

DATE: June 19, 2014

TO: Bruce A. Rudd, City Manager

SUBJECT: FINDINGS AND RECOMMENDATION ON APPEAL OF KERTEL COMMUNICATIONS, INC., dba SEBASTIAN ("KERTEL") REGARDING BID FILE NOS. 3320 AND 3338

Procedural History

The City invited bids for Bullard and McKinley Avenues traffic signal synchronization projects, Bid File Numbers 3320-11696 and 3338-11606. City staff issued a determination that designated Crosstown Electrical and Data, Inc. ("Crosstown") of Irwindale, California, as the lowest responsive and responsible bidder, in compliance with specifications set forth in the Bid Files.

The second lowest bidder, Kertel Communications, Inc., dba Sebastian ("Kertel") (Appellant), timely appealed the determination. An appeal hearing was conducted on June 11, 2014 at 10:00 am in Fresno City Hall by Independent Administrative Hearing Officer Edward Johnson.

Issues on Appeal

Appellant's appeal letter alleged Crosstown to be "not responsible" because Crosstown failed to meet bid contractor qualification requirements to have the appropriate licenses to perform required work, cannot self perform that work, and failed to list subcontractors that could perform the work. The work in question was traffic control and asphalt work.

Issues Raised at Hearing

Kelly Yost appeared for Appellant. Appearing for the City was Brandon Collett, Deputy City Attorney; Gary Watahira, Purchasing Manager; Lalkumar Goonawardena, Design Services Manager; and Robert Anderson, Deputy Director for Public Works (collectively, "City").

Mr. Yost argued that traffic control and asphalt work required their own specialty licenses which Crosstown did not possess. He argued Crosstown could not self perform this work because it exceeds that which is incidental to Crosstown's license specialty. Although he acknowledged that there was no standard for determining what percentage of a project was considered to be "incidental," he argued that the work at issue represented over four percent

of the project cost, which is a significant amount of money and work, and is not incidental, but instead is critical to the project.

City's Appeal Packet asserted that Crosstown is the apparent lowest responsive and responsible bidder, and meets all qualifications in the bid files.

Analysis

California Business and Professions Code, section 7059(a), states that:

Nothing contained in this section shall prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades, if the performance of the work in the crafts or trades, other than in which he or she is licensed, is incidental and supplemental to the performance of the work in the craft for which the specialty contractor is licensed.

California Code of Regulations, 16 CCR section 831, defines Incidental and Supplemental as follows:

For the purposes of Section 7059, work in other classifications is "incidental and supplemental" to the work for which a specialty contractor is licensed if that work is essential to accomplish the work in which the contractor is classified. A specialty contractor may use subcontractors to complete the incidental and supplemental work, or he may use his own employees to do so.

Here, the "work in other classifications" is the asphalt and traffic control work. The "work for which a specialty contractor is licensed" and the "work in which the contractor is classified" is that allowed by the C-10 license held by Crosstown. The City Appeal Packet, City Attorney Brief, states that it is City policy to allow a C-10 licensed contractor to bid on the electrical work for traffic signals included in the subject bids.

Thus, the question is whether asphalt and traffic control work is "essential" to accomplish the electrical work for traffic signals.

The term "incidental" is not used in the context of being a percentage, or minor consequence, of the total work, as argued by Kertel, but is instead used in the context of being essential to that work.¹

¹ As far back as the 1950's, "incidental and supplemental" has been construed to mean "necessary to the main purpose." (See *Currie v. Stolowitz*, 169 Cal.App.2nd 810, 814 (1959)).

There is substantial evidence in the record that asphalt and traffic control work is essential to the project. Consequentially, asphalt and traffic control work is incidental and supplemental to the performance of the traffic signal work.

Crosstown may perform incidental and supplemental work through subcontractors or their own employees.

Crosstown, in their response to the appeal, stated that they self perform this work on a regular basis. They are then not required to list any subcontractors for the work.

As part of the record of appeal, the Hearing Officer endorses and incorporates by reference Respondent's Brief.

Conclusion

After considering all evidence presented, the Hearing Officer finds that asphalt and traffic control work is essential, incidental and supplemental to the traffic signalization work required by the bid files.

The Hearing Officer therefore recommends to the City Manager that the City Council UPHOLD the staff determination that designated Crosstown as the lowest responsive and responsible bidder.



Edward Johnson
Independent Administrative Hearing Officer

Cc: Bob Callistro, Supervising Buyer
Gary Watahira, Purchasing Manager