

**DATE :** July 24, 2017

**TO :** Wilma Quan-Schecter, City Manager

**FROM:** Michael D. Flores, Independent Administrative Hearing Officer

**Subject:** **FINDINGS AND RECOMMENDATION TO CITY COUNCIL ON PROTEST OF TEICHERT CONSTRUCTION CO., REGARDING FRESNO-YOSEMITE INTERNATIONAL AIRPORT TAXIWAY "C" RECONSTRUCTION PROJECT- BID FILE NO. 3519.**

**Procedural History**

The City of Fresno ("City") invited bids for the reconstruction of Taxiway "C" at Fresno-Yosemite International Airport ("Airport") project, Bid File no. 3519. After receiving all bids, City staff issued a determination that designated Security Paving Company, Inc. ("Security Paving"), as the lowest responsible and responsive bidder, in compliance with the specifications set forth in the Bid Files.

The second lowest bidder, Teichert Construction Company ("Teichert"), timely protested the City's determination. A hearing was conducted on July 10, 2017 at 1:30 P.M., in Fresno City Hall by Independent Administrative Hearing Officer Michael D. Flores.

**Issues on Appeal**

Teichert's protest letter alleged that the contract award was to a bidder other than the lowest responsive and responsible bidder. Teichert's grounds for their contention were that, (1) Notwithstanding City Charter §1208, Public Contract Code §5103 is applicable for this Bid File; (2) Security Paving's failure to list a soil stabilization contractor in its "List of Subcontractors", but listing one in their "Subcontractor Information-Detail" form evidences a material mistake in Security Paving's bid;; (3) Security Paving's submission of four subcontractors on its "List of Subcontractors", while listing seven subcontractors on its "Subcontractor Information-Detail" form at bid opening was also a material mistake; (4) Security Paving's material mistakes described in sections (2) and (3) would, pursuant to Public Contract Code §5103, the requirements of the Bid File and case law, allow Security Paving to withdraw its bid without forfeiting its bid bond, thus giving Security Paving an advantage not available to other bidders; (5) Security Paving's advantage would make their bid "non-responsive" and would require the City to reject Safety Paving's bid and award the project to Teichert, or in the alternative, reject all bids and request resubmittal of bids.

## **Findings**

At the July 10<sup>th</sup> hearing, Scott D. McElhern, Esq., Downey Brand, LLP appeared on behalf of Teichert Construction Co., along with Eric Stannard, Vice President of Public Works for Teichert, and Janez Seliskar, Chief Estimator for Teichert.

Robert Schaffer, General Counsel appeared on behalf of Safety Paving Co., Inc.

Deputy City Attorneys Amanda Freeman and Brandon Collet appeared on behalf of the City of Fresno, along with Todd Knittel, City Purchasing Manager.

## **Analysis of Issues**

**(1) Application of Public Contract Code §5103:** Teichert argues that Safety Paving’s failure to include a soil stabilization subcontractor on its “List of Subcontractors” form included with its bid documents submitted to the City, and its inconsistent number of subcontractors listed in the “List of Subcontractors” and “Subcontractor Information-Detail Form” are material mistakes pursuant not only to the holdings of the cases cited in their briefs, replies and responses submitted to the Hearing Officer and other parties, but also pursuant to California Public Contract Code section 5103. The City argues that they are a Charter City, and that under City Charter section 1208, the City is not subject to the California Public Contract Code in whole or in part unless the City Council authorizes it by resolution. In rebuttal, Teichert points out that in its “Instructions to Bidders”, section vii, the City clearly states that any errors or omissions by a bidder, “...will be dealt with in accordance with the California Public Contract Code including, but not limited to sections 4107.5 and 5103.”

City Charter section 1208(e) states, “The city shall not be subject to the California Public Contract Code, in whole or in part, unless Council agrees by ordinance.” While subsection (e) is clear, the language in the “Instructions to Bidders” provided by the City in their bid documents is equally clear. To argue on one hand that the City is not bound by the rules and regulations of the California Public Contract Code unless specifically allowed by resolution of the City Council, and on the other hand inform all potential bidders that any errors or omissions will be subject to Public Contract Code sections 4107.5 and 5103, is an inconsistent argument at best.

While the City’s argument may have some merit as it applies to the Public Contract Code’s other sections, at least as to sections 4107.5 and 5103, the statement in the “Instructions to Bidders” of the City’s intent to refer to the two sections when dealing with errors and omissions by bidders is substantial evidence that the City has in essence agreed to incorporate Public Contract Code sections 4107.5 and 5103 into the City’s rules and regulations as they apply to Bid File 3519.

