



Joint Exercise of Powers Agency

City of Antioch City of Brentwood City of Oakley County of Contra Costa

Special Meeting of the Board of Directors

Wednesday, May 31, 2006
6:00 p.m.

Tri-Delta Transit Meeting Room
801 Wilbur Avenue
Antioch, California

1. Call to Order
2. Public Comment
3. Closed Session

Conference with Legal Counsel - Anticipated Litigation

Significant exposure to litigation pursuant to Government Code section 54956.9 (b) (one potential case).

4. Determination Items

A. RECONSIDER the actions taken by the Authority on May 11, 2006 and approve one of the following options:

1. **RESCIND** the actions taken by the Authority on May 11, 2006 to reject bids and authorize rebidding of the Segment 3 construction project; **REINSTATE** the bids for the Segment 3 construction project; and **DIRECT** the Secretary or his designee to send letters to each of the respective bidders requesting that they reaffirm their bids are valid through July 6, 2006, consistent with the bid documents for the State Route 4 Bypass Segment 3 Construction Project.

OR

2. **REAFFIRM** the following actions taken by the Authority on May 11, 2006:

- A. **REJECT** all bids previously submitted for the project.
- B. **APPROVE** the plans and specifications and **AUTHORIZE** the rebidding of the project.
- C. **DIRECT** the Secretary or his designee to publish a Notice to Contractors in accordance with the procedures in Public Contract Code Sections 20390-20393 inviting bids for the work.
- D. **AUTHORIZE** the Secretary or his designee to issue bid addenda as needed for clarification of contract bid documents.

Board of Directors:

Mary N. Piepho, Chair
Donald P. Freitas, Vice Chair
Annette Beckstrand
Brad Nix

Authority Staff Office:

Contra Costa County
255 Glacier Drive
Martinez, CA 94553
(925) 686-0619

5. Board Member Comments

6. Correspondence

7. Adjournment

The Authority will provide reasonable accommodations for persons with disabilities planning to attend Board meetings who contact the Program Manager at least 24 hours before the meeting, at (925) 686-0619.

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STATE ROUTE 4
BYPASS AUTHORITY

DATE: May 31, 2006

TO: Board of Directors

FROM: *for* Dale Dennis, Program Manager *NEW*

SUBJECT: **RECONSIDER** the actions taken by the Authority on May 11, 2006 regarding the Rejection of Bids and the Authorization of Rebidding the SR4 Bypass, Segment 3 Construction Project

Recommendation: **RECONSIDER** the actions taken by the Authority on May 11, 2006 and approve one of the following options:

1. **RESCIND** the actions taken by the Authority on May 11, 2006 to reject bids and authorize rebidding of the Segment 3 construction project; **REINSTATE** the bids for the Segment 3 construction project; and **DIRECT** the Secretary or his designee to send letters to each of the respective bidders requesting that they reaffirm their bids are valid through July 6, 2006, consistent with the bid documents for the State Route 4 Bypass Segment 3 Construction Project.

OR

2. **REAFFIRM** the following actions taken by the Authority on May 11, 2006:
 - A. **REJECT** all bids previously submitted for the project.
 - B. **APPROVE** the plans and specifications and **AUTHORIZE** the rebidding of the project.
 - C. **DIRECT** the Secretary or his designee to publish a Notice to Contractors in accordance with the procedures in Public Contract Code Sections 20390-20393 inviting bids for the work.
 - D. **AUTHORIZE** the Secretary or his designee to issue bid addenda as needed for clarification of contract bid documents.

DD:nw
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ACTION OF BOARD ON _____ APPROVED AS RECOMMENDED ___ OTHER ___

VOTE OF DIRECTORS

UNANIMOUS (ABSENT _____)

AYES: _____ NOES: _____

ABSENT: _____ ABSTAIN: _____

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Directors on the date shown.

