

October 15, 2024

VIA E-MAIL ONLY

County of Fresno
Design Division, Department of Public Works and Planning
2220 Tulare Street, Sixth Floor
Fresno, CA 93721
DesignServices@fresnocountyca.gov

Re: Elkhorn Recharge Facility
Bid Protest of Wood Bros., Inc. Re: G&J Heavy Haul
Bid Date: October 9, 2024

Dear Sir or Madam,

This office represents Wood Bros., Inc. in its protest of any award of the contract for the Elkhorn Recharge Facility (“Project”) to G&J Heavy Haul (“G&J”) pursuant to Section 3-1.04A of the Project Specifications. G&J has submitted a nonresponsive bid, and the County of Fresno should therefore reject its bid pursuant to Section 2-1.46 of the Specifications. As the lowest responsive bidder, Wood Bros., Inc. should be the recipient of the contract award for the Project and hereby demands such.

G&J has failed to list subcontractors to perform work for which G&J is neither licensed nor qualified.

First, G&J’s failure to specify and list a subcontractor(s) for the specialty pipe and concrete structure work identified in Bid Item Nos. 17 and 18 is a fatal defect in its bid. According to Public Contract Code section 4106, “[i]f a prime contractor fails to specify a subcontractor...the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the contractor shall perform that portion himself or herself.” Section 4106 further states that “[i]f after the award of contract, the prime contractor subcontracts...any such portion of the work, the prime contractor shall be subject to the penalties named in Section 4111.” A prime contractor that violates any of the provisions of the Subletting and Subcontracting Fair Practices Act violates its contract and the awarding authority may either cancel the prime contractor’s contract or assess the prime contractor a penalty in an amount of not more than 10 percent of the amount of the subcontract involved. (Public Contract Code § 4110.)

Due to G&J’s failure to specify a subcontractor to perform the specialty pipe and concrete structure work on the Project, G&J has in effect declared that it is fully qualified to perform the work identified in Bid Item Nos. 17 and 18 and will be self-performing that work on the Project. G&J has also indicated that it will self-perform Bid Item No. 10, removal and disposal of existing

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asbestos cement pipe section which would require handling hazardous materials. There is no indication that G&J holds the proper license and/or certification to self-perform Bid Items Nos. 10, 17, or 18. Instead, G&J possesses a C-12 license for earthwork and paving. It does not possess a Class A license with the California Contractor's State License Board, and likewise neither of its two listed subcontractors hold a Class A license. G&J's Bid Form, Proposal 8(a)-(b) lists Famico Corp dba A-One National Fence (fencing, Class C-13) and Central Valley Reinforcing, Inc. (rebar, Class C-50) as the only subcontractors exceeding one half of one percent.

Under Public Contract Code section 6100(a), prior to awarding a contract for work to be performed by a contractor, a state entity must verify with the Contractor's State License Board that the person seeking the contract is licensed in a classification appropriate to the work to be undertaken. Under Public Contract Code Section 6100(b) the state entity in lieu of verification, may require the person seeking the contract to present his or her pocket license or certificate of licensure and provide a signed statement that swears, under penalty of perjury, that the license or certificate of licensure presented belongs to the person seeking the contract, and is in a classification appropriate to the work to be undertaken. Wood Bros., Inc. respectfully requests that the County of Fresno investigate G&J's qualifications to perform the work described in Bid Item Nos. 10, 17, and 18. If G&J is not licensed to perform the specialty pipe and concrete structure work identified in Bid Item Nos. 17 and 18 or the removal and disposal of existing asbestos cement pipe identified in Bid No. 10, it cannot self-perform this portion of the Project. As such, the Project can in no way be awarded to G&J without violating California law. Furthermore, if G&J is awarded the contract and then subcontracts the work described in Bid Item Nos. 10, 17, and 18 to a qualified and licensed subcontractor, it violates Public Contract Code section 4106.

In *Fred J. Early, Jr., Co. v. County Sanitation Dist. No. 2* (1963) 214 Cal. App. 2d 505, the court held that under Government Code section 4102(b), which provides that a general contractor should not, without the consent of the awarding authority, permit any subcontract to be assigned or transferred or performed by anyone other than the subcontractor listed in the bid, a general contractor who refused to enter into a contract with a subcontractor listed in the bid and proceeded to do the work himself, without the awarding authority's consent, was subject to the penalty provided for by Government Code section 4106 (20 per cent of the amount of the subcontract). Here, the facts are analogous. G&J has neglected to list any subcontractor in its bid for Bid Item Nos. 10, 17, and 18, thus asserting to the County of Fresno its intent to perform that work itself.

