



Sullivan Hill Rez & Engel
A Professional Law Corporation

600 B Street
Suite 1700
San Diego, CA 92101
T 619.233.4100
F 619.231.4372
sullivanhill.com

SHAILENDRA U. KULKARNI
KULKARNI@SULLIVANHILL.COM
619.595.3204

January 23, 2019

VIA CERTIFIED MAIL AND ELECTRONIC MAIL

City of Rialto
Attn: Robert Eisenbeisz, PE
Director of Public Works
150 S. Palm Avenue
Rialto, CA 92376

Re: Construction of Frisbee Park Expansion
City Project No.: CB 150304
Our Client: RAL Investment Corp. d/b/a Silverstrand Construction

Dear Mr. Eisenbeisz:

As you are aware, this firm represents RAL Investment Corp. d/b/a Silverstrand Construction ("Silverstrand") in connection with the public bidding procedures administered by the City of Rialto (the "City"), as owner, concerning the public works construction project commonly known as the "Construction of Frisbee Park Expansion, City Project No. CB 150304 (the "Project").

We are in receipt of and thank you for a copy of the January 9, 2019, correspondence (the "Response Letter") of RC Graves Construction ("RC"). Therein, RC attempts to "explain away" the multiple bid irregularities highlighted in Silverstrand's December 27, 2018, bid protest letter (the "Bid Protest Letter").

The purpose of this letter is to a) refute RC's arguments as to the purported responsiveness of its bid and/or responsible-ness of RC, as a bidder, and b) renew Silverstrand's demand that the Project be awarded to Silverstrand as the lowest responsive/responsible bidder.

I. **RC's Response Letter does nothing to refute, negate, or explain RC's plain violation of the maximum fifty percent (50%) subcontracting threshold established by the Bid Specifications.**

As previously discussed in Silverstrand's Bid Protest Letter, the requirement that a bidding Prime Contractor refrain from subcontracting out more than fifty percent (50%) of the work on the Project -- and the express, black-letter requirement that such bidder thus refrain from listing subcontractors whose aggregate work percentages total more than fifty percent (50%) of the work on the Project -- is set forth in the "Information Required of Bidder – List of Subcontractors" form as follows:

Special Notes: The Prime Contractor shall perform not less than 50% of the Work identified in this Bid. In the event a Bidder lists subcontractors who will perform Work under this Bid in excess of 50% of the Work identified in this Bid, the Bid ***shall be considered non-responsive***.

Bid Forms at p. 11 (emphasis added).

Notwithstanding these plain instructions, in submitting its bid for the Project, RC opted to list subcontractors whose aggregate work percentages total **62.45%**. This is a direct (and glaringly obvious) violation of the maximum subcontracting threshold of the Bid Specifications. Thus, because the Bid Specifications plainly state that any bid which fails to comply with the referenced fifty percent (50%) maximum subcontracting threshold "***shall be considered non-responsive***," RC's bid ***must*** be rejected as non-responsive. See Murray Co. v. Occupational Safety & Health Appeals Bd., 180 Cal. App. 4th 43 (2009) (holding that use of word "shall" implies a mandatory requirement that carries with it no discretion).

In its Response Letter, RC attempts to side-step its clear noncompliance with the fifty percent (50%) maximum subcontracting threshold of the Bid Specifications by arguing that, when designated "specialty" work items are excluded, RC's bid is still in compliance with the fifty percent (50%) minimum self-performance requirements of the Bid Specifications.¹ However, in so arguing, RC erroneously attempts to conflate the requirement that RC self-perform at least fifty percent (50%) of the work on the Project with the separate requirements that RC a) *refrain from* subcontracting out fifty percent (50%) or more of such work, and accordingly b) *refrain from* listing subcontractors whose aggregate work percentages total more than fifty percent (50%). There is nothing in RC's Response Letter that explains (or even attempts to explain) RC's non-compliance with these latter requirements of the Bid Specifications.

¹ As will be discussed, *infra*, RC is separately incorrect as to this point, as RC's apparent lack of employees precludes it from "self-performing" any portion of the work on the Project.

Here, the prohibition against “list[ing] subcontractors who will perform Work under this Bid in excess of 50% of the Work” -- and the attendant warning that any bid listing aggregate subcontractor percentages in excess of fifty percent (50%) “**shall be considered non-responsive**” -- could not be clearer. Within this context, to argue (as RC apparently does) that a bid which lists subcontractor percentages that total more than fifty percent (50%) could somehow still be responsive to the plain requirements listed **on the same page of the Bid Form** is patently absurd. Indeed, because the Bid Form provided by the City actually contains a separate column for listing the subcontract percentages of each listed subcontractor, determining RC's noncompliance with the referenced requirements of the Bid Specifications is a simple exercise in adding the percentage values which are already lined up in a vertical column on such Bid Form. RC cannot argue its way out of arithmetic.

