



04-12-24A11:33 RCVD

April 11, 2024

URGENT BID PROTEST

April Perez-Hollins
Office Chief
California Department of Transportation
Program/Project Management & Office Engineer
1727 30th Street MS 43
Sacramento, California 95816-7005

Re: Caltrans Contract No. 08-1G6704– Urgent Bid Protest
Low Bidder: Walsh Construction Company II, LLC
Bid Date: March 12, 2024

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Dear Ms. Perez-Hollins:

1. Introduction

Walsh Construction Company II, LLC (“Walsh”), submitted a bid to the Department of Transportation (“Caltrans”) on the above project (“Project”) on March 12, 2024. Upon opening of the bids, Walsh was the apparent low bidder with a total base bid of \$59,844,929.00. The second bidder, Ortiz Enterprises, Inc. (“Ortiz”), submitted a bid in the amount of \$60,801,162.10, over \$900,000 higher than the bid submitted by Walsh. On March 28, 2024 Caltrans notified Walsh that its bid was deemed non-responsive due to a variance in the amount Walsh listed for bid item 73, Plant Establishment Work. The purpose of this letter is to formally protest the award of this project, in accordance with Section 3-1.04 of the Standard Provisions, to any firm other than Walsh, as Walsh remains the lowest responsive and responsible bidder.

2. Caltrans can and should waive this immaterial error.

In the Caltrans March 28, 2024 letter, Caltrans indicates that Walsh’s bid was deemed non-responsive because Walsh’s bid listed \$48,730.96 for bid item 73 rather than an amount at least \$104,000.00 as provided in Section 2-1.09 of the Special Provisions, a difference of \$55,269.04. Even if Walsh had listed the \$104,000.00 amount for bid item 73, Walsh would still be the low bidder on the Project as Walsh’s bid was \$955,233.10 lower than the second bidder. Please note that the bid price for bid item 73 is based on the quote received from Diversified Landscape Co. (copy attached). Our cost as proposed to Caltrans is based on Diversified Landscape performing this work for the cost they proposed to us. The additional \$730.96 covers the bond cost for their scope of work. The difference in listed price for bid item 73 is immaterial and waivable, rendering Walsh the lowest responsive and responsible bidder.



Caltrans' award of this project to any bidder other than Walsh is a wasteful allocation of taxpayer funds because California law compels Caltrans to accept Walsh's lowest responsive and responsible bid. California law requires that Caltrans award the Project to the lowest responsive and responsible bidder. (Pub. Contract Code, § 10180.) "A bid is responsive if it promises to do what the bidding instructions require." (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1438.) "It is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid *or given the bidder an advantage or benefit not allowed other bidders* or, in other words, if the variance is inconsequential." (*Valley Crest Landscape, Inc. v. City Council, supra*, 41 Cal.App.4th at pp. 1440-1441, italics in original.) In determining whether a bidder actually enjoyed a competitive advantage, "court[s] emphasize[] the factual and individualized nature of the inquiry as to whether a bid variation results in an unfair competitive advantage in the bidding process." (*Bay Cities Paving & Grading Inc. v. City of San Leandro, supra*, 223 Cal.App.4th 1181, 1197, underlining added.) The Court of Appeal in *Ghilotti* detailed the applicable principles and framework, stating:

[A] deviating bid must be set aside despite the absence of corruption or actual adverse effect on the bidding process make it clear that the deviation must be capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders. These considerations must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder...

In *Domar, supra*, our Supreme Court emphasized the necessity of a pragmatic approach, placing the public interest above the interests of the bidders: "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 enacted 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. These provisions are strictly construed by the courts, and will not be extended beyond their reasonable purpose. 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.'"

(*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 908-909.) Under *Ghilotti*, Caltrans should waive the discrepancy in the amount listed for bid item 73 as it did not have an actual adverse effect on the bidding process and did not afford Walsh any competitive advantage, i.e., "an actual competitive advantage [that] arises only when a bid defect establishes an actual ground for a successful bidder to withdraw its bid without incurring liability under its bond...." (*Bay Cities Paving & Grading, Inc. v. City of San Leandro, supra*, 223 Cal.App.4th at p. 1197, underlining added.)