ATTESTED: Maurice M. Shiu, Secretary to the Authority

By _____

Discussion:

Smith and Brockhage, LLP submitted a letter dated May 10, 2006 (attached) on behalf of DeSilva Gates that was relevant to the May 11, 2006 Board item, whereby the Authority Rejected Bids and Authorized Rebidding the SR4 Bypass, Segment 3 Construction Project. Unfortunately, the timing of receipt of the letter did not allow sufficient time to provide the letter to the Authority prior to the Board taking action on May 11, 2006. As such, this item is being brought back to the Board for reconsideration.

SMITH & BROCKHAGE, LLP

2480 BUSKIRK AVENUE, SUITE 200
PLEASANT HILL, CALIFORNIA 94523

Telephone: (925) 296-0636
Facsimile: (925) 296-0640

RANDALL M. SMITH
rmus@smithbrock.com

May 10, 2006

VIA FACSIMILE TRANSMISSION – (925) 756-2385 and OVERNIGHT DELIVERY

State Route 4 Bypass Authority
c/o Parsons Brinckerhoff
3260 Lone Tree Way, Suite 104
Antioch, CA 94509
ATTN: Craig Carney

Re: Project: State Route 4 Bypass – Segment 3
Our File No. 7502.1

Dear Mr. Carney:

We represent DeSilva Gates Construction, LP (“DGC”), the low bidder for the above-referenced project.

In a letter dated April 28, 2006, the third low bidder, RGW Construction, Inc. (“RGW”), protested the bids of the two low bidders, DGC and Bay Cities Grading and Paving (“Bay Cities”). RGW’s protest is frivolous.

The sole basis for the protest is RGW’s argument that DGC and Bay Cities unbalanced their bid price for Asphaltic Emulsion (Paint Binder), in that the bid price for that bid item was too low. Yet, there is no provision in the contract documents or any California law which prohibits a bidder from bidding a bid item below its actual cost or for a nominal amount. The owner is of course not allowed to add to or otherwise change the terms of the bid solicitation after bid. See, e.g., *Pozar v. Department of Transportation*, 145 Cal.App.3d 269 (1983); *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal.App.2d 803 (1962). Accordingly, the Authority cannot retroactively impose restrictions on bidding which were not set forth in the bid solicitation documents.

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Indeed, it is well-settled law that the bidding of below-cost or understated prices is appropriate, and the mere fact that a bid includes such prices is not a proper grounds for rejecting a bid. See, e.g., *H.R. General Maintenance Corp.*, 1999 WL 94980, DCCAB No. P-557 (1999); *Bollinger Machine Shop & Shipyard, Inc.*, 96-1 CPD (Comptroller General Decision) P 123 (1995); *DGC Contract Services, Inc.*, 1995 WL 25932 (Comp. Gen.) (1995); *Advanced Modular Space, Inc.*, 95-2 CPD P 168 (1995); *A.D. Willis Company, Inc.*, 95-2 CPD P 160 (1995); *Wizards-Movers Elite, Inc.*, 94-1 CPD P 221 (1994); *Intelligent Environments*, 94-2 CPD P 210 (1994); *Applied Science & Technologies, Inc.*, 94-1 CPD P 135 (1994); *Nissho Iwei American Corporation*, 94-1 CPD P 34 (1994); *Hampton Roads Leasing, Inc.*, 93-1 CPD P 486 (1993); *Atlantic Research Corporation*, 92-1 CPD P 543 (1992).¹

RGW attempts to argue that because the price submitted by the two low bidders for the Paint Binder was too low, "this bid unit is very obviously unbalanced." This argument reflects a gross misunderstanding of what is meant by an unbalanced bid.

A bid is not unbalanced merely because a bidder bids one or more items for a nominal amount. Instead, a bid is only unbalanced if it contains both understated prices for some items and overstated prices for other items. See, e.g., *Bollinger Machine Shop & Shipyard, Inc.*, *supra*; *DGS Contract Services, Inc.*, *supra*; *Advanced Modular Space, Inc.*, *supra*; *A.D. Willis Company, Inc.*, *supra*; *Wizards-Movers Elite, Inc.*, *supra*; *Intelligent Environments*, *supra*; *Applied Science & Technologies, Inc.*, *supra*; *Nissho Iwei American Corporation*, *supra*; *Hampton Roads Leasing, Inc.*, *supra*; *Atlantic Research Corporation*, *supra*.

