



DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

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Subject: Denial of Protest by DRC-ERRG JV of the DRR18088 Awards to Ceres Environmental Services, Inc., ECC Constructors, LLC, and SPSG Partners

Dear Mr. Hamersmith:

Please be advised that the California Department of Resources Recycling and Recovery (CalRecycle) hereby denies DRC-ERRG JV's (DEJV) protest of the DRR18088 award to Ceres Environmental Services, Inc. (Ceres), ECC Constructors, LLC (ECC), and SPSG Partners (SPSG) (collectively, Awardees). DEJV's bid was properly disqualified for lack of responsiveness.

Background

The Camp Fire destroyed more than eighteen thousand structures in Butte County during the month of November 2018. On November 8, 2018, Acting Governor Newsom proclaimed a state of emergency (see CalRecycle Staff Response, tab 2¹) and found that strict compliance with "various statutes and regulations specified...would prevent, hinder, or delay the mitigation of the effects of the Camp Fire."² Specifically, the Acting Governor ordered:

¹ CalRecycle Staff Response hereafter referred to as "CSR".

² The Governor may suspend statutes prescribing procedure for the conduct of state business during declared emergencies under the authority of California Government Code (GC) section 8571.



“As necessary to assist local governments and for the protection of public health and the environment, state agencies shall enter into contracts to arrange for the procurement of materials, goods, and services necessary to quickly assist with the response to and recovery from the impacts of the Camp Fire. Applicable provisions of the Government Code and the Public Contract Code, including but not limited to travel, advertising, and competitive bidding requirements, are suspended to the extent necessary to address the effects of the Camp Fire.”

On November 15, 2018, CalRecycle received a “Mission Task” – an official order from the Governor’s Office of Emergency Services (OES) – to provide debris removal operations for the Camp Fire emergency response (see CSR tab 3). Among its responsibilities, CalRecycle was specifically ordered to “[e]nter into contracts per Governor’s Proclamation of State of Emergency dated November 8, 2018, for the removal of fire debris from an estimated 12,000 parcels in Butte County.” CalRecycle IFB DRR18088, the subject of this protest, was created in direct response to this order, and the three resultant contracts are the primary mechanism for fire debris removal in the Camp Fire emergency response.

The original IFB was posted on December 19, 2018, and a revised IFB document (see CSR tab 4) was posted as part of Addendum 4 on January 16, 2019.³ The IFB received five addenda: Addendum 1 (see CSR tab 5) posted on December 28, 2018; Addendum 2 (see CSR tab 6) posted on January 7, 2019; Addendum 3 (see CSR tab 7) posted on January 9, 2019; Addendum 4 (see CSR tab 8) posted on January 16, 2019 (with the Revised IFB document); and Addendum 5 (see CSR tab 9) posted on January 18, 2019. The IFB closed at 2:00 pm on January 22, 2019. Nine bids were received and opened. CalRecycle staff examined the bids for completeness and responsiveness and five were disqualified, while the other four were found to have been submitted by responsive, responsible bidders. DEJV’s bid, the subject of this protest, was disqualified for lack of responsiveness because DEJV failed to provide a reference for one post-disaster residential debris removal project with a minimum contract value of \$15,000,000 performed by the bidder itself, completed within the past five years (see CSR tab 10).

Per the Award of Agreement section of the IFB, two contracts for work inside the Town of Paradise were awarded based on the two lowest remaining bids: those of ECC and SPSG. The third contract, for work outside the Town of Paradise, was then awarded to the lowest remaining bidder not already receiving an award for work inside the Town of Paradise: Ceres. DEJV’s bid for work inside the Town of Paradise was lower than that of one of the apparent awardees – had DRJV not been disqualified, it would have been awarded a contract for work inside the Town of Paradise.

³ Unless otherwise noted, further references to the “IFB” refer to the revised IFB document.

Protest Procedure

The IFB describes the procedure for protest of award:

A Bidder may protest the proposed award by filing a protest with CalRecycle's Hearing Officer.