Here, a factual and individualized nature review of the difference between what Walsh listed for bid item 73 and the amount referenced in the Special Provisions reveals no actual impact on the bidding process as Walsh is still the lowest responsive and responsible bidder even if Walsh had listed \$104,000 for bid item 73. This did not provide Walsh with any advantages not afforded other bidders. Further, Walsh could not have pulled its bid under Public Contract Code Section 5103 because the listing did not make the bid *materially* different than it was intended to be. In order to pull a bid under Section 5103:

The bidder shall establish to the satisfaction of the court that:

- (a) A mistake was made.
- (b) He or she gave the public entity written notice within five working days, excluding Saturdays, Sundays, and state holidays, after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred.
- (c) The mistake made the bid **materially** different than he or she intended it to be.
- (d) The mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.

(Emphasis added.) In *Valley Crest*, the court held the ability to pull one's bid under Section 5103 constitutes a material advantage not afforded other bidders. This case is similar to *Bay Cities Paving & Grading Inc. v. City of San Leandro*, *supra*, 223 Cal.App.4th 1181, where the bidder submitted a bid without the first page of its bid bond. There, the court held the deviation did not make the bid materially different than it intended to be because the second page of the bid bond was sufficient to show the bid bond had been obtained. Similarly here, whether Walsh bid \$48,730.96 or \$104,000 for bid item 73, Walsh still would be the lowest responsive and responsible bidder. Again, please note that the bid price for bid item 73 is based on the quote received from Diversified Landscape Co. (copy attached). Our cost as proposed to Caltrans is based on Diversified Landscape performing this work for the cost they proposed to us. The additional \$730.96 covers the bond cost for their scope of work. This difference in bid item amount did not make the bid **materially** different than Walsh intended. Thus, the element needed to pull its bid under Section 5103—materiality—is absent from this bid item amount and Walsh could not have pulled its bid under Section 5103. Thus, Walsh did not enjoy an advantage not afforded other bidders. Accordingly, Walsh requests Caltrans waive immaterial and waivable bid item discrepancy and proceed to award the Project to the lowest responsive and responsible bidder: Walsh.

3. Caltrans Should Protect the Public Fiscal Interest and Award To the Lowest Responsive and Responsible Bidder: Walsh.

State agencies such as Caltrans must take action to ensure taxpayer funds do not go to waste. The *Ghilotti* Court's admonition applies especially in these times:

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 enacted 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.

(*Ghilotti Construction Co. v. City of Richmond, supra*, 45 Cal.App.4th at p. 909.) The State can begin by saving almost a million dollars by awarding this Project to the lowest responsive and responsible bidder: Walsh.

4. If Caltrans rejects Walsh's bid as non-responsive, it must similarly reject the other bidders as both have bid variances.

a. Ortiz Bid Errors

Ortiz's bid is non-responsive as it fails to meet the DBE goal on the project and incorrectly listed the license number for a listed subcontractor. Ortiz's DBE participation plan includes AC Oil to supply fuel in the amount of \$666,667, however Walsh believes that amount reflects a 100% value of the fuel supply from AC Oil, not 60% as is required by the Standard and Special Provisions as well as the federal regulations at 49 CFR Part 26. Therefore, the adjusted amount of DBE participation for AC Oil should be 400,000. Furthermore, Ortiz listed Quality Hydroseeding for \$388,140 but failed to include the requisite DBE confirmation form. Therefore, in accordance with 2-1.12B(2), participation for Quality Hydroseeding shall not be counted. With a submitted bid price of \$60,801,162.10, Ortiz needed to commit to \$12,768,244 in DBE participation to meet the 21% stated goal, or submit sufficient documentation of its good faith efforts. Correcting the amount reported for AC Oil and removing the amount reported for Quality Hydroseeding in accordance with the Specifications reduces Ortiz's DBE participation to \$12,744,037 or 20.96%, thereby failing to meet the 21% goal.

Additionally, Ortiz listed Synergy Traffic Control ("Synergy") for 100% of bid items 154, 156, 157, 158, 161, 162, 163. However the license number listed for Synergy is wholly inaccurate. The license number listed is 1021717 which is the license number for American Traffic Barricade and Safety Company, Inc., not Synergy. Synergy's license number is 931953. Given the errors included in Ortiz's bid, Ortiz's bid should be rejected as non-responsive.

b. Flatiron West, Inc. ("Flatiron") bid errors.