¹ The California courts routinely turn to Federal public contract law for guidance and legal authority in dealing with public contract law issues. E.g., *Amelco v. City of Thousand Oaks*, 27 Cal.4th 228, 244-246 (2002); *City of Salinas v. Souza & McCue Construction Co.*, 66 Cal.2d 217, 222 (1967); *E.H. Morrill Company v. State of California*, 65 Cal.2d 787, 792 (1967); *State of California v. Guy F. Atkinson Co.*, 187 Cal.App.3d 25, 33-34 (1986); *C. Norman Peterson v. Container Corp.*, 172 Cal.App.3d 628, 647-648 (1985); *Pacific Architects v. State of California*, 100 Cal.App.3d 100, 125 (1979); *Jasper Construction v. Foothill Junior College District*, 91 Cal.App.3d 1, 8, 10 (1979); *A. Teichert & Son, Inc. v. State of California*, 238 Cal.App.2d 736, 756-757 (1965). Thus, as stated by the court in *Pacific Architects v. State of California*, *supra*, "We are strongly persuaded by decisions relating to federal procurement bidding."

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c/o Parsons Brinckherhoff
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The applicable rules of law were stated in *Wizards-Movers Elite, Inc., supra*, as follows:

To be rejected as unbalanced, an offer must be both mathematically and materially unbalanced.

A bid is mathematically unbalanced where it contains understated prices for some items and overstated prices for other items. The submission of a below-cost bid is not illegal, and the mere fact that a bid includes understated prices does not justify rejection of the bid. Accordingly, even a well-founded allegation of understated prices, without an assertion of overstated prices, does not constitute a legally adequate basis for finding that an offer is mathematically unbalanced. [Citations omitted.]

In *Intelligent Environments, supra*, a bid protest was denied based on the following reasoning:

An allegation that the awardee's prices are unreasonably low is not a basis for sustaining a protest, since there is no legal basis to object to the submission or acceptance of a below-cost offer on a fixed-price contract.

The protest also is without merit with respect to the suggestion by *Intelligent Environments*, without any explanation, that Easel's offer is impermissibly unbalanced. Before an offer can be rejected as unbalanced, it must be found to be both mathematically and materially unbalanced. An offer is not mathematically unbalanced unless it is based on nominal prices for some items and enhanced prices for other items. There is no evidence that Easel's offer contains any enhanced pricing, in the absence of which Easel's offer could not be rejected as unbalanced. [Citations omitted.]

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In *Nissho Iwei American Corporation, supra*, it was reasoned as follows:

Nissho also argues that Sumitomo's bid must be rejected since its prices are unbalanced . . .

One of the elements required for a bid's prices to be considered unbalanced is that the bid must contain understated prices for some items and overstated prices for other items. The submission of a below-cost bid is not illegal, and the mere fact that a bid includes understated prices does not justify rejection of the bid. Accordingly, even a well-founded allegation of an understated price, without the showing of overstated prices, does not constitute a legally adequate basis for finding the existence of this element of unbalancing.

Here, while Sumitomo's total price for pumps was significantly lower than Nissho's total price, there is nothing in the record which shows that Sumitomo's bid contains overstated prices. Although Sumitomo's total price for the motors was higher than Nissho's, the motors do not appear to be overpriced when compared to the prices submitted by the other bidders or the government estimate for this item. Since we find no enhanced pricing in the awardee's bid, we see no basis to conclude that the prices in Sumitomo's bid were unbalanced. [Citations omitted.]