**(2) Failure to List Soil Stabilization Subcontractor in Both Subcontractor Lists at Bid Opening:** In its initial protest to the City, Teichert contended that one of the factors establishing that Security Pavement’s bid was non-responsive was their failure to list a soil stabilization subcontractor in their “List of Subcontractors”, while listing one in their “Subcontractor Information-Detail Form”; both submitted on the day of bid opening. Teichert did not make that argument at the July 10<sup>th</sup> hearing, so the Hearing Officer does not know if Teichert has



abandoned that particular argument, or merely incorporated it into their general argument that Safety Paving's bid contained material mistakes rendering their bid non-responsive pursuant to the relevant law and Bid File. Since Teichert had at least initially asserted this argument separately, the Hearing Officer feels obliged to analyze and comment on it separately.

While Teichert argued that such a mistake is considered material under statutory and case law, the City and Safety Paving contended that the omission of a soil stabilization subcontractor in the "Subcontractor Information-Detail Form" does not make Safety Paving's bid non-responsive. The City argued that no bidder was required to use a subcontractor to perform soil stabilization work, and Teichert's assertion that Safety Paving did not have the equipment or expertise to perform soil stabilization work was not supported by any evidence. In addition, Security Paving's legal counsel Mr. Shaffer stated at the July 10<sup>th</sup> hearing that Safety Paving carried a Class "C" contractor's license and did have the equipment and expertise to provide those services. The City also asserted that even if for argument's sake the omission could be considered a mistake, it would not be considered a material mistake pursuant to Public Contract Code section 5103, and those cases cited by Teichert; chiefly, *Konica Business Machines U.S.A. Inc. V. Regents of University of California* (1988) 206 Cal.App.3d 449 ("*Konica*"), and *MCM Construction, Inc. V. City & County of San Francisco* (1998) 66 Cal.App.4<sup>th</sup> 359 ("*MCM*"). Both City and Safety Paving contend that the omission of the soil stabilization subcontractor from one of the subcontractor lists did not affect the price of the bid, provided no advantage to Safety Paving not allowed to the other bidders, and could not be considered a vehicle for favoritism on behalf of Safety Paving.

Although the rulings in the cases cited by Teichert are relevant to their arguments, the cases also provide exceptions and distinguishing factors that are also applicable to the facts in this case. In *Konica*, while the court held that in general, competitive bids that don't conform to the bid specifications cannot be accepted, it also held that a "substantially conforming bid" that could not have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders, while not strictly responsive, may be accepted (*Konica, supra*, at 454). And even though *MCM* stands for the proposition that the ability of a bidder to withdraw their bid without forfeiting their bid bond constitutes a "[D]istinct advantage not available to other bidders", it does not automatically apply to all bids containing mistakes or deviations. The *MCM* court also held that the rule of strict compliance is not a complete barrier to "waiving inconsequential deviations" and accepting the bid containing that deviation (*MCM, supra*, at 369-370). The court went on to define an "inconsequential deviation" as one that "...was not capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders." (*Id.*). The *MCM* court also held that the evaluation of these factors must be made "...from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case," and "must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder." (*MCM, supra*, citing, *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 908-909, ("*Ghilotti*").) The Hearing Officer could find no difference in the dollar amount of Safety Paving's bid after it was determined that because it had not listed a soil stabilization subcontractor in its "List of Subcontractors" it would be required to self-perform that service. Nor did Teichert submit any evidence establishing that Security Paving's mistake would be capable of facilitating corruption or extravagance, or would be likely to affect potential bidders' responses or their bid amounts. In the absence of those



factors, Safety Paving's mistake regarding the failure to list a soil stabilization subcontractor in their "List of Subcontractors" included in their bid could only be considered an "inconsequential deviation" under both the *Konica* and *MCM* decisions.

As to the public interest factor, the City pointed out in their Brief that charter cities are required to follow charter provisions that require bids to be awarded to the lowest responsible and responsive bidder. (*Respondent's Brief*, page 2). The Hearing Officer agrees with Teichert that the City must carefully review all bids for all public projects to ensure that they conform with all laws, rules and regulations to safeguard their citizens and prevent any corruption, favoritism, or potential diminishment in the quality of the construction of the project, monitor and control the cost of the project whenever possible, and provide an equal opportunity for all qualified bidders to be considered and awarded a project. However, he believes it is equally important that the City serve the public interest by keeping a project moving forward at a steady pace, without unnecessary or unwarranted delays. In some cases where a mistake has been made in a bid submittal, the courts have devised factors in which the facts of a particular case can be analyzed to determine whether that mistake can be considered "inconsequential". When the facts have justified such a determination, the courts have held that the public interest is better served by allowing the mistake to be corrected and having the project continue to move forward, rather than be delayed by substituting another bidder or starting the bidding process over.

Based upon the evidence submitted by all parties, and the relevant statutory and case law, the Hearing Officer finds that Safety Paving's failure to list a soil stabilization subcontractor in its "List of Subcontractors" contained in its bid to be an "immaterial mistake" or "inconsequential deviation", and does not render their bid non-responsive.

