



CITY OF COSTA MESA

CALIFORNIA 92628-1200

P. O. BOX 1200

FROM THE OFFICE OF THE DIRECTOR, DEPARTMENT OF PUBLIC SERVICES

Via Email and Certified Mail

September 10, 2020

Farid Soroudi, President
 Environmental Construction, Inc.
 21550 Oxnard Street, Suite 1060
 Woodland Hills, California 91367

Email: estimating@environcon.com

SUBJECT: LIONS PARK PLAYGROUND IMPROVEMENTS, CITY PROJECT NO. 20-15 – NOTICE OF REJECTION OF BID PROTEST

Dear Mr. Soroudi:

The City of Costa Mesa (“City”) received the bid protest letter submitted by Environmental Construction, Inc. (“ECI”) against the bids submitted by Handy Industrial (“Handy”), Act 1 Construction, Inc. (“Act 1”) and RSB Group, Inc. (“RSB”) on September 3, 2020 for the City of Costa Mesa Lions Park Playground Improvement Project No. 20-15 (the “Project”). In addition, your letter apparently attempts to protest the Notice Inviting Bids (“Notice”) itself. For the reasons set forth below, following City staff’s review and analysis of the protest and, in consultation with legal counsel, I have determined that: a) your protest itself does not conform to the specified bid protest procedures; and b) even if it did so conform, each of above listed bidders submitted responsive bids. Your bid protest is accordingly rejected pursuant to the procedures set forth in the Notice. Therefore, the City will move forward with awarding the Project to Handy as the lowest responsible bidder.

Legal Standard

California Public Contract Code section 20162, which governs the City’s award of the contract for this Project, requires that the contract be awarded, if at all, to the lowest responsible bidder. A bid is responsive if it promises to do what the bidding instructions demand. (See *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.*, 146 Cal. App. 4th 757, 764 (5th Dist. 2007).) Responsiveness is determined from the face of the bid. (See *Great West Contractors, Inc. v. Irvine Unified School Dist.*, 187 Cal. App. 4th 1425, 1452-53 (4th Dist. 2010).) A bid that substantially conforms to a call for bids may, although not strictly responsive, be accepted if the variance is inconsequential, meaning the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders. (See *Ghilotti Construction Co. v. City of Richmond*, 45 Cal. App. 4th 897, 904 (1st Dist. 1996).) An actual competitive advantage arises only when a bid defect establishes an actual ground for a successful bidder to withdraw its bid

Environmental Construction, Inc.

without incurring liability under its bond. (See *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, 223 Cal. App. 4th 1181 (1st Dist. 2014).)

Violation of Bid Protest Procedures

ECI has submitted no information in its protest that it has complied with the following procedures of which provides in relevant part:

The party filing the protest shall concurrently transmit a copy of the initial protest document and any attached documentation to all other parties with a direct financial interest which may be adversely affected by the outcome of the protest. Such parties shall include all other Bidders or proposers who appear to have a reasonable prospect of receiving an award depending upon the outcome of the protest. (Notice, B-5, Item No. 23.)

In addition, the City has received no response from any other bidder, which is further indicia that they did not receive notice of your protest. Accordingly, your protest is rejected in its entirety for your failure to properly provide notice to the other bidders, as specified.

Purported Defects in the Notice Inviting Bids

You have provided no legal authority or facts in support of your apparent protest against the form of the Notice itself. Your letter alleges that "the City's failure to provide a section to list the scope of work for the designated subcontractors provided an opportunity for Act 1 and the other bidders to bid shop and bid peddle." Regardless of the form of the Proposal and any purported defects therein, all bidders are required to comply with the relevant requirements of the Public Contract Code.

Bid Submitted by Handy Industrial

Any alleged defects in Handy's bid would be inconsequential because they would not have affected the amount of the bid or given Handy an advantage or benefit not allowed other bidders. Handy's bid clearly provides a base bid amount including allowances of \$1,780,000. Furthermore, even if there had been a discrepancy between the base bid amount and the unit prices, the unit price for the Bid Item No. 1 (\$1,580,000), the unit price for the Bid Item No. 2 (\$125,000.00), and the unit price for the Bid Item No. 3 (\$75,000.00) totals \$1,780,000.00, which controls the amount of the bid. (See Notice, P-1b.) In addition, the bidders list for the subcontractors was properly submitted by Handy on August 31, pursuant to the requirement of the Notice. (See Notice, P-5a.)