In *Applied Science & Technologies, Inc., supra*, it was reasoned as follows:

AST also protests that Midwest's negotiated price is materially unbalanced. Specifically, AST argues that Midwest's price for one sub-contract-line-item (subCLIN) is far below the government estimate and the average of the other bidders' prices for that sub-CLIN. Before a bid can be rejected as unbalanced, it must be found to be both mathematically and materially unbalanced. A bid is not mathematically unbalanced unless it is based both on nominal prices for some items and enhanced

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prices for other items. While AST argues that Midwest's bid contains a nominal price for one sub-CLIN, the protester does not contend that any of Midwest's CLIN or sub-CLIN prices are enhanced. Since Midwest's bid does not contain both nominal and enhanced pricing, the bid is not mathematically unbalanced and is therefore not subject to rejection as unbalanced. [Citations omitted.]

In *Atlantic Research Corporation, supra*, it was reasoned as follows:

ARC also alleges that Thiokol's offer was unbalanced, as it contained below cost prices. To be rejected as unbalanced, an offer must be both mathematically and materially unbalanced. To be mathematically unbalanced, however, an offer must contain understated prices for some items and overstated prices for other items. Allegations of understated prices, without any indication of overstated prices, offer no basis for concluding that an offer was mathematically unbalanced. Since ARC does not allege (and apparently does not believe) that Thiokol's offer contained any overstated prices, we will not consider its allegation of unbalancing. [Citations omitted.]

In *Bollinger Machine Shop & Shipyard, Inc., supra*, the relevant rules of law were set forth as follows:

To be rejected as unbalanced, a bid must be both mathematically and materially unbalanced. A bid is mathematically unbalanced if it contains understated prices for some items and overstated prices for other items. On the other hand, the submission of a below-cost bid is not illegal, and the mere fact that a bid includes understated prices does not justify rejection of the bid. Accordingly, even a well-founded allegation of understated prices without evidence of overstated prices does not constitute a legally adequate basis for finding that a bid is mathematically unbalanced. [Citations omitted.]

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Indeed, the language RGW cites from the Caltrans Standard Specifications applies only when "the prices obviously are unbalanced." (Emphasis added). (Section 2-1.10 of the Caltrans Standard Specifications). Again, there is no provision that states that a bidder cannot submit a price for one bid item which is below the expected cost for that bid item. Moreover, inherent in the word "unbalanced" itself, is the concept that more than one price is involved.

Here, however, RGW is only claiming that the price of one bid item was too low. RGW does not contend that any of the other prices are overstated, much less that they are "obviously" overstated. Thus, according to well-settled law, as well as the plain meaning of the Caltrans Standard Specifications, the prices in DGC's bid cannot be considered "obviously" unbalanced.

Moreover, the mere fact that a bid is mathematically unbalanced is not a sufficient grounds to reject a bid.

Section 2-1.10 of the Caltrans Standard Specifications states: "Proposals in which the prices obviously are unbalanced may be rejected." (Emphasis added). The word "may" is of course permissive, rather than mandatory. See, *Common Cause v. Board of Supervisors*, 49 Cal.3d 432, 443 (1989).

Indeed, as stated in a number of the decisions cited above, it is only proper to reject a bid that is both mathematically unbalanced and found to be "materially unbalanced." See, also, *Richard P. Murray, Inc.*, 80-1 BCA P 14,448 (1980); *John Murphy Construction Company*, 79-1 BCA P 13,836 (1979); *Leon L. Levy*, Comp. Gen. Dec. B-161,928, 1967 WL 2823 (1967); *E. Arthur Higgins*, 79-2 BCA P 14050 (1979) ("unbalanced bids are recognized as an acceptable practice."); *Frank Stamato & Co. v. City of New Brunswick*, 90 A.2d 34 (1952).

Thus, for example, in *Frank Stamato & Co. v. City of New Brunswick*, *supra*, the court dealt with a specification section with nearly the same language concerning unbalanced bids as contained in Section 2-1.10 of the Caltrans Standard Specifications. It read as follows: "Bids which are obviously unbalanced may be rejected."

