

June 8, 2021

Clarice Marcin  
Orange County Sanitation District  
10844 Ellis Avenue  
Fountain Valley, CA 92708

Re: **Response to Bid Protest by Act 1 Construction**  
Project No: P1-134  
South Perimeter Security and Utility Improvements at Plant No. 1

Dear Ms. Marcin,

In his letter of June 4, 2021, Mr. Don Trenholm of Act 1 Construction (Act 1) claims the bid submitted by Tovey/Shultz Construction, Inc. (Tovey/Shultz), is nonresponsive. Mr. Trenholm is mistaken. Tovey/Shultz's bid is responsive to the request for bids and the requirements of the Subletting and Subcontracting Fair Practices Act set forth at California Public Contract Code § 4100 et seq.

Whether a bid on a public works project is nonresponsive must usually be determined from the face of the bid, and "a bid is responsive if it promises to do what the bidding instructions demand." (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, at 1341.) Tovey/Shultz's bid meets this standard.

Act 1 raises two grounds on which it claims Tovey/Shultz's bid is nonresponsive: (1) that Tovey/Shultz does not list a surveyor among its list of subcontractors, and (2) that it failed to list a qualified contractor for the fiber optic cabling. Both claims are incorrect.

1. Tovey/Shultz is not required to list the surveyor in its bid. That Tovey/Shultz did not list a surveyor in its bid does not make its bid nonresponsive. The bid amount from the surveyor Tovey/Shultz will use on this project is \$18,340, which is less than 1/2 of 1% of Tovey/Shultz's bid. As Act 1 notes, subcontracts for amounts less than the greater of \$10,000 or 1/2 of 1% of the prime contractor's bid are not required to be listed in the prime contractor's bid. (See Public Contract Code § 4104, subd. (a)(1).) Tovey/Shultz's bid is \$4,396,779, so 1/2 of 1% is \$21,983.90. The surveyor bid is for a lesser amount so plainly the surveyor did not need to be listed as a subcontractor in Tovey/Shultz's bid.

2. Tovey/Shultz did list a qualified fiber optic subcontract. Here Act 1 makes two claims both of which are false. Act 1 claims Tovey/Shultz listed two subcontractors for this scope of work. This is incorrect. Tovey/Shultz listed only Intersect Technology Institute dba ITI Cabling for the fiber optic work. Act 1 also claims that ITI Cabling is not certified to install the specified system. This is also incorrect. While this issue goes beyond the face of Tovey/Shultz's bid and, as such, does not raise a question of responsiveness, ITI Cabling is certified on the system specified for this project. That certification is enclosed with this letter.



Finally, even if Tovey/Shultz had listed two subcontractors for this scope of work, which it did not do, Act 1 is incorrect in claiming that Tovey/Shultz does not have the licensing required to do this work. Tovey/Shultz has a class B general building contractor's license. By statute, a general building contractor can perform any building contract involving more than two unrelated trades or crafts, not counting framing or carpentry, except that a general building contract cannot perform fire protection work or well digging without being licensed in those separate classifications. (See Business and Professions Code § 7057.) Tovey/Shultz is not precluded by the pertinent licensing statutes from taking a contract that would require it to self-perform low voltage electrical work so long as the building contract in question involves more than two unrelated trades or crafts when not counting framing and carpentry, as is the case here. Thus, while Tovey/Shultz does not admit it listed two subcontractors to do the fiber optic scope of work, if it had done so this would not be grounds for rejecting Tovey/Shultz's bid as nonresponsive.

Tovey/Shultz contends it should be awarded the contract for the above identified project because Tovey/Shultz is the low responsive bidder. The objections raised by Act1 are incorrect and are contrary to the intent of the competitive bidding statutes and the public policy of this State:

“These [bid protest] considerations 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. ‘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, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.’

*Bay Cities Paving & Grading, Inc. v. City of San Leandro, supra, 223 Cal.App.4th 1181, 1189, quoting from Ghilotti Construction Co v. City of Richmond (1996) 45 Cal.App.4th 897, 908-909.*

Sincerely,

Tovey/Shultz Construction, Inc.

Kevin Terry  
President and CEO

enclosure (1)



**FutureFLEX® Air-Blown Fiber Solution  
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**ITI Cabling Inc.**

L1812101

12/31/2021

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