The protest must be filed within five (5) days of the notice of intent to award the contract.

Within five (5) working days of the initial protest filing, the Bidder must submit a detailed written statement with information that supports that the Bidder would have been awarded the contract and the grounds for that position.

Because of the necessity to begin fire debris removal immediately, the Agreement may be awarded prior to a decision on the filed protest. In the event that the Hearing Officer finds that the contract was awarded incorrectly, the contract may be terminated and awarded to the protestant.

In considering the protest, the Hearing Officer may request and consider written statements of the protestant, the awarded bidder, and CalRecycle, along with all IFB and bid documents.⁴

CalRecycle announced its intent to award the contract on January 25, 2019, and DEJV's protest was received by CalRecycle on January 26, 2019 (see CSR tab 11); the protest was submitted within the time allowed.

DEJV's detailed statement was received by CalRecycle on February 1, 2019 (see CSR tab 13), including a cover letter (see CSR tab 12) and a declaration with exhibits (see CSR tab 14); the detailed statement was submitted within the time allowed.

The detailed written statement is to be a robust and complete statement including details, supporting information and the grounds for the protest⁵. Protestants are free to attach exhibits and declarations, and are not limited to a certain number of pages. Here, DEJV submitted a robust 22-page statement that included an 8-page declaration and 8 exhibits. It included the various grounds for its protest and supporting details as required by the IFB.

Submission of additional written statements from the protestant, awardee, and CalRecycle staff is at the discretion of the Hearing Officer⁶. Here, the Hearing Officer solicited responses from the Awardees and CalRecycle Staff. Each Awardee submitted a response to DEJV's protest on February 8, 2019 (see CSR tabs 15

⁴ IFB at page 30.

⁵ *Id.* at 30.

⁶ *Id.* at 30.

[Ceres], 16 [ECC], and 17 [SPSG]). CalRecycle Staff submitted written comments on February 19, 2019.

On February 20, 2019, DEJV requested permission from the Hearing Officer to submit additional written comments in response to submissions from the Awardees and CalRecycle Staff. That request was denied. The basis of DEJV's protest and supporting information was thoroughly described in its detailed written statement. Additional written comments were unlikely to introduce new relevant evidence.

In its detailed written statement and again on February 20, 2019, DEJV requested a hearing in connection with its protest. Those requests were denied. As explained below, DEJV's bid was disqualified for lack of responsiveness not responsibility. Therefore, no evidentiary hearing is required by law. Furthermore, a hearing was unlikely to meaningfully supplement the record, as DEJV had already thoroughly described the grounds for its protest in its detailed written statement.

DEJV Protest Claims

The protest lodged by DEJV alleges that the reference requirement in question was not included as a requirement in the original or revised IFB documents, so DEJV cannot be held to the requirement (see CSR tab 13, page 2). It also alleges that the requirement is contrary to law (see CSR tab 13, pages 3-4). Finally, it alleges that even if the reference requirement was applicable to DEJV and legal, the disqualification of its bid was based on a determination of responsibility, rather than responsiveness, and DEJV is entitled to an evidentiary hearing (see CSR tab 13, page 3).

Legal Standard

Generally in California, protests on IFB awards would be considered under Public Contracts Code section 10345(a). While the procedure has been abbreviated under the authority of the Governor's Proclamation of a State of Emergency, the legal principle remains the same: the contract should be awarded to the lowest responsive responsible bidder. CalRecycle found DEJV's bid to be nonresponsive and disqualified it. DEJV alleges that its bid was improperly disqualified (and by inference, responsive to the requirements of the IFB) and that it should have been awarded a contract as a low bidder.

