



AUGUST 20TH, 2019

VIA ELECTRONIC MAIL ONLY

Mr. Jay Kaura
Contracts Administrator
Orange County Sanitation District
10844 Ellis Avenue
Fountain Valley, California 92708
construction@ocsd.com

Re: Return Activated Sludge Piping Replacement At Plant No. 2
Project No.: P2-123
Bid Date: July 29, 2019
Low Bidder: Shimmick Construction Company, Inc.

Dear Mr. Kaura:

1. Introduction

This is the response of Shimmick Construction Company, Inc. ("SCCI") to W.M. Lyles Co.'s ("Lyles") letter dated August 13, 2019 concerning the above Project. Shimmick is the most responsible low bidder who bid the Project. Lyles' contrary assertions are without merit because the OSHA citations in support of its protest against SCCI are either still pending appeal or are open. The remaining OSHA citations, and most serious safety accidents listed in Lyles' protest were not against SCCI. As detailed in its bid package, SCCI either has performed or is performing six major contracts worth \$219,485,243.00 of work over the past twelve years for the Orange County Sanitation District ("District"). There have been no OSHA reportable safety incidents on any of those projects. SCCI is a qualified and responsible bidder for the Project. The District should reject Lyles' protest and proceed to award the Project to the lowest responsive and responsible bidder: SCCI.

2. Brief Factual Summary

A. Bids Received

On July 29, 2019, the District received bids for the Project. SCCI was the low bidder by \$551,759.65, as detailed in the following table of the top three bidders:



Bidder	Bid	Spread
SCCI	\$6,042,110.35	
Lyles	\$6,593,870.00	\$551,759.65
Kiewit Infrastructure West, Co.	\$6,843,000.00	\$800,889.65

B. The District's Responsibility Specification

The District included within the Invitation to Bids the following definition of responsible bidder:

A responsible bidder has the apparent ability to meet and successfully complete the requirements of the Contract Documents. Responsibility determination includes, but is not limited to consideration of a Bidder's trustworthiness, the quality of past performance, financial ability, and the fitness and capacity to do the proposed work in a satisfactory matter.

(Invitation to Bid, p. 7, § 13-A(2).) Aside from the bidder's safety record, the District would consider at least five other categories of responsibility.

C. Lyles' Protest

On August 13, 2019, Lyles protested award to SCCI on the basis that SCCI is not a safe contractor and, therefore, not responsible to perform the work. In support, Lyles attached an OSHA report detailing various OSHA citations SCCI had received in the last five years. As detailed below, Lyles' protest is misleading and without merit. The most serious violations were not attributed to SCCI, but rather joint ventures of which SCCI was a member. Further, aside from the alleged safety infractions, Lyles does not dispute SCCI's, "trustworthiness, the quality of [SCCI's] past performance, financial ability, [or SCCI's] fitness and capacity to do the proposed work in a satisfactory matter," which are the other categories considered for responsibility. The District should reject Lyles' protest and award the Project to the lowest responsive and responsible bidder: SCCI.

3. Legal Standard

"A bidder is responsible if it can perform the contract as promised. A bid is responsive if it promises to do what the bidding instructions require." (*MCM Const., Inc. v. City & Cty. of San Francisco* (1998) 66 Cal.App.4th 359, 368, internal citations omitted.) "In the usual case, the 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." (*D.H. Williams Constr., Inc. v. Clovis Unified Sch. Dist.* (2007) 146

Cal.App.4th 757, 764.) However, “[a] determination that a bidder is responsible [or not] is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment.” (*Ibid.*) “[A]s in most due process cases, we believe the remedy must permit the agency to properly consider the issues in a due process hearing, and then to exercise the discretion vested in the agency by statute.” (*Ibid.*) Public bids:

[M]ust be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. ‘It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.’

(*MCM Const., Inc. v. City & Cty. of San Francisco* (1998) 66 Cal.App.4th 359, 370.) There is no dispute that SCCI’s bid is responsive. There should also be no doubt that SCCI is a responsible bidder. To the extent Lyles maintains the District must reject SCCI’s bid on issues of non-responsibility, SCCI is entitled to a due process hearing before the District to establish its responsibility. As detailed below, a hearing is not necessary, because SCCI is a responsible bidder.

4. Lyles’ Protest Is Without Merit and Should Be Summarily Rejected

A. Lyles’ OSHA Citations Do Not Establish Non-responsibility

OSHA violations are not final unless and until all pending appeals have been exhausted and a final ruling has been issued on the violation. All of SCCI’s OSHA violations listed in Lyles’ protest are either still open or pending appeal. Thus, while SCCI was required to list the *citations* in its bid, the underlying violations themselves are still being contested and thus, cannot be counted against SCCI’s safety record. Further, 11 of the 18 remaining OSHA citations were not cited to SCCI, but rather to firms who were joint venturers of which SCCI was a member. Since those citations were not against SCCI, they cannot be counted towards SCCI’s safety record. It is noteworthy that those citations not filed against SCCI include one fatality, a fractured arm and leg, and the partial amputation referenced in Lyles’ protest. Lyles cites to no other objective evidence that would characterize SCCI as unsafe because that evidence refutes Lyles’ accusation. As SCCI listed in its bid, it has an accident frequency below a factor of 1.00, workers’ compensation EMR below 1.00, and has the requisite injury prevention programs in place. SCCI is a responsible bidder. The District should reject the misleading and meritless



protest of Lyles and award the Project to the lowest responsive and responsible bidder SCCI.

B. California Will Defer to the District's Discretion to Award to SCCI

Although Lyles' protest should be summarily rejected, it is noteworthy that any challenge to the District's decision to award to SCCI will fail. That is because California law affords vast discretion to awarding agencies in competitive bids. The review of agency decisions is "limited to an examination of the proceedings to determine whether the [District's] actions were arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. There is a presumption that the [District's] actions were supported by substantial evidence, and [petitioner/plaintiff] has the burden of proving otherwise. [Courts] may not reweigh the evidence and must view it in the light most favorable to the [District's] actions, indulging all reasonable inferences in support of those actions." (*Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1187.) Here, SCCI is the lowest bidder. SCCI has been determined responsible on every District project it has ever worked on. That is why SCCI has performed or is performing \$219,485,243.00 of work with the District. Doubtless, SCCI is a responsible bidder. The District should reject the meritless protest of Lyles and award the Project to the lowest responsive and responsible bidder: SCCI.

5. Conclusion

It is undisputed SCCI submitted a responsive bid. SCCI a responsible bidder. Lyles wrongly references nonbinding OSHA citations—most of which were not cited to SCCI—to support its self-serving protest. Public bids "must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder." (*MCM Const., Inc. v. City & Cty. of San Francisco* (1998) 66 Cal.App.4th 359, 370.) Here, SCCI complied with the bid documents and submitted the lowest bid. Lyles' bid protest is without merit and against public policy. The District should reject Lyles' protest and award the Project to the lowest responsive and responsible bidder: SCCI. Please contact us with any questions and please notify us of any response from Lyles and/or public hearing for consideration of this matter. Thank you.

Sincerely,

Brad Fales
Deputy Director, Electrical Division