Moreover, it must be noted that RC's failure to adhere to the maximum subcontracting threshold of the Bid Specifications -- and specifically, RC's violation of the express prohibition against listing subcontractors whose aggregate work percentages total more than fifty percent (50%) of the work on the Project -- is the *exact same* violation that was deemed a non-waivable, material bid irregularity in Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432 (1996). Therein, in rejecting a bid which listed subcontractors in excess of the fifty percent (50%) maximum subcontracting threshold there at issue, the Valley Crest court held:

[The bid specifications] made listing the subcontractor percentages a material element of the bid. Since it was a material element of the bid, North Bay could not change its bid to correct the mistake in stating the percentages. **North Bay's bid provided for more than 50 percent of the work to be done by subcontractors; therefore, it was nonresponsive .**

. . .

Valley Crest, 51 Cal. App. 4th at 1443 (emphasis added) (bracketed text added).

Furthermore, although RC cites to Ghilotti Construction Co. v. City of Richmond, 45 Cal. App. 4th 897 (1996) in its Response Letter for the proposition that a public entity may waive a bidder's violation of a maximum subcontracting threshold under certain circumstances, it should be noted that -- unlike in the instant case -- the bid specifications at issue in Ghilotti did not contain any mandatory provision directing that a bid which failed to adhere to such maximum subcontracting threshold “**shall be considered non-responsive.**” Emphasis added. As in Pozar v. Department of Transportation, 145 Cal. App. 3d 269, 271 (1983), the City has no choice but to “follow its own rules” set forth in the Bid Specifications and reject RC's bid as non-responsive.

Thus, RC's bid must be rejected, and the contract for the Project must be awarded to Silverstrand as the lowest responsive, responsible bidder.

II. RC's Response Letter fails to offer any pre-bid evidence explaining the apparent misrepresentations in its bid as to subcontract amounts.

As previously discussed in Silverstrand's Bid Protest Letter (including, notably, the table set forth therein), in comparing the subcontract amounts referenced in RC's bid with cost proposals received by Silverstrand from the same subcontractors, Silverstrand was disturbed to discover substantial variances. In many cases, these variances are greater than \$100,000 -- and, in the case of Ace Electric ("Ace"), as high as \$547,108.00.

The stated purpose of Cal. Pub. Contr. Code § 4100, *et seq.* (the "Subletting and Subcontracting Fair Practices Act") -- including the subcontractor listing requirements of Cal. Pub. Contr. Code § 4104 -- is to prevent "bid shopping and bid peddling." Cal. Pub. Contr. Code § 4101. These practices involve efforts by prime contractors to coerce lower bids from subcontractors after a contract has been awarded to the prime bidder using as leverage prior bids from subcontractors (*i.e.*, "bid shopping"), and efforts by other subcontractors to undercut the price of successful subcontractors after the prime contract has been awarded (*i.e.*, "bid peddling"). D.H. Williams Constr., Inc. v. Clovis Unified Sch. Dist., 146 Cal. App. 4th 757 (2007). Part and parcel of this public policy is the proposition that bidding prime contractors not be allowed to misrepresent to the public entity the amounts which it intends to pay each subcontractor for work listed in a bid.

Further, because the Bid Specifications require that all bidders list ***by contract percentage*** the amount of work which will be allocated to each listed subcontractor, it is clear that the City has enunciated a desire to ensure that bidding Prime Contractors accurately and truthfully indicate the subcontract amounts that will be awarded to each such subcontractor.

Although RC states in its Response Letter that it "welcomes a meeting with the City to review RCG's subcontract values and scopes of work on the Project," such an offer is a far cry from actually presenting evidence of a) pre-bid estimates received by RC for the scopes of work which RC claims that it will award to the specified subcontractors, and/or b) pre-bid letters of intent issued by RC confirming such intended subcontract amounts. Silverstrand has "showed its work" as to Silverstrand's basis for its concerns about RC's stated subcontract values -- namely, by providing actual evidence of bids received by Silverstrand from the same subcontractors and for the same work. RC has failed to do so.

Thus, notwithstanding RC's broad and self-serving proclamations to the contrary, Silverstrand remains deeply concerned that RC may have misrepresented to the City the percentage of the total contract value which it intends to award to each subcontractor listed in RC's bid. At a minimum, such misrepresentations would render RC's bid non-responsive with regard to the subcontractor listing requirements of the Bid Specifications. At worst, to the extent that such misrepresentations were found to be knowing and/or intentional, they could potentially also constitute actionable false claims under the California False Claims Act, Cal. Gov. Code § 12650, *et seq.*

III. RC is not a “responsible” bidder with respect to the Project because RC is not capable of self-performing any portion of the work on the Project.

As with the maximum fifty percent (50%) subcontracting threshold, RC’s attempts to “explain away” its inability to self-perform any of the work on the Project are similarly unavailing.

In the context of public bid law, the concept of the lowest “responsible” bidder refers to the “quality, fitness and capacity of the low bidder to satisfactorily perform the work.” City of Inglewood-L.A. Cty. Civic Ctr. v. Superior Court, 7 Cal. 3d 861, 867 (1972). A contract cannot be awarded to a bidder who is found to be unqualified to do the particular work under consideration.” Domar Elec., Inc. v. City of Los Angeles, 9 Cal. 4th 161 (1994).

Here, as set forth more voluminously in Silverstrand’s original Bid Protest Letter, whereas the Bid Specifications require that any bidder must be able to self-perform at least fifty percent (50%) of the work on the Project, the “Contractor’s License Detail” applicable to RC’s license with the California Contractors State License Board (“CSLB”) makes clear that RC is not capable of satisfying this self-performance requirement. Therein, with regard to the status of RC’s workers compensation insurance, the “Contractor’s License Detail” states: “This license is exempt from having workers compensation insurance; they [sic] certified that they [sic] **have no employees.**” Emphasis added. Thus, because RC cannot “self-perform” any portion of the work on the Project in the absence of employees capable of physically performing such work, and because RC’s “Contractor’s Licensing Detail” makes clear that RC does not have any employees, RC is simply not a responsible contractor for purposes of this Project.

In its Response Letter, RC attempts to downplay the import of the “Contractor’s Licensing Detail” by contending that it will obtain appropriate workers compensation insurance prior to the commencement of the Project.² This argument completely misses the point. It is not RC’s apparent lack of appropriate workers compensation insurance that renders RC a non-responsible contractor for the Project; it is the fact that, by RC’s own admission, it has “**no employees**” to satisfy the fifty percent (50%) self-performance requirement of the Bid Specifications. No amount of workers compensation insurance coverage can cure this baseline flaw in RC’s bid.

² As with the complete lack of *pre-bid* documentation evidencing RC’s intent to execute subcontracts in amounts mirroring the subcontract amounts referenced in RC’s bid, even the broker letter submitted by RC in support of its intent to obtain appropriate workers compensation insurance bears a date (January 9, 2019) that long post-dates the submission of RC’s bid. See Response Letter at Exhibit “E,” January 9, 2019, letter of Owen-Dunn Insurance Services. This is part and parcel of RC’s entire response to the instant bid protest, which reflects RC’s post-bid scrambling to defend an imperfect bid rather than RC’s considered, reasonable pre-bid efforts to ensure the accuracy and appropriateness of the representations that would ultimately end up in RC’s bid.

Indeed, it is precisely because the City wanted to avoid a scenario in which the "low bidder" did not have the ability to perform the work on the Project with its own employees that the fifty percent (50%) minimum self-performance requirement was incorporated into the Bid Specifications. Within this context, RC's submission of a bid despite RC's knowledge that it had no employees of its own runs directly contrary to the purpose and intent of the self-performance requirement.

Thus, RC's bid must be rejected on the ground that RC is not a "responsible" contractor for purposes of this Project.

IV. Conclusion.

In light of the foregoing, Silverstrand hereby reiterates its demand that the City reject the putative "low bid" of RC and award the Project to Silverstrand, as the lowest responsive and responsible bidder. Silverstrand further continues to request that Silverstrand be afforded notice of any proceeding of the City and/or the City Council at which the instant bid protest letter may be discussed, and that Silverstrand further be afforded the right to address the City and/or the City Council at any such proceeding. Silverstrand reserves all rights.

Thank you for your professional courtesy and prompt attention to this matter. Should you have any questions or comments, please let me know.

Very truly yours,

SULLIVAN HILL REZ & ENGEL
A Professional Law Corporation

By: 
Shailendra U. Kulkarni

SUK/suk

CC: Ted Rigoni (*via electronic mail*)
Rodolfo Victorio (*via electronic mail*)
RAL Investment Corporation (*via electronic mail*)
Fred Galante (*via electronic mail*)
Brian Wright Bushman (*via electronic mail*)
Hector Gonzalez (*via electronic mail*)