Flatiron submitted a bid for the Project in the amount of \$72,034,958.00, over \$12 million dollars higher than the bid submitted by Walsh. Flatiron, similar to Walsh, listed \$50,000 for bid item 73, an amount lower than \$104,000. Therefore if Walsh's bid is nonresponsive for this basis, so too is Flatiron.

c. Caltrans must consistently evaluate purported defects in the submitted bids.

Should Caltrans maintain its position that the variance in the amount listed by Walsh for bid item 73, which provided no actual advantage to Walsh, was a material error rendering the bid non-responsive, it must review the other bids to the same standard according to the Public Contract Code and established California law.

5. Conclusion



As discussed in detail, Caltrans should waive the immaterial variance in the amount listed for bid item 73 in Walsh's bid and award this project to Walsh as the lowest responsive and responsible bidder. However, should Caltrans refuse to waive this immaterial variance, Caltrans must similarly reject the bids submitted by Ortiz and Flatiron as both of those bids contained errors as well. Walsh reserves all rights including but not limited its right to supplement this correspondence or to protest the award of this project to any bidder other than Walsh, the lowest responsive and responsible bidder. Walsh appreciates your consideration of this matter. Please contact the undersigned with any questions.

Sincerely,

Walsh Construction Company II, LLC

A handwritten signature in blue ink, appearing to read "J.L. Titus Jr." with a stylized flourish at the end.

J.L. Titus Jr.
Program Manager
socalexec@walshgroup.com
951-336-7040

CC: Corporate Counsel

Diversified Landscape Co.

21730 Bundy Canyon Road
Wildomar, CA 92595

Phone: 951-245-1686
Fax: 800-783-4197

Union Contractor - Lic. 576183 - DIR 100009249 - DBE 8022 -SB 12567 - DOORs 6427

To: Walsh Construction Company II, LLC	Contact: Estimating
Address: 1260 Corona Pointe Court Suite 201 Corona, CA 92879	Phone: (951) 336-7040 Fax: (951) 336-7041
Project Name: 08-1G6704	Bid Number: 5284
Project Location: Route 79, Temecula, CA	Bid Date: 3/12/2024
Addendum #: 4	
Attachments: Diverscape Inc.-DOORs.pdf	

Line #	Item Description	Estimated Quantity	Unit	Unit Price	Total Price
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DBE

167	Vegetation Control (Minor Concrete)	5,820.00	SY	\$79.00	\$459,780.00
187	Mobilization	1.00	LS	\$60,800.00	\$60,800.00
Total Price for above DBE Items:					\$520,580.00

Non-DBE

28	Move In/Out Temporary Erosion Control	6.00	EACH	\$970.00	\$5,820.00
29	Temporary Hydraulic Mulch	80,000.00	SY	\$0.52	\$41,600.00
31	Temporary Drainage Inlet Protection	51.00	EACH	\$330.00	\$16,830.00
32	Temporary Fiber Roll	10,000.00	LF	\$5.20	\$52,000.00
33	Temporary Reinforced Silt Fence	2,000.00	LF	\$3.35	\$6,700.00
34	Temporary Silt Fence	60,000.00	LF	\$3.95	\$237,000.00
45	Temporary High-Visibility Fence	2,000.00	LF	\$11.40	\$22,800.00
64	Roadside Clearing	1.00	LS	\$47,800.00	\$47,800.00
66	Soil Amendment	13.00	CY	\$99.80	\$1,297.40
67	Commercial Fertilizer (Slow Release)	94.00	LB	\$2.80	\$263.20
68	Plant (Group M)	1,040.00	EACH	\$7.70	\$8,008.00
69	Plant (Group U)	120.00	EACH	\$280.00	\$33,600.00
70	Plant (Group B)	20.00	EACH	\$160.00	\$3,200.00
71	Transplant Plant (Nevin's Barberry)	1.00	EACH	\$8,460.00	\$8,460.00
72	Maintain Existing Planted Areas	1.00	LS	\$61,300.00	\$61,300.00
73	Plant Establishment	1.00	LS	\$48,000.00	\$48,000.00
75	Erosion Control (Bonded Fiber Matrix)	1,900,000.00	SF	\$0.13	\$247,000.00
76	Rolled Erosion Control Product (Blanket)	787,000.00	SF	\$0.45	\$354,150.00
77	Compost (CY)	12,300.00	CY	\$44.60	\$548,580.00
Total Price for above Non-DBE Items:					\$1,744,408.60