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The court held that this language "is not a prohibition against unbalanced bids." The court further stated:

The mere fact that a bidder has submitted an unbalanced bid, does not automatically operate to invalidate an award of the contract to such bidder. There must be proof of collusion or of fraudulent conduct on the part of the bidder and the City or its engineer or other agent, or proof of other irregularity of such substantial nature as will operate to affect fair and cooperative bidding. [Citations omitted.]

Here, RGW has not even attempted to demonstrate that there was any such collusion, fraudulent conduct or substantial irregularity. As noted in the decisions cited above, unbalanced bidding is generally not prohibited, and only becomes a matter of concern when it affects fair and competitive bidding.

Indeed, it is a customary and accepted practice for Asphaltic Emulsion (Paint Binder) to be bid at a nominal price.

Please find enclosed, as Exhibit "A," data downloaded from Caltrans' website showing nominal bid prices of \$0.01 to \$100.00 which were submitted to Caltrans from January 5, 2000 through May 2, 2006, for Asphaltic Emulsion (Paint Binder).² As this exhibit shows, the bidding of nominal unit prices for Asphaltic Emulsion is customary in the industry. Indeed, each of the bidders who submitted bids on the above-referenced project has previously submitted such nominal bid prices for Asphalt Emulsion (Paint Binder). For example, RGW submitted a bid price of \$100.00 per ton for Caltrans Contract No. 04-444104 (See, Page No. 13 of Exhibit "A"), a bid price of \$1.00 per ton for Caltrans Contract No. 10-3A4304 (see, Page No. 12 of Exhibit "A"), and a bid price of \$0.01 (one penny) per ton for Caltrans Contract No. 04-448504 (see, Page No. 7 of Exhibit "A").

² Because of the bulk of the exhibits, they are not being faxed, but will accompany the original of this letter.

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In the enclosed Exhibit "B," we have included twelve examples of Caltrans Bid Summaries for projects that were bid and awarded in which the bid item Asphaltic Emulsion (Paint Binder) and other various bid items were bid for nominal amounts. We have included at least one project for each of the bidders on the Highway 4 Bypass-Segment 3 project.

Exhibit "C" contains the pay estimates for twenty Caltrans contracts that were awarded to contractors that bid \$1.00/Tonne for Asphaltic Emulsion (Paint Binder). The bid dates for these projects ranged from March 23, 1999 to October 5, 2005, a period of over six (6) years. The contractors for these twenty Caltrans contracts include Granite Construction, Tiechert, Bay Cities, W. Jaxon Baker, DeSilva Gates Construction, Argonaut, FCI, Lees Paving and OC Jones. Simply put, it is customary and accepted practice for nominal prices to be bid for Asphaltic Emulsion (Paint Binder) and have the project awarded. All contractors that bid on the above-referenced project have bid nominal prices for various bid items on previous contracts and still had the jobs awarded to them.

Moreover, it must be noted that RGW submitted below cost, nominal and unbalanced bid prices on the above-referenced project. See, for example, RGW's bid prices for Bid Item Nos. 133, 172, 176, 177, 187, 202 and 212 and compare them to the bid prices of the other three bidders and to the Engineer's Estimated prices. Thus, for example, it is clear that RGW's unit price for Bid Item 172 is materially below the cost of performing the work. The Engineer's Estimated unit price for that Bid Item was \$42,500; DGC's unit price was \$50,000; Bay Cities' unit price was \$57,120; and Granite's unit price was \$56,000. Yet, RGW's unit price for this item of work was only \$10,000, which is approximately one-fifth of the bid prices of the other three bidders and the Engineer's Estimate. Similarly, RGW bid the nominal price of \$1.00 for Bid Item No. 212 (Clearing and Grubbing).

Accordingly, if the Authority were to reject DGC's low responsive bid based on the grounds stated in RGW's bid protest, the Authority would also have to reject RGW's bid (as well as the second low bid of Bay Cities).