To have a bid accepted, a bidder must be both responsive and responsible. Responsiveness relates to whether the bidder properly provided everything requested in

the IFB.⁷ Responsibility relates to the ability of the bidder to actually perform the work as promised.⁸

The basic standard for determination of whether an issue is one of responsiveness or responsibility, and whether the disqualified bidder is entitled to a hearing, comes from *Taylor Bus Service, Inc. v. San Diego Board of Education*:

“A determination that a bidder is responsible is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment. Not only is the process complex, but the declaration of nonresponsibility may have an adverse impact on the professional or business reputation of the bidder. Such circumstances reasonably require the procedures defined in *City of Inglewood*.

A determination of nonresponsiveness on the other hand is less complex. The 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.”⁹

Ultimately, a disqualification for lack of responsiveness does not require an evidentiary hearing: “We hold that a bidder determined to be nonresponsive is entitled to notice of that fact and is entitled to submit materials, in a manner defined by the district, concerning the issue of responsiveness. The district is not required to conduct a hearing, however, and need not produce findings.”¹⁰ The present protest procedure alone provides sufficient due process to a disqualified bidder when the disqualification is based on responsiveness.

⁷ “A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted.” *Cypress Sec., LLC v. City and County of San Francisco*, 184 Cal.App.4th 1003, 1015 (Cal. App. 1st Dist. 2010), quoting *Ghilotti Constr. Co. v. City of Richmond*, 45 Cal.App.4th 897, 904 (Cal. App. 1st Dist. 1996), itself quoting a phrase used in many other published cases.

⁸ “Responsibility means the fitness, quality and capacity of the bidder to satisfactorily perform the proposed work.” *Taylor Bus Serv, Inc. v. San Diego Bd. of Education*, 195 Cal.App.3d 1331, fn 4 (Cal. App. 4th Dist. 1987) (hereinafter “*Taylor Bus*”).

⁹ *Id.* at 1341-1342. Note that the reference to “City of Inglewood” refers to the requirement for a finding of non-responsibility elaborated upon in *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, 7 Cal.3d 861 (1972).

¹⁰ *Id.* at 1343.

In this case, CalRecycle does not allege that DEJV cannot capably perform the work in question (which would be a question of responsibility). Instead, the disqualification is based on responsiveness, and specifically whether DEJV's bid itself satisfies the terms of the IFB.

Argument

Reference Requirement not in the IFB

In the "Qualifications and Resources" section of the IFB, CalRecycle stated the following: "Bidders shall provide all information required below. Failure to provide any information below may cause the bid to be considered non-responsive and the submittal may be rejected." (CSR tab 4, page 15). Item (b) in that section requested references:

"References: The Bidder shall provide references for a minimum of three (3) verifiable post-disaster residential debris removal projects, performed as a prime or sub-contractor, with environmental cleanup project references and/or experience that support the above qualifications. At least one of the three projects must consist of wildfire debris removal specifically. Each of these three references shall support experience for the types of work identified in Section V, Work to be Performed, completed within the last 5 years, and be of a minimum contract amount of \$15,000,000. Post-disaster residential debris removal projects performed by the Bidder or listed, committed subcontractors shall be considered for purposes of meeting the minimum of three references. CalRecycle reserves the right to contact these references as well as seek references in addition to the client references provided by the Bidder, as it deems necessary. Contractors shall provide the name and current phone number of references that can confirm accuracy of experience and qualifications listed in the Proposal. References who are employees of the company submitting the Proposal or employees of firms legally associated with the Contractor submitting the Proposal will not be considered as valid references. Experience or qualifications that cannot be confirmed by CalRecycle staff (e.g., inappropriate contact person or incorrect telephone number) may be disregarded. Because of the extremely short evaluation period, CalRecycle reserves the right not to disqualify a proposal if some references cannot be verified in the time scheduled.

Contractors and subcontractors do not specifically need California fire debris removal experience. If liquidated damages were applied to the referenced projects the Bidder must explain the circumstance. Use Attachment F to fulfill this requirement." (CSR tab 4, pages 15-16, bold removed)

In Addendum 4, CalRecycle addressed the following clarifying question regarding this requirement:

"Q163. Does the requirement on page 15 of the IFB that "The Bidder shall provide references for a minimum of three (3) verifiable post-disaster residential debris removal projects, performed as a prime or sub-contractor" require that the Bidder itself performed any of the 3 removal projects, or may "listed, committed subcontractors" satisfy the entire "References" requirement?

