



Via Email to jrobb@smwb.com

January 13, 2023

M. Jonathan Robb, Jr.
Sweeney Mason, LLP
983