Total Bid Price: \$2,264,988.60

Notes:

- Bid Notes:**
- The above prices do not include Performance and Payment Bond. Add 1.5% if bond is required. Due in 30 days.
- Repairs for temporary erosion control to be time and material.
- Retention to be held at the same rate as Owner to Contractor.
- Retention to be released within 60 days of completion and acceptance of work.
- 160 working day(s) required and includes 1 move-in(s). Additional move-ins=\$1,500 each.
- Semi-truck access is required within 200 feet for mulch and compost work.
- Staging area and water supply is required within 2 miles of mulch or compost work area.
- Standby time will be charged at the rate of \$150 per hour.
- Hydroseed truck access is required.
- Water to be provided through a 2.5" metered hydrant or equal at jobsite for hydroseed work.
- Roadside clearing will be performed immediately prior to any landscape work.
- Mobilization to be paid evenly (50/50) over first two progress payments.

Diversified Landscape Co.

21730 Bundy Canyon Road
Wildomar, CA 92595

Phone: 951-245-1686
Fax: 800-783-4197

Union Contractor - Lic. 576183 - DIR 100009249 - DBE 8022 -SB 12567 - DOORs 6427

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- Diversified Landscape will be included with any eligible escalation events that may occur between owner and contractor.
- Upon completion of work, we will receive a PFE - Proposed Final Estimate.
- **Bid Exclusions:**
- Night work is excluded.
- Import or export of top soil is excluded.
- Water meters, point of connection, cost of water and hot taps are excluded.
- All Clearing and grubbing, removal and disposal of trash, debris, and weeds is excluded.
- Cut, cap, patch and removal of concrete or asphalt is excluded.
- Traffic control is excluded.
- Excavation and compaction is excluded.
- Concrete wash outs are excluded.
- Maintenance of temporary erosion control is excluded.
- Removal of temporary erosion control is excluded.
- **Proposal Notes:**
- All of the notes above to be made part of contract.
- Proposal good for 60 days.
- **This proposal is all-inclusive. Separating items without prior approval renders them invalid and will require negotiations before agreeing to subcontract execution.**
- **We are a Disadvantaged Business Enterprise (#8022) for NAICS Codes 237110; 237310; 237990; 238910; 484220**
- **Work codes include:**
C2001 rock blanket; c1575 remove bridge item; c9908 heavy equipment Rental (owned equip only); c7215 concreted-rock slope protection; C1910 grading; c1970 embankment construction; c2065 irrigation System; c5100 concrete structure; c5110 concrete surface finish; C7200 rock slope protection; c7301 concrete curb & sidewalk - misc
- Please provide prelim info with subcontract including bond company and bond number.

Payment Terms:

Payment to be made within 7 days of progress payment to contractor.

<p>ACCEPTED: The above prices, specifications and conditions are satisfactory and hereby accepted.</p> <p>Buyer: _____</p> <p>Signature: _____</p> <p>Date of Acceptance: _____</p>	<p>CONFIRMED: Diversified Landscape Co.</p> <p>Authorized Signature: _____</p> <p>Estimator: Daniel Cano (951) 245-1686 daniel@diversifiedlandscape.com</p>
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ORIGIN ID:ONTA (951) 336-7045
IDALIS SALDANA
WALSH GROUP
1280 CORONA POINTE COURT
SUITE 201
CORONA, CA 92879
UNITED STATES US

SHIP DATE: 11APR24
ACTWGT: 0.50 LB
CAD: 111647606/NET4535
BILL SENDER

TO **APRIL PEREZ-HOLLINS**
CALIFORNIA DEPT. OF TRANSPORTATION
1727 30TH STREET
MS 43
SACRAMENTO CA 95816

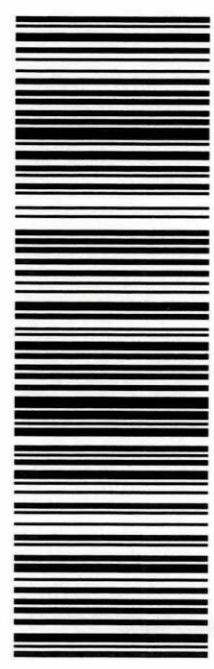
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