A163. The requirement for at least one wildfire debris removal project of \$15,000,000 or greater must be satisfied by the Bidder. Listed, committed subcontractors may satisfy some or all of the remaining two required post-disaster residential debris removal projects of \$15,000,000 or greater (which may or may not be wildfire-related)." (CSR tab 8, Q&A 163)

CalRecycle was very specific in its clarification, of which the relevant part is that the bidder was required to submit one reference specific to the bidder itself for a wildfire-related post-disaster residential debris removal project with a minimum contract value of \$15,000,000, completed within the past five years. While DEJV provided many references, it did not provide one meeting the above requirements.¹¹

DEJV alleges that the reference requirement relating to the bidder itself was not noted in the IFB issued on December 19, 2018 (CSR tab 13, page 2), or the revised IFB issued on January 16, 2019 (CSR tab 13, pages 6-7). DEJV admits that the clarifying requirement was present in Addendum 4 but argues that the addendum language should not be controlling (CSR tab 13, pages 6-8). The original IFB (and the revised IFB) includes the following:

"Addenda

CalRecycle reserves the right to amend, alter, or change the rules and conditions of this IFB.

Any ambiguity, conflict, discrepancy, omission, or other error discovered in the IFB should immediately be reported to CalRecycle prior to the deadline for submission of written questions. CalRecycle will issue addenda to address such issues. Addenda will be available on the CalRecycle webpage for this particular solicitation at <http://www.calrecycle.ca.gov/contracts>." (CSR tab 1, page 8)

Furthermore, the original IFB (and the revised IFB) includes a requirement for a cover letter, signed by an individual authorized to contractually bind the bidder, acknowledging the bidder's receipt of any addenda issued (CSR tab 1, pages 14-15). DEJV's cover letter states "DRC-ERRG JV is in receipt of IFB DRR18088 Addendum No. 1, dated December 28, 2018, Addendum No. 2, dated January 7, 2019, Addendum No. 3, dated January 9,

¹¹ Note that as DEJV bid as a joint venture, both constituent entities to the joint venture (DRC Pacific, Inc. [DRC] and Engineering Remediation Resources Group Inc. [ERRG]) could be argued to be the "Bidder" for purposes of this requirement. CalRecycle would have accepted the bid if an appropriate reference was submitted for the joint venture or either constituent entity.

2019, Addendum No. 4, dated January 16, 2019, and Addendum No. 5, dated January 18, 2019" (see CSR tab 18, page 3). Based on its receipt of the addenda, DEJV was aware or should have been aware of the reference requirement at the time it submitted its bid.

The express purpose of the IFB addenda is to address "[a]ny ambiguity, conflict, discrepancy, omission or other error discovered in the IFB" (CSR tab 4, page 8). The only standard against which a bidder can be considered is the final IFB with all revisions and addenda. In this case, CalRecycle issued Addendum 4 to clarify the project reference requirement.

DEJV argues that CalRecycle's decision not to revise the underlying "References" language in the IFB somehow renders the clarification ineffective. While it is within CalRecycle's discretion to revise the IFB, no law compels CalRecycle to do so. To the extent that CalRecycle did revise the IFB, the revisions reflect only limited adjustments. CalRecycle added language already drafted that had been inadvertently deleted during editing (CSR tab 4, page 17, as noted in Addendum 2 at CSR tab 6) and made the edits that impacted the actual cost basis and dollar values for the underlying bids (CSR tab 4, pages 1-2, 20-27, 42-44, 47-49, 62, and 67). CalRecycle did not make any other edits, instead choosing to rely on the general statement that ambiguity would be addressed by the addenda (CSR tab 4, page 8).