**(3) Listing of Different Numbers of Subcontractors on Different Bid Forms Constitutes a Material Mistake:** Teichert also contended that Security Paving's submittal of its "List of Subcontractors" listing four subcontractors, and its "Subcontractor Information- Detail Form" listing seven subcontractors at bid opening, was a material mistake. Teichert argued in their pleadings and at the July 10<sup>th</sup> hearing that under *Konica*, the court held that public contracts awarded without strict adherence to bidding requirements will be set aside. Teichert argued that Safety Paving's error in this instance constituted a material mistake, as it did not strictly comply with the bid specifications as required under *Konica*, and rendered Security Paving's bid "[M]aterially different than the bidder intended it to be" pursuant to Public Contract Code section 5103. Teichert argued that this mistake would allow Safety Paving to withdraw its bid without losing its bid bond, thus obtaining a benefit not available to the other bidders, and rendering Safety Paving's bid non-responsive pursuant to Public Code Section 5103 and the ruling in the *MCM* case. Teichert also argued that the fact Safety Paving did not seek to withdraw its bid was irrelevant as held in *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4<sup>th</sup> 1432, 1442 ("*Valley Crest*").

As to this issue, the City argued that the "Subcontractor Information- Detail Form", provided by Safety Paving at the time of the bid opening, was not required by Public Contract Code §5103, but was required to be provided to the City by the three lowest bidders within one working day of the from the date of the bid opening if that bidder listed subcontractors on the "List of Subcontractors" form. The City argued that nothing in the Bid File limited a prospective bidder

from providing only one “Subcontractor Information- Detail Form” within the time period, and contended that Safety Paving provided an amended “Subcontractor Information- Detail Form” within that required time period that matched the number of subcontractors listed in the “List of Subcontractors” form, and therefore there was in fact no mistake made at all.

Both the City and Security Paving also argued that, even if the Hearing Officer found that there was a mistake made regarding the inconsistent number of subcontractors between the two forms, the discrepancy did not result in a material mistake, but is only a “inconsequential deviation” which can be waived by the City pursuant to page ii of the Bid File. Citing the *Ghilotti* case, *supra*, the City also argued that a bid containing a discrepancy can be considered responsive if that discrepancy is “inconsequential”. The *Ghilotti* court held that a discrepancy would be considered “inconsequential” if it **did not**: 1) affect the amount of the bid; 2) give a bidder an advantage over others (or, as Teichert had argued, allowed Safety Paving to withdraw its bid without forfeiting their bid bond); 3) become a potential vehicle for favoritism; 4) influence potential bidders to refrain from bidding; or 5) affect the ability of the City to make bid comparisons. As cited previously, the *Ghilotti* court held that the evaluation of these factors “must be viewed in light of the public interest, rather than the private interest of a disappointed bidder.” (*Id.*, p. 909).

In analyzing these five factors, the Hearing Officer could find no evidence that the discrepancy in the number of subcontractors listed by Safety Paving in the two forms submitted at bid opening affected the bid price submitted by Safety Paving. Teichert provided no evidence, nor could the Hearing Officer find any evidence in his review of the Bid File documents to support a finding that Safety Paving’s discrepancy had become or would become a vehicle for favoritism. Additionally, the Hearing Officer could find no evidence that Safety Paving’s discrepancy influenced potential bidders to refrain from bidding on this project or any other, nor did Teichert provide any evidence to support this factor. And no evidence that Safety Paving’s discrepancy affected the City’s ability to make bid comparisons was submitted to the Hearing Officer. Because of the lack of evidence in support of these factors, the Hearing Officer finds that Safety Paving’s discrepancy in listing different numbers of subcontractors on the two forms submitted at bid opening to be inconsequential. Therefore, Safety Paving could not have withdrawn its bid without forfeiting its bid bond, and did not have an unfair vantage over the other bidders pursuant to Public Contract Code §5103.

Applying the facts in this case to the five criteria from *Ghilotti* and the similar criteria found in the *Konica*, *MCM*, and *Valley Crest* cases previously discussed, and keeping in mind the evaluation of those criteria should be viewed in light of the public interest, Teichert’s argument on this issue is not persuasive.

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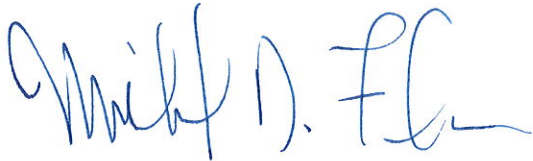
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**Recommendation**

For the reasons provided above, the Hearing Officer recommends that the City Council UPHOLD the staff determination that designated Security Paving Company, Inc. as the lowest responsible and responsive bidder.

Date: July 24, 2017

A handwritten signature in blue ink, appearing to read "Michael D. Flores". The signature is stylized and cursive.

Michael D. Flores  
Independent Administrative Hearing Officer

Cc: Todd Knittel, Purchasing Manager