In *Valley Crest Landscape, Inc. v. City Council of the City of Davis* (1996) 41, Cal.App.4th 1432, 1435 the low bidder, North Bay, submitted a bid that did not follow the bid requirements that it self-perform at least 50 percent of the work. The City allowed the low bidder to correct its mistake and submit new percentages changing the amount of subcontractor work from 83 percent to 44.65 percent. (*Id.*) The second low bidder, Valley Crest, objected and filed suit. The appellate court held that North Bay had an unfair advantage because it had the benefit of backing out of the bid that was not available to other bidders and therefore its mistake could not be corrected by

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waiving an irregularity. (*Id.* at 1442.) The court further stated that:

This specification made listing the subcontractor percentages a material element of the bid. Since it was a material element of the bid, North Bay could not change its bid to correct the mistake in stating the percentages. North Bay’s bid provided for more than 50 percent of the work to be done by subcontractors; therefore, it was nonresponsive to section 8-1 of the specifications. The City could not permit the mistake as to this material element of the bid to be corrected by purporting to ‘waive an irregularity.’

G&J’s bid does not comply with Section 2-1.33C(8).4.2 of the Specifications.

Next, California Public Contract Code section 4104(a)(1) and Section 2-1.10 of the Project Specifications requires the prime contractor to list “the name and location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor...in an amount in excess of one-half of 1 percent of the prime contractor’s total bid...” Section 2-1.33C(8) of the Project Specifications also requires the following: “For each subcontractor listed, the Subcontractor List form **must** show: 4.2. Percentage of the subcontracted work for each bid item listed.” (Emphasis added.) G&J has failed to include a percentage of the work to be performed by either of its listed subcontractors, leaving those sections blank. Pursuant to Section 2-1.33A of the Specifications, “Failure to submit the forms and information as specified results in a nonresponsive bid.”

“A basic rule of competitive bidding is that bids must conform to specifications, and if a bid does not so conform, it may not be accepted.” (*Konica Business Machines U.S.A., Inc. v. The Regents of the University of California* (1988) 206 Cal.App.3d 449, 454 (Citations omitted).) When a public entity’s request for bids states that the requested goods or services are required to meet certain specifications, the public entity may not award the contract to a bidder whose bid deviates from the specifications if other bids do conform to the specifications. (*Id.* at 454-457.)

All of G&J’s independent contractor drivers must provide evidence that they are registered with the DIR.

Finally, while G&J has stated its bid documents that it and its two listed subcontractors are registered with the Department of Industrial Relations, Wood Bros., Inc. is informed and believes that G&J hires drivers who operate as independent contractors and are thus independently required to also be registered with the DIR should they provide work on the Project. Indeed, the Specifications require full compliance stating “no contractor or subcontractor may be listed on a bid proposal for a public works project unless registered with the Department of Industrial Relations.” (Spec. Sec. 2-1.03.)

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An agency must determine whether a bid is responsive to the call of bids, that is, whether the bid promises to do what the bidding instructions demand. (*D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 764.) A “determination that a bid is nonresponsive is not based on disputed facts, does not involve an exercise of agency discretion, and does not require a hearing for the excluded bidder. (*Id.*) Here, G&J has submitted a bid that either deviates from the mandatory requirements that (1) the Contractor must list all subcontractors who will perform in excess of ½ of one percent of the total bid price, or (2) G&J has declared that it will self-perform work for which it is neither qualified nor licensed. G&J has also failed to comply with the Specifications with regard to mandatory information about the percentage of a listed subcontract’s work and the DIR registration status of independent contractor drivers. Whereas, Wood Bros, Inc. has submitted a bid in conformance with the Specifications and therefore should be awarded the contract as the lowest responsive bidder.

Furthermore, a district or agency has, before soliciting bids, exercised its business and governmental judgment in defining a set of requirements for the work to be done.

Responsiveness can be determined from the face of the bid and the bidder at least has some clue at the time of submission that problems might exist. In most cases, the determination of nonresponsiveness will not depend on outside investigation or information and a determination of nonresponsiveness will not affect the reputation of the bidder. Given the predetermination of bid specifications and given the more apparent and less external nature of the factors demonstrating nonresponsiveness, less due process is reasonably required with that determination than when nonresponsibility is declared.

(*Taylor Bus Service, Inc. v. San Diego Board of Education* (1987) 195 Cal.App.3d 1331, 1342.)

G&J’s failure to comply with the Specification and with the Public Contract Code can be determined from the face of its bid. As a result of G&J’s noncompliance, the County of Fresno must find G&J’s bid nonresponsive. Because G&J’s bid is non-responsive, pursuant to California law and the Specifications, it must be rejected. As the lowest responsive bidder Wood Bros., Inc. should be awarded the contract.

Very truly yours,
/S/
Erin S. Sanchez