Given the emergency situation and the necessity to keep the contracting process moving as quickly as possible, CalRecycle did not feel it was a prudent use of time to contemplate integrating further edits into the revised IFB, a complex, 96-page document requiring multiple levels of review. Further revising the IFB to incorporate all the clarifications present in Addendum 4 would have delayed the release of the Addendum and the revised IFB, cutting into a time period that DEJV alleges was already too short (CSR tab 13, page 8).

DEJV's bid was properly disqualified by CalRecycle as nonresponsive because the bid did not provide the references required. The clarification to the reference requirement in Addendum 4 is controlling and was acknowledged by DEJV.

DEJV also alleges that the closure of the question-and-answer period and the limited time period between the issuance of Addendum 4 (January 16, 2019) and the closure of the IFB (January 22, 2019) left it without time to change the composition of its bid team (CSR tab 13, pages 7-8). However, DEJV and all potential bidders were informed from the outset that this solicitation was an emergency response with substantially shortened time periods and other differences from typical IFBs (CSR tab 1, page 1). CalRecycle's obligation under the Proclamation of a State of Emergency was to "enter into contracts...to quickly assist with the response to and recovery from the impacts of the Camp Fire." (CSR tab 2, page 2) The timeline provided represents CalRecycle's best effort to appropriately respond to the threats to human health and the environment arising

from the emergency situation. This timeline is not a basis upon which to protest the contract awards and does not eliminate the requirement that DEJV provide the required references.

To the extent that DEJV's protest rests on the assertion that it was not required to provide the wildfire-specific reference as clarified in Addendum 4, the protest is rejected.

Responsiveness versus Responsibility

CalRecycle disqualified DEJV's bid for nonresponsiveness. In determining whether DEJV provided the required references, CalRecycle did not rely on information found outside the bid documents or apply "subtle judgment." CalRecycle simply reviewed the references described in DEJV's bid and found none that satisfied the requirement that the bidder provide at least one reference specific to the bidder itself for a wildfire-related post-disaster residential debris removal project with a minimum contract value of \$15,000,000, completed within the past five years.

In arguing that its bid was actually disqualified based on a determination of responsibility, DEJV leans heavily on *D.H. Williams Construction Inc. v. Clovis Unified School District*¹² and *Great West Contractors, Inc. v. Irvine Unified School District*¹³ without acknowledging that these cases apply only in situations where the bidder has actually complied with the applicable bid requirements. The *Great West* court held "We thus recognize ... that literal noncompliance with a bid request does indeed makes [sic] a bid nonresponsive"¹⁴ and that the application of the analysis provided in *D.H. Williams* was reserved for situations where "there is literal compliance, but the public entity still claims the bid was nonresponsive."¹⁵ Here, DEJV literally failed to provide the reference required, which is clearly nonresponsive and CalRecycle's disqualification does not reflect a determination based on the responsibility of DEJV.

CalRecycle does not suggest DEJV, its constituent entities, or its subcontractors are somehow "bad" contractors. CalRecycle has made no allegations about any of these entities, the quality of their work, or their fitness as contractors. Instead, CalRecycle has only determined that this specific bid did not contain everything required by the IFB.

Because the disqualification was based solely on the nonresponsiveness of the bid, DEJV is not entitled to an evidentiary hearing. DEJV's bid was properly disqualified by CalRecycle as nonresponsive because the bid did not provide the reference required. To the extent that DEJV's protest rests on the argument that the bid disqualification was based on a determination of responsibility, the protest is rejected.

¹² 146 Cal.App.4th 757 (Cal. App. 5th Dist. 2007), hereinafter "*D.H. Williams*".

¹³ 187 Cal.App.4th 1425 (Cal. App. 4th Dist. 2010), hereinafter "*Great West*".

¹⁴ *Id.* at 1456.