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In its protest letter, RGW also states that if it had used the price submitted by the two low bidders for the Paint Binder, its bid would have been \$384,019 lower. This is of course entirely irrelevant. RGW could have submitted whatever price it wanted for the Paint Binder, but chose to submit a price which was substantially higher than the price of the low bidder and the second low bidder. RGW does not claim that it intended to submit a total bid less than its bid price of \$41,187,012, and does not offer to reduce its bid price for that item or its total bid price. Nor can it do so after bid opening. RGW's bid was the third low bid, and it cannot change it now.

DGC respectfully requests that RGW's bid protest be denied, and that award be made to DGC, the low responsive and responsible bidder. DGC looks forward to an award of the contract and a mutually successful job.

Very truly yours,

SMITH & BROCKHAGE, LLP



Randall M. Smith, Esq.


RMS/mdt

cc: Michael Willcoxon, Esq.
Michael Kloos

STATE ROUTE 4
BYPASS AUTHORITY

DATE: May 11, 2006

TO: Board of Directors

FROM: Dale Dennis, Program Manager 

SUBJECT: Reject Bids and Authorize Rebidding the SR4 Bypass, Segment 3 Construction Project

Recommendation: Staff recommends the Board of Directors take the following actions related to the above project:

1. **REJECT** all bids previously submitted for the project.
2. **APPROVE** the plans and specifications and **AUTHORIZE** the rebidding of the project. *Bids for this work will be received on May 30, 2006 at 2:00 p.m. at the Authority offices.*
3. **DIRECT** the Secretary or his designee to publish a Notice to Contractors in accordance with the procedures in Public Contract Code Sections 20390-20393 inviting bids for the work.
4. **AUTHORIZE** the Secretary or his designee to issue bid addenda as needed for clarification of contract bid documents.

DD:nw
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ACTION OF BOARD ON 5/11/06 APPROVED AS RECOMMENDED OTHER

VOTE OF DIRECTORS
 UNANIMOUS (ABSENT _____)
AYES: 4 NOES: 0
ABSENT: _____ ABSTAIN: _____

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Directors on the date shown.

ATTESTED: Maurice M. Shiu, Secretary to the Authority

By 

Discussion:

On November 10, 2005, the Board authorized the Program Manager to advertise the State Route 4 Bypass, Segment 3 project and to prepare the necessary documents for the award of this work. The project was designed by Contra Costa County Public Works Department and advertised in accordance with legal requirements in the following: Contra Costa Times/Newspapers, ebidboard.com, and 17 plan rooms.

On April 25, 2006, the following bids were received and opened at the Authority staff offices at the Contra Costa Public Works Department in Martinez:

<u>Contractor</u>	<u>Bid</u>
1. De Silva Gates Construction, Inc.	\$40,981,204.00
2. Bay Cities Paving and Grading, Inc.	\$41,170,790.85
3. RGW Construction Inc.	\$41,187,012.00
4. Granite Construction	\$46,177,936.35

Engineer's Estimate \$39,540,091.06

Subsequent to the bid opening, the Authority received a bid protest from RGW Construction, the third lowest bidder (see attached copy).

In the project contract bid documents, the Board reserved the right to reject any and all bids. Staff has evaluated the bids and believes that it is in the Authority's best interest to reject all bids and to rebid the project. Therefore, staff is now recommending that the Board reject the bids previously submitted for this project, approve the project design (plans and specifications), and authorize re-advertising the project in accordance with the procedures set forth in Public Contract Code Sections 20390-20393. The new bids will be received and opened at 2:00 p.m. on May 30, 2006 at the Authority staff offices at the Contra Costa Public Works Department in Martinez.

- cc: Maurice Shiu, Secretary
 Julie Bueren, Contra Costa County Deputy Public Works Director
 Frank Scudero, Accounting
 Carol Reynolds, Accounting
 David F. Schmidt, County Counsel's Office
 County Recorder
 Joe Brandt, City of Antioch
 Bailey Grewal, City of Brentwood
 Jason Vogan, City of Oakley
 Joe Sbranti, City of Pittsburg
 Bart Littell, Parsons Brinckerhoff