Bid Submitted by Act 1 Construction, Inc.

Similarly, any alleged defects in Act 1's bid are inconsequential because they would not have affected the amount of the bid or given Act 1 an advantage or benefit not allowed other bidders. Even if there had been a discrepancy between the amounts expressed in writing and numerals for their listed total bid, the unit price – which totals \$1,827,236.93 –

Environmental Construction, Inc.

controls the amount of the bid. (See Notice, P-1b.) Accordingly, Act 1 would not be able to withdraw their bid even if they requested such, which they have not. In addition, like Handy, the bidders list for the subcontractors was properly submitted by Act 1 and received by the City on September 2nd, pursuant to the requirement of the Proposal. (See Notice, P-5a.) Act 1's bid substantially conforms to the terms of the Notice.

Bid Submitted by RSB Group, Inc.

Similarly, the alleged defects in RSB's bid are inconsequential because they would not have affected the amount of the bid or given RSB an advantage or benefit not allowed other bidders. RSB's bid clearly provides a base bid amount including allowances of \$1,829,000. Furthermore, even if there had been a discrepancy between the base bid amount and the unit prices, the unit price for the Bid Item No. 1 (\$1,629,000), the unit price for the Bid Item No. 2 (\$125,000.00), and the unit price for the Bid Item No. 3 (\$75,000.00) which totals \$1,829,000 controls the amount of the bid. (See Notice, P-1b.) Accordingly, RSB would not be able to withdraw their bid even if they requested such, which they have not.

As outlined above, Public Contract Code section 20162 requires that the City award the contract for this Project to the lowest responsible bidder. City staff has reviewed Handy's bid and determined that it is responsive on its face, in that Handy's bid promises to do what the bidding instructions for this Project demand. Accordingly, I have determined that Handy's bid is responsive and that Handy is the lowest responsible bidder. Therefore, the City rejects ECI's protest for each reason as stated above and will move forward with awarding this contract to Handy.

Pursuant to this Notice my decision is final, and is not subject to the appeal procedures set forth in Chapter IX, Title II of the Costa Mesa Municipal Code. (See Notice, B-5, item No. 23.) Thank you for your interest in this Project. The Project is scheduled to be awarded by the City Council on September 15, 2020 via Zoom and can be accessed with the following information:

Please click the link below to join the webinar:

<https://zoom.us/j/94504846284?pwd=Q1FBMGILZkZJRkdKNVZGakJxbmZ0QT09>

Or sign into Zoom.com and "Join a Meeting"

Enter Webinar ID: 945 0484 6284/ Password: 570950

- If Zoom is not already installed on your computer, click "Download & Run Zoom" on the launch page and press "Run" when prompted by your browser. If Zoom has previously been installed on your computer, please allow a few moments for the application to launch automatically.
- Select "Join Audio via Computer."
- The virtual conference room will open. If you receive a message reading, "Please wait for the host to start this meeting," simply remain in the room until the meeting begins.
- During the Public Comment Period, use the "raise hand" function located in

Environmental Construction, Inc.

the participants' window and wait for city staff to announce your name and unmute your line when it is your turn to speak. Comments are limited to 3 minutes, or as otherwise directed.

Participate via telephone: Call: 1 669 900 6833
Enter Webinar ID: 945 0484 6284/ Password: 570950

During the Public Comment Period, press *9 to add yourself to the queue and wait for city staff to announce your name/phone number and press *6 to unmute your line when it is your turn to speak. Comments are limited to 3 minutes, or as otherwise directed.

Please feel free to contact the undersigned if you have any further comments or questions.

Sincerely,



Raja Sethuraman
Public Services Director
City of Costa Mesa

Cc: City Clerk
Contract Administrator
City Attorney's Office
Handy Industrial
Environmental Construction, Inc.
RSB Group, Inc.

Attachment 1: ECI Construction Bid Protest dated September 3, 2020

ENVIRONMENTAL CONSTRUCTION, INC.