¹⁵ *Id.*

Compliance with Competitive Bidding Law

DEJV argues that CalRecycle's reference requirement is contrary to California and federal law because it restricts competition. However, DEJV ignores CalRecycle's authority under the Proclamation of a State of Emergency (CSR tab 2, page 2). This order, under the authority of Government Code (GC) section 8571, suspends the provisions of the California Public Contract Code, including specifically competitive bidding requirements, to the extent necessary to address the effects of the Camp Fire (CSR tab 2, page 2). While CalRecycle did not find it necessary to disregard competitive bidding altogether, CalRecycle found it appropriate to use the reference requirements to identify contractors who had previously performed large wildfire-related, post-disaster residential debris removal projects. This allowed CalRecycle to quickly and definitively review bids while providing confidence that the overall debris removal operation would be successful.

In its reference to federal law, DEJV cites only Title 2 Code of Federal Regulations (CFR) section 200.319, a section regarding procurements standards for certain federal awards. However, as a California state agency, 2 CFR section 200.319 does not apply to CalRecycle. The appropriate section in this case is 2 CFR section 200.317:

“§ 200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with § 200.322 Procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by section § 200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract provisions.”

By complying with California law, specifically GC section 8571, CalRecycle has complied with 2 CFR section 200.317. Regardless, 2 CFR section 200.317 is explicit about which other related sections apply to states (only 2 CFR sections 200.322 and 200.326) while making clear that only “other non-Federal entities” are required to follow all the sections from 2 CFR sections 200.318 to 200.326. 2 CFR section 200.319 is simply inapplicable to CalRecycle, and as such, CalRecycle cannot be in violation.

To the extent that DEJV's protest rests on the allegation that CalRecycle's IFB or the reference requirement specifically are contrary to law, the protest is rejected.

Allegations of Ceres

In its protest response, Ceres notes that DEJV failed to present the required contractor license (CSR tab 15, pages 3-4). The IFB requires that bidders provide a specific contractor license: Class A – General Engineering Contractor license with HAZ Certification (CSR tab 4, pages 17-18). DEJV's bid did not present a contractor license

in its own name, which is itself not fatal because of DEJV's status as a joint venture. In practical effect, a joint venture is generally a temporary partnership formed for completing a single solicitation or contract.¹⁶

While failure to hold a required contractor license usually results in a statutory finding that the bid is nonresponsive,¹⁷ joint ventures are a potential exception. California Business and Professions Code (BPC) section 7028(c) states that "[t]his section shall not apply to a joint venture license, as required by Section 7029.1. However, at the time of making a bid as a joint venture, each person submitting the bid shall be subject to this section with respect to his or her individual licensure." Assuming that DEJV is an appropriate joint venture per BPC section 7029.1, and CalRecycle has no cause to contest that, the lack of a contractor license for the joint venture means that each constituent entity to the joint venture must comply with the IFB requirements with respect to their individual licensures. While ERRG, one of DEJV's constituent entities is appropriately licensed (see CSR tab 19, excerpts from DEJV's bid package, page 3), DRC holds the Class A – General Engineering Contractor license but lacks the required HAZ Certification. When combined with the lack of a contractor license in the name of the joint venture at the time of bid, the fact that DRC does not hold the appropriate HAZ Certification also compels the disqualification of DEJV's bid.

Because neither DEJV nor all of its constituent entities hold the appropriate contractor licenses, BPC section 7028(e) requires the bid to be considered nonresponsive.

¹⁶ Nature and Distinctions, 9 Witkin, Summary 11th Partn § 12 (2018).

¹⁷ "(e) Unless one of the foregoing exceptions applies, a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency..." California Business and Professions Code (BPC) section 7028.15(e).

Conclusion

CalRecycle staff disqualified DEJV's bid as nonresponsive based on the bid's lack of a required reference. The disqualification of the bid is not based on a finding that DEJV is non-responsible and DEJV is not due an evidentiary hearing on the matter. CalRecycle could alternatively have disqualified DEJV's bid as nonresponsive based on DEJV's lack of a required contractor license. DEJV's protest is rejected in full.

Sincerely,



Douglas C. Jensen
Hearing Officer
Attorney IV, CalRecycle

cc by email:

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