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VIA E-MAIL & FED-EX (Delivery scheduled for March 27, 2020)

March 26, 2020

Ali Salamirad
Salamirad Morrow Timpane Dunn
17901 Von Karman Avenue
Suite 500
Irvine, CA 92614

**RE: DECISION Regarding Bid Protest of Archico Design Build, Inc. for Redondo Beach
Transit Center Project - Your Letters of March 13, 2020 and March 24, 2020**

Dear Mr. Salamirad:

SUMMARY

I write in response to your letters of March 13th and March 24th and your email of March 22nd, regarding the bid protest of your client Archico Design Build, Inc. to the bid submitted by M.S Construction Management Group (MSCMG) for the above referenced project. Your protest was based primarily on two issues, one a matter of opinion, with which we disagree and the second a technical irregularity, which we may and will waive. Therefore, it is the decision of the City of Redondo Beach (City) to reject this protest.

BACKGROUND

The solicitation for the referenced project began in January 2020 with a bid due date of February 27, 2020 at 11:00 AM. At bid opening, four bids had been received. The bids were opened in the office of the City Clerk and the bids read aloud. On March 2, 2020, the City received a bid protest from MSCMG against the apparent low bid. The email notification was not followed in a timely manner with a certified copy per the published bid protest procedures and therefore dismissed. MSCMG followed with a duplicate protest letter, this time in proper form and dated March 6, 2020. On March 3, 2020 the City received notice of a bid withdrawal by the apparent low bidder, Woodcliff Corporation (Woodcliff), which was followed by a certified mail copy on March 6, 2020. Woodcliff claimed a mistake in the amount of \$1,000,000 was made in the calculation of their bid. The City accepted the withdrawal and notified the bidders on March 9, 2020. The City notified MSCMG on March 16, 2020 that their protest was being dismissed as the protested bid had been withdrawn.

On March 13, 2020 the City received an email from your office (followed by a hard copy on March 18, 2020) containing a bid protest letter from you, indicating that you were serving as counsel to Archico Design Build, Inc (Archico) in this matter. The City informed you on March 20, 2020 of the requirement in the published bid protest procedures to include a notary acknowledgment of the signor of the bid protest letter. The City began review of the assertions made in the protest letter of March 13, 2020 almost immediately. As part of that review, the City requested a response from MSCMG on March 16, 2020. MSCMG provided a response letter that the City received via email on March 17, 2020, which was followed by a certified mail copy, received on March 20, 2020.

Review of the protest's assertions included legal review by the City Attorney's office and contracted outside counsel, evaluation of the response to the bid protest provided by MSCMG, and examining previous due diligence work in evaluating the bids by the City's consultant Construction Manager.

The City's review was essentially complete by March 20, 2020. In an email from the City's project manager on that date, the City notified you of its preliminary findings by email along with confirmation that City required notary documentation. After your email of March 22nd discussing your intention to resubmit the protest letter, you sent another bid protest letter via email dated March 24, 2020 with the additional information that a notary acknowledgment of signature and the letter itself would arrive on March 26, 2020. The City received that letter on March 26, 2020. The two bid protest letters from you on behalf of Archico are being treated as one since the contain essentially the same assertions against the bid from MSCMG.

On March 24, 2020, the City also issued a Notice of Intent to Award via email to the remaining bidders, indicating the intent to award the project to MSCMG.

DISCUSSION

The bid protest letters assert two purported "material omissions that render the MS bid non-responsive."

First, the letters assert that MSCMG "fails to list any subcontractors for approximately \$5 million of construction work." Although not entirely clear, the letter appears to suggest that MSCMG is unable to perform the work for which they did not list a subcontractor. In response, we direct your attention to Section 4106 of the Public Contract Code, which provides as follows:

"If a prime contractor fails to specify a subcontractor or if 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 1 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.

If after award of contract, the prime contractor subcontracts, except as provided for in Sections 4107 or 4109, any such portion of the work, the prime contractor shall be subject to the penalties named in Section 4111.”

MSCMG, in their response to the bid protest dated March 17, 2020 lists the various trades they will be self-performing. As MSCMG holds both A and B licenses, and a Hazardous Substances Removal certification, they are fully licensed to complete all work for which they did not list a subcontractor on their bid. That being the case, we see no violation of the Subcontracting and Subletting Fair Practices Act, or of the Invitation for Bids. The City has been provided with no evidence that MSCMG is unable to self-perform that work. If it later turns out MSCMG cannot perform any of the work for which they did not list a subcontractor, they will be subject to the penalties in Public Contracting Code Section 4111.

Second, the letters assert that the failure to execute the Affidavit of Noncollusion is material and inexcusable. We disagree. While MSCMG did not submit the executed Affidavit with their bid, they did include the notary’s acknowledgment that the Affidavit was executed. Further, MSCMG subsequently delivered to the City the executed Affidavit.

The City views this omission as a minor irregularity that is waivable. We see no unfair advantage to MSCMG if the City waives the requirement to submit a signed affidavit with the bid.

Your letter of March 24th raises additional issues to those presented in the letter of March 13th. In the March 24th letter, you claim that the City’s position of waiving the omission of the Affidavit as an oversight or mistake is inconsistent with the City’s “demand” that you submit a notarized letter. We find just the opposite. In the case of the Affidavit, we made MSCMG aware of the omission and allowed them to correct for reasons described above. In the case of your March 13th protest letter we made you aware of the omission and also invited you to correct it. The City acted in good faith toward you by beginning the review of your protest despite not having the notarized document.

You also add in your letter of March 24th that MSCMG would have used the omission of the Affidavit as a basis for withdrawing its bid. While we cannot predict under what circumstances MSCMG may have withdrawn their bid, the fact is they have not. If they had attempted to, under the basis of the omitted Affidavit, they could have not done so with impunity and their bidder’s bond would be subject to claims by the City. We see no basis in this argument that an unlawful bidding advantage is given by waiving this minor irregularity.

DETERMINATION

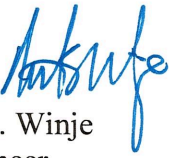
For these reasons, the City has determined that the assertions made in your letters are not sufficient to overturn the intention to award the contract to MSCMG. Your bid protest, after careful review and consideration described above, is rejected. The published bid protest procedures describe the process to appeal this decision. Among the requirements, any appeal shall be made in writing to the City Manager by the protestor within five (5) working days from the date of this letter. Please see the published bid protest procedures for all appeal requirements.

Mr. Ali Salamirad

March 26, 2020

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Sincerely,


Andrew S. Winje
City Engineer

cc: Cristine Shin, Senior Deputy City Attorney
Ted Semaan, Public Works Director
Jun Fujita-Hall, Project Manager
Joe Hoefgen, City Manager