General Engineering Contractors
21550 Oxnard Street, Suite #1060
Woodland Hills, CA 91367
818-449-8920

September 3, 2020

Raja Sethuraman
Public Services Director
City of Costa Mesa
77 Fair Drive,
Costa Mesa, California

Project: Lions Park Playground Improvements
Project No.: 20-15

Subject: Environmental Construction, Inc.'s Bid Protest

Mr. Sethuraman,

Please allow this letter to serve as Environmental Construction, Inc.'s ("ECI") protest to the City of Costa Mesa's ("the City") Bid Proposal ("Proposal") and to the bids Handy Industrial, Act 1 Construction, Inc. ("Act 1"), and RSB Group, Inc. ("RSB") submitted for the Lions Park Playground Improvements Project, No. 20-15 (the "Project"). The City's Proposal is in violation of the California Public Contract Code Section 4106. Additionally, Handy Industrial, Act 1, and RSB's bids failed to comply with the City's Project specifications. Therefore, ECI requests that all bids be rejected and the Project be re-bid.

The nature of this protest revolves around the City's violation of the California Public Contract Code Section 4106. The City's Proposal includes a page titled "Designation of Subcontractors," which requires a prime contractor to specify only one subcontractor for each portion of the work to be performed under the contract. However, the table provided by the City on this same page did not include a section in which a prime contractor could identify a subcontractor's scope of work. Public Contract Code Section 4106 states that, in the event "a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of one percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself."¹ Here, Handy Industrial, Act 1, and RSB failed to designate only one subcontractor for certain scopes of work. Handy Industrial listed Bid Item Numbers that were not provided by the City, and, because the City's Proposal only included three Bid Items, Act 1 and RSB listed Item Number 1 for every subcontractor. The City's failure to provide a section to list the scope of work for the designated subcontractors provided an opportunity for Act 1 and the other bidders to bid shop and bid

¹ Pub. Contract Code, § 4106

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peddle. Indeed the intent behind Section 4106 was to eliminate this possibility and to provide the public the full benefits of fair competition.²

Furthermore, Handy Industrial's bid was non-responsive and should be rejected due to its failure to comply with the City's strict requirements. On the Proposal Schedule form, Handy Industrial did not provide a Total Base Bid Amount. Therefore, Handy Industrial's Total Base Bid Amount must be designated as \$0, thus, making the Total Base Bid Including Allowances \$75,000. This is a material error that allows Handy Industrial to withdraw its bid and gain an unfair advantage over the other bidders. (See *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432). Handy Industrial's failure to provide a Total Base Bid Amount also makes its bid non-responsive as per the Project specification that, "All blanks in the bid form must be appropriately filled in." Lastly, although Handy Industrial provided a City of Costa Mesa Bidder's List form ("Bidder's List") for itself, it failed to provide a Bidder's List for each of its subcontractors, as required by the City. Thus, Handy Industrial's bid does not comply with the strict requirements of the Project specifications.

Similarly, Act 1's bid was non-responsive and should be rejected due to its failure to comply with the City's strict requirements. On the first page of the Proposal, Act 1 wrote in words, "One million eight hundred twenty-seven thousand two hundred twenty-six dollars," but the figures it provided above show \$1,827,236. Therefore, Act 1 has the ability to withdraw its bid due to error and gain an unfair advantage over the other bidders. (See *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432). Act 1 was also noncompliant with the City's requirements that the Total Amount for Base Bid including Allowances be written entirely in words because it used numbers to notate ninety-three (93) cents on both the first page of the Proposal and on the third page of the Proposal Schedule. Additionally, Act 1 failed to provide the Bidder's List form for each of its subcontractors although it provided one for itself. Consequently, Act 1's bid does not comply with the strict requirements of the Project specifications.

Lastly, RSB's bid was also non-responsive and should be rejected due to its failure to comply with the City's strict requirements. On the Proposal Schedule, RSB listed the Total Base Bid Amount as \$1,629,000, making its Total Base Bid Including Allowances \$1,704,000 instead of the listed \$1,829,000. Again, this is a material error that allows RSB to withdraw its bid and gain an unfair advantage over the other bidders. (See *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432). Thus, RSB's bid does not comply with the strict requirements of the Project specifications.

As you may know, any defect in a contractor's bid which grants it an unfair advantage over other bidders must be deemed non-responsive. Accordingly, ECI requests that the City reject Handy Industrial, Act 1, and RSB's bids as non-responsive, reject all other bids for this Project, and re-bid the Project due to the City's violation of the California Public Contract Code

² Pub. Contract Code, § 4101

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Section 4106. Should you have any questions, please do not hesitate to contact me at (818) 449-8920 or at smaraslian@environcon.com.

Sosi Maraslian



Contract Administrator
Environmental Construction, Inc.