

FELDMAN & ASSOCIATES, INC.

ATTORNEYS AT LAW

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December 8, 2014

via Fax

Department of Transportation

John C. McMillan

Office Engineer

PO BOX 168041, MS-43

Sacramento, CA 95816-8041

Fax: 916-227-6282

Department of Transportation

Mulissa Smith

Contract Awards Branch Chief

PO BOX 168041, MS-43

Sacramento, CA 95816-8041

Fax: 916-227-6282

Re: USS Cal Builders, Inc., ("USS Cal")/Caltrans
Request to Extend Award Period and Bid Protest/Request for Hearing:
Contract No. 07-259024

Dear Office Engineer:

On behalf of USS Cal, I am submitting this Protest of the December 5, 2014, letter indicating that USS Cal's low bid on the Construction State Highway in Los Angeles County at Various Locations project (the "project"), Contract No. 07-259024, was nonresponsive and is being rejected.

The Department is in full agreement that USS Cal's bid that it submitted on bid-day was completely responsive and was the low bid. The subsequent "error," which was not an error at all, occurred four days later when USS Cal submitted its hardcopy of the DBE Commitment form just as it was instructed to do in the bid instructions.

The decision to find the DBE Commitment form nonresponsive does not change the fact USS Cal was, and is, the low bidder. The "error" was not material, nor was it an error at all, nor was it a deviation from the bid requirements.

The contract should be awarded to USS Cal.

Summary of Argument

A bid is responsive if it promises to do what the bidding instructions demand. (*D.H. Williams Const., Inc. v. Clovis Unified School Dist.* (2007) 146 Cal.App.4th 757,764, citing *Taylor Bus. Service v. San Diego Bd. of Educ.* (1987) 195 Cal.App.3d 1331.) USS Cal's bid promised to do everything the instructions asked and was completely responsive.

USS Cal fully responded to the bid and the bid instructions. Its Bid Total placed it as the low bidder. Its \$14,177,056.24 bid was \$620,199.80 less than the second low-bidder.

USS Cal further complied with the additional requirement placed on the low-bidder to submit its DBE Commitment form within four business days. It submitted that form and you received that form. That should end the inquiry into the bids and render USS Cal the lowest responsive bid.

The alleged error made by USS Cal in making it nonresponsive is that it submitted a scanned DBE form. A review of the specifications and bid instructions does not include any statement that excludes a scanned DBE Commitment form that was submitted in-person to your office. The submittal of a scanned DBE form is allowed for all of the following reasons:

1. Section 2-1.33 permits the submission of either a paper bid or an electronic bid. Therefore, the department agreed to accept non-paper, non-original submittals from anyone who opted to submit bids electronically.

2. Section 2-1.33 states in Footnote "b" of the "Bid Form Submittal" chart, that for post-bid documents relating to "bid item nos. and percentage of bid item subcontracted...", those may be faxed ("If the information is not submitted at the time of bid, fax it to (916) 227-6282.") The request for the DBE Commitment form then states in Footnote "e" on the same chart, "If not submitted at the time of bid, applicable only to the apparent low bidder, 2nd low bidder, and 3rd low bidder." Therefore, while you did specify the format of subcontractor documents, the department did not specify a format for the DBE Commitment form and therefore did not exclude scanned or faxed copies of that form. A scanned submittal of that form is therefore acceptable and responsive.

3. Additionally, Section 2-1.33 states that for **electronic** bids: "Forms to be submitted at the time of bid must be submitted as described in the Electronic Bidding Guide **or faxed....**"

This means that you did accept some DBE Commitment Forms that were scanned or submitted in electronic form. Caltrans even has a whole webpage devoted to electronic bidding instructions under "Contract Awards and Services --- Electronic Bidding." A copy of that webpage is attached here as Exhibit "A." After a diligent search, I cannot find any instruction where the Department requires original forms, or non-scanned submittals, of the DBE Commitment Form. Even though you accepted scanned/electronic versions of that form from other bidders, you have determined, arbitrarily, that USS Cal may not submit a scanned or faxed copy of that form.

Therefore, your decision to deem USS Cal's scanned DBE Commitment Form nonresponsive means that you are accepting other bidders' electronically-submitted DBE Commitment forms but not USS Cal's form or bid. This decision to deem the scanned copy of the DBE Commitment form "nonresponsive" is **an arbitrary decision that in reality prefers another bidder over USS Cal as the true low bidder.**

Based on the above three points, USS Cal's bid is the lowest responsive, responsible bid.

Trivial, Immaterial Errors Should be Waived

This "error" is a trivial and immaterial error. An error in submitting a scanned copy of the DBE Commitment form does not deprive the public, the owner, or other contractors, of the value inherent in a low, responsible bid. See e.g., *Ghilloti Const. Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897 (a public entity may waive inconsequential deviations from contract specifications in a public contract bid).

The incorrect submittal of the DBE Commitment form, if you can even characterize the submittal as "incorrect," is trivial, immaterial, and should be waived. USS Cal gained no advantage by submitting a scanned or faxed copy of this form. The fact that the form was submitted after it was already determined that it was the lowest responsive responsible bidder underscores that USS Cal did not gain any advantage in the bidding process by submitting a scanned or faxed copy of this form.

The overarching purpose of our public bidding process is to eliminate fraud and abuse and to ensure the judicious use of public funds. As the California Court of Appeal has remarked, "it certainly would amount to a 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, with the hope of securing acceptance of his, a higher bid." (*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377 at 383.)

Nor could such a deviation permit USS Cal to withdraw its bid, and would also, therefore render the "error" immaterial. See *Ghilotti*, 45 Cal.App.4th at p. 912. See also *Bay Cities Paving & Grading, Inc. v. San Leandro* (January 28, 2014, A137971) ---Cal.App.4th --- [14 Cal. Daily Op. Serv. 1559].

Neither the Department nor any other bidder should be able to void USS Cal's low bid and award it to any other party based on this trivial, inconsequential, technicality.

Summary

It is clear that the public contract code and the Department's own intentions with this bid support an award of this contract to USS Cal.

As stated above, this letter serves as USS Cal's protest to your decision (attached here as Exhibit "B") to award the Contract to any contractor other than USS Cal and a request to extend the contract award period pending a hearing on this protest, and a resolution of the determination that USS Cal's bid is nonresponsive. USS Cal hereby authorizes me, as its counsel, to extend the validity of their bid beyond the thirty day contract award period, specified in section 3-1.04 of the specifications, while this protest is adjudicated.

Thank you in advance for your review of this Protest letter. Please contact me if you have any questions.

Sincerely,



Mark A. Feldman, Esq.
for FELDMAN & ASSOCIATES, INC.

Encl.: Exhibit A

Cc: Adam H. Meyers, Esq.; USS Cal Builders, Inc.

Exhibit A

12/8/2014

Caltrans - Office Engineer - Electronic Bidding

[Home](#) → [Contract Awards and Services](#) → [Electronic Bidding](#)

Electronic Bidding

Electronic Bid Opening webcast

The public opening of electronically bid projects is available via public webcast and teleconference. Please see the following webpage for further information:

http://www.dot.ca.gov/hq/esc/oe/contractor_info/ElectronicBidOpeningInstructions.pdf

First time bidding electronically?

Follow the steps below to prepare yourself for electronic bidding. It can take 7 days to be completely ready for electronic bidding, start the process as quickly as possible.

- **Is the project an electronic bidding project?**
 - On the project advertisement page the project will be labeled as "ELECTRONIC BIDDING PROJECT", also the link to order your bid book will be labeled as "Download Electronic Bid Book" on electronic bidding projects. On electronic bidding projects, bids may only be submitted to Caltrans electronically, no paper bids will be accepted for electronic bidding projects
- **Receive your Bidder ID number**
 - To receive your Bidder ID number, you must submit a request for your Bidder ID number to: Office Engineer, MS43, Department of Transportation, 1727 30th Street, Sacramento, CA, 95816-7005, or the request can be faxed to (916)227-6282. The request for Bidder ID number must be on your company letterhead, and it must contain your full legal company name, address, phone number and fax number. For faster response, include an email address to which the Bidder ID number will be sent.
- **Download the Expedite Bid software**
 - The Expedite Bid electronic bidding software can be downloaded from <https://bidx.com/ca/main>
- **Establish a Digital ID**
 - When you have received your Bidder ID number, you can begin the process to establish your Digital ID. Your Digital ID is established through Bidx.com. Follow the directions found in the [Bidx Training Center](#), or call the Bidx help desk at 1-888-352-2439 to establish your Digital ID. Your Digital ID is your electronic signature, allowing you to electronically submit your bid to Caltrans through Bidx. The Digital ID process can take several days, as notarized paperwork must be sent to Bidx before your Digital ID can be enabled.
- **Download and complete the electronic bidding form**
 - Select the "Download Electronic Bid Book" link from the Caltrans Project Advertisement website, follow the directions on each webpage, and download the electronic bid file. The electronic bid file will be named Contract#.EBS. **DO NOT CHANGE THE FILE NAME!** If you are not given an opportunity to select where to download the file to, it will most likely be downloaded to your Documents/Downloads folder. Follow the [Electronic Bidding Guide](#) to help you complete your electronic bid form.
- **Test your system, by submitting a bid**
 - When your Digital ID has been enabled you may submit a bid to Caltrans through Bidx to test your system. Upon successful bid submission, you will receive a Bid Submittal Receipt from the Bid software. This receipt indicates the time that your bid was submitted. After verifying that your system works, you may withdraw your bid, or you may submit another bid. Caltrans will only see the last bid submitted, and will not see any withdrawn bid. If you have any issues with submitting your bid, you may contact the Bid Express Help Desk at 1-(888)352-2439.

12/8/2014

Caltrans - Office Engineer - Electronic Bidding

• Electronic bidding addenda

- Electronic bidding addenda files have the form of Contract#.001, .002, .003, etc. The number indicates which addenda the file is for. Example 10-ABC123.002 is the second EBS amendment file for contract 10-ABC123
- The EBS amendment files are available for download from the same location the Addenda are posted to on the Caltrans website, in each Addenda's E-Bid folder
- Download the EBS amendment file from the Caltrans website, and save the file to the same location that the base EBS file is saved to. If you are not given the opportunity to select where to save the file to, it is most likely in your Documents/Downloads folder.
- **DO NOT CHANGE THE FILE NAME OF THE EBS, OR EBS AMENDMENT FILES!**The EBS file should have a file name of Contract#.EBS, and the EBS Amendment file should have a file name of Contract#.001, depending on which addenda it refers to
- Open the base EBS file, and a window will open indicating the changes applied by the addenda. Save the EBS file before closing the Bid software
- Detailed directions can be found at the Caltrans Electronic Bidding Training Materials website at http://www.dot.ca.gov/hq/esc/oe/electronic_bidding/oe_trainingmaterials.html

Bid Express Help Desk

The Bid Express Help Desk can be reached at 1-888-352-2439

Electronic bidding training materials are available on the [Electronic Bidding Training Materials Website](#)

F.A.Q.'s Have a question about electronic bidding? It may have already been answered at the [Electronic Bidding F.A.Q. page](#).

Electronic Bid Bonds

Electronic bid bonds can now be submitted with your electronic bid. For more information, have your surety agent contact either [SurePath](#) or [Surety 2000](#) for more information.

Energy Crisis Information

It is possible that a power outage may occur during a Bid Opening. The following is a brief description of how the Bid Opening will be conducted in the event of a power outage. Please allot an appropriate amount of time for power related delays when submitting your bids. In the event of a power outage prior to Bid Opening (12:30 PM or later):

- Bids will be accepted until the specified bid opening date and time
- No additional time will be allowed for submitting Bids
- The public reading of the bids will be postponed until 4:00 PM on the date of bid opening
- If power has not been restored by 4:00 PM on the date of Bid Opening, the Department will reschedule the opening of bids for the following day
- Bid results will be made available on the Office Engineer website, as soon as possible, after power has been restored.

In the event of a power outage during a Bid Opening:

- The last project downloaded will be read, by flashlight if necessary
- The public will be escorted out of the building by Building Security
- Any projects remaining to be downloaded, will not be downloaded until power is restored
- Bid opening will resume at 4:00 PM, if power has been restored
- If power has not been restored by 4:00 PM on the date of Bid Opening, the Department will reschedule the opening of bids for the following day

Electronic Bidding update

Caltrans has chosen the American Association of State and Highway Transportation Officials, Trns*port

12/8/2014

Caltrans - Office Engineer - Electronic Bidding

Expedite Bid software as its electronic bidding solution. Expedite is integrated with Info Tech's Bid Express Internet Bidding Service (Bidx) for the submittal of electronic bids through the internet. More information regarding Expedite Bid can be found at the Expedite product website at <https://www.infotechfl.com/>. More information regarding Bidx can be found at the Bidx website at <https://www.bidx.com> For questions regarding electronic bidding, contact the Caltrans Contract Awards Unit at (916)227-6299.

Bidding formsBidder's Bond FormSubcontractor ListCertified DVBE Summary formCaltrans Bidder DBE CommitmentCertified Small Business Listing for the Non-Small Business Preference formGood Faith Efforts Documentation

Exhibit B

STATE OF CALIFORNIA—CALIFORNIA STATE TRANSPORTATION AGENCY

EDMUND G. BROWN JR., Governor

**DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES**

OFFICE ENGINEER
P. O. BOX 168041, MS-43
SACRAMENTO, CA 95816-8041
PHONE (916) 227-6299
FAX (916) 227-6282
TTY 711
www.dot.ca.gov



*Serious drought.
Help save water!*

December 5, 2014

Facsimile: (714) 503-5805

Eric Othman, Secretary
USS Cal Builders, Inc.
8051 Main Street
Stanton, CA 90680

07-259024
07-LA-5,10,91,110,134-Var
B.O. 11/20/14

Dear Mr. Othman:

The Department of Transportation (Caltrans) received a bid submitted by USS Cal Builders, Inc. (USS Cal) for Contract No. 07-259024 on November 20, 2014. By this letter, Caltrans notifies USS Cal that its bid is nonresponsive since USS Cal did not comply with Contract Revised Standard Specifications, Section 2-1.33, BID DOCUMENT COMPLETION AND SUBMITAL, which states in part:

If the DBE commitment form is not submitted with the bid, the apparent low bidder, the 2nd low bidder, and the 3rd low bidder must complete and submit the form to the Office Engineer. The DBE commitment form must be received by the Office Engineer no later than 4:00 p.m., on the 4th business day after bid opening.

Caltrans confirms that it received a scanned copy of the DBE submittal on November 25, 2014. However, Caltrans does not accept scanned or faxed copies of this submittal.

Based on the above, Caltrans will proceed to award this contract to the lowest responsible bidder, provided that all requirements have been met.

Your attention is directed to Section 3-1.04 of the 2010 Standard Specifications. Caltrans is not obligated to offer an extension of the award period for a nonresponsive bid. Should you wish to extend your bid while resolving a nonresponsive finding, you must send your request to the Office Engineer no later than 4:00 pm, two business days prior to the expiration of your bid.

If you have any questions, please contact Mulissa Smith, Contract Awards Branch Chief, at (916) 227-6228.

Sincerely,

JOHN C. McMILLAN
Deputy Division Chief
Office Engineer
Division of Engineering Services

FELDMAN & ASSOCIATES, INC.

ATTORNEYS AT LAW

11030 SANTA MONICA BOULEVARD
SUITE 109
LOS ANGELES, CALIFORNIA 90025

(310) 312-5401

FACSIMILE (310) 312-5409

December 8, 2014

FACSIMILE TRANSMITTAL

Time: _____

File No: _____

File Name: USS Cal Builders, Inc., ("USS Cal")/Caltrans
Request to Extend Award Period and Bid Protest/Request for Hearing:
Contract No. 07-259024

Sent To: _____ Telecopy Number: _____

John C. McMillan
Deputy Division Chief
Office Engineer
Division of Engineering Services

Fax: 916-227-6282

From: Mark A. Feldman, Esq.
mfeldman@feldmanandassoc.com; ameyers@feldmanandassoc.com

Total Pages (Including this Cover Page): 11

DESCRIPTION OF DOCUMENT(S) TRANSMITTED:

Bid Protest and Request to Extend Contract Award Period

MESSAGE:

ORIGINAL WILL BE SENT VIA:

MAIL FEDERAL EXPRESS MESSENGER WILL NOT BE SENT

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