished Bid Bond was acknowledged by Kelli Osborn, Notary Public. Ms. Osborn witnessed Mr. Richardson’s signature by hand, signed the Acknowledgment by hand, and printed her notary seal using a State-compliant rubber notary stamp.

As Attorney-in-Fact and on behalf of the surety, Travelers Casualty and Surety Company of America, Isabel Barron electronically signed the Bid Bond; and she applied the surety-provided electronic corporate seal. Ms. Barron’s signature was witnessed by Maria Gomez, Notary Public. Ms. Gomez signed the Acknowledgment of Ms. Barron’s signature electronically and printed her notary seal using a digital stamp provided by an authorized California vendor.

Granite was the low bidder for the Project. However, the County wrongly determined Granite’s bid was non-responsive. Granite objects to that erroneous determination and protest award of the Project to any other bidder as illegal.

2. Basis of County’s Non-responsive Determination

The County determined Granite’s bid was non-responsive based on the following: (1) the authenticity of the electronic signature(s); (2) the use of electronic notary signature(s); and (3) no observed embossing of the notary seal on the Bid Bond. However, the County’s determination is without merit, as the Bid Bond submitted with Granite’s bid is an original, Granite’s electronic signatures are authentic, use of electronic notaries are authorized in California, and there is no requirement that a notary seal be embossed.

3. Basis of Objection and Protest and Relevant Legal Authorities

a. The Surety’s and Notary’s Electronic Signatures Are Authentic

Pursuant to Government Code section 16.5, a public entity has the option to accept electronic signatures on communications. “A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.” (Civ. Code, § 1633.7, subd. (a).) “If a law requires a signature, an electronic signature satisfies the law.” (Civ. Code, § 1633.7, subd. (d).) “An . . . electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner. . . .” (Civ. Code, § 1633.9, subd. (a).) For instance, an electronic signature is authentic when using DocuSign®, a company used to electronically sign documents in compliance with the federal Electronic Signatures in Global and National Commerce Act. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 845.)

Here, the County chose to accept electronic signatures for bid documents when stating in the Special Provisions that “the bidder acknowledges that its electronic signature is legally binding.” (Special Provision, § 2-1.33.) Further, the Special Provisions addressing the bid security only require that the bidder provide the original bid security to the County. It does not state that the bid security cannot have electronic signatures. Because the County explicitly agreed to accept electronic signatures, Granite’s use of an electronic signature on its Bid Bond cannot form the basis for a determination of non-responsiveness.

In addition, the electronic signatures on Granite’s Bid Bond are authentic, as declared under penalty of perjury by Ms. Gomez. Indeed, Ms. Gomez declared under penalty of perjury that Isabel Barron personally appeared before Ms. Gomez and provided “satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument...” Thus, Ms. Gomez’s acknowledgement under penalty of perjury that Ms. Barron’s signature is authentic satisfies the requirements of Civil Code section 1633.9 in authenticating electronic signatures.

b. Electronic Notary Signatures Are Permitted Under California Law

California notaries public are authorized under current law to perform electronic notarizations if all the requirements for a traditional paper-based notarial act are met. (See California Secretary of State website.)² This requires an affiant to appear personally before a notary public, the notary public administer an oath or affirmation to the affiant, the notary public make a determination that the affiant is the person executing the documents, and a signature of the affiant in the presence of the notary. (Gov. Code, § 8202.)

Here, Ms. Barron appeared personally before Ms. Gomez, Ms. Gomez administered the oath to Ms. Barron, and Ms. Barron electronically signed the Bid Bond in the presence of Ms. Gomez. Thus, the electronic notarization met all requirements of a traditional paper based notarial act and is valid. Accordingly, the County’s determination of non-responsiveness based on the use of an electronic notary is without merit and contrary to California law.

c. There Is No Requirement for a Notary Seal to be Embossed

A notary’s seal may be “affixed to a document” provided the “name of the notary, the State Seal, the words ‘Notary Public,’ and the name of the county wherein the bond and oath of office are filed, and the date of the notary public’s commission expires” appear on the seal. (Gov. Code, § 8207.) The seal “shall be affixed by a seal press or stamp that will print or emboss a seal which legibly reproduces under photographic methods the required elements of the seal.” (*Ibid.*) There is no requirement that a notary’s seal must be embossed. Further, even if the notary seal was defective, which it is not, the “failure to affix a seal does not affect the validity of any instrument.” (Corp. Code, § 207, subd. (a).) Therefore, the printed seal on Granite’s Bid Bond meets the requirements for a notary seal and cannot form the basis for determining Granite’s bid is non-responsive.

² “California notaries public are authorized under current law to perform electronic notarizations as long as all the requirements for a traditional paper-based notarial act are met, including the use of a seal for all but two specific documents used in real estate transactions.” (California Secretary of State, <https://www.sos.ca.gov/notary/customer-alerts#:~:text=California%20notaries%20public%20are%20authorized,requires%20a%20person%20to%20appear.>)

4. The County May Waive the Alleged Defects

California law only precludes a bidding entity from waiving any bid defect if the defect could either: (1) have affected the bid price; or (2) afforded the bidder an advantage over its competition. (*Valley Crest Landscape, Inc. v. City Council*, 41 Cal. App. 4th 1432, 1441.) Here, neither element is met. Granite's use of electronic signatures and seals has absolutely no effect on the bid price. Further, such electronic signatures and seals afforded Granite no competitive advantage over the other bidders. As such, to the extent the County determines such electronic records are defects (which they are not), such defects may be waived under the standard California waive-ability test.

5. Relief Required

For the reasons set forth above, and so as to avoid any defect in the bidding process caused by the County, Granite respectfully requests the County accept Granite's bid, determine it to be responsive, and award the Contract to Granite, as the lowest responsive and responsible bidder. Award to any other bidder in these circumstances would be illegal and no payment could be made to any other bidder except as allowed under Public Contract Code section 5110. A copy of this letter is being sent to the second bidder per the specifications and to apprise it of the risk of an illegal award. Granite requests notice of any and all County public meetings where this matter will be considered. Thank you for your prompt attention to this important matter.

Sincerely,

GRANITE CONSTRUCTION COMPANY

A handwritten signature in blue ink, appearing to read "J. Richardson".

Joseph P. Richardson
Regional Chief Estimator

cc: 2nd Low bidder, Onyx Paving Company



Department of Public Works

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

www.SBCounty.gov

Noel Castillo, P.E.
Director

David Doublet, P.E.
Assistant Director

VIA EMAIL

July 10, 2024

File: Baker Blvd. and Park Ave
W.O. No. TX1814

Mr. Joseph P. Richardson, Regional Chief Estimator
Granite Construction Company
38000 Monroe Street
Indio, CA 92203

**RE: BAKER BOULEVARD AND PARK AVENUE, WORK ORDER NO. TX1814
RESPONSE TO BID PROTEST – GRANITE CONSTRUCTION COMPANY**

Dear Mr. Richardson:

The San Bernardino County Department of Public Works (County) has received and reviewed the timely bid protest submitted by Granite Construction Company ("Granite") regarding the determination of non-responsiveness for Granite's bid on the Baker Boulevard and Park Avenue Project. In addition, the Department has received from Onyx Paving, another bidder for the Project, an email opposition to Granite's bid protest asserting why the Granite bid should be found to be non-responsive. After a thorough evaluation of the bid protest, opposition, facts, and relevant legal standards, we have reached the following findings and determinations.

Review, Findings, and Determinations.

1. Bid Submission Compliance:

- Special Provisions, Section 2-1.34, "Proposal Guaranty," of the bid documents required that, "the bidder shall mail or submit in person the original bid security, in a separate sealed envelope [to the Department] before the time set for the opening of bids."
- This section further provided that, "[a]ny 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."

2. Bid Submission Details:

- On June 27, 2024, prior to the date and time set for the opening of bids, Granite hand-delivered its bid with hand-signed documents and an electronically signed Bid Bond, which was authenticated by a notary. The submission included a bid security.
- The Special Provisions did not prohibit electronic signatures or require wet signatures. The provisions also stated that "the bidder acknowledges that its electronic signature is legally binding." (Special Provision, § 2-1.33.)

BOARD OF SUPERVISORS

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3. Legality of Electronic Signatures and Notarizations:

- According to Government Code section 16.5 and Civil Code sections 1633.7 and 1633.9, electronic signatures are legally binding and cannot be denied legal effect.
- Electronic Notary Signatures are permitted under California law if all traditional notarial act requirements are met (Gov. Code § 8202).

4. Findings:

- Granite's bid security was submitted timely, notarized, and the electronic notarization appears to have met all requirements of a traditional paper-based notarial act.
- The electronic signatures on Granite's Bid Bond appear to be authentic and valid under California law.

5. Opposition by Onyx Paving to Granite's Bid Protest:

- Onyx Paving submitted an email opposition to Granite's bid protest, arguing that Granite's protest is with merit and was correctly deemed to be non-responsive. In support of its argument, Onyx Paving cites to the Special Provisions, Section 2-1.34, "Proposal Guaranty," quoted above. Other than citation to Special Provisions, Section 2-1.34, Onyx Paving provided no further argument or factual basis in support of the finding that Granite's bid was non-responsive.

Conclusion:

After a detailed review and evaluation, the County finds that Granite's bid is **responsive**. Granite complied with the bidding instructions by timely providing an original bid security, in a separate sealed envelope, and meeting all legal requirements for electronic signatures and notarizations.

Final Determination:

Granite's bid submission, including the electronically signed and notarized original Bid Bond, satisfies the requirements of the Special Provisions. Therefore, Granite's protest is accepted, and its bid is to be considered responsive. Accordingly, after considering Granite Construction Company's bid as responsive we have determined that you are the lowest bidder at \$3,869,000.

Should you have any questions, please contact me at asilao@dpw.sbcounty.gov or (909) 387-7920.

Sincerely,



ANDY SILAO, P.E., Chief
Contracts Division

WL:mb

cc: Noel Castillo, Director, Public Works
Mervat Mikhail, Deputy Director, Transportation
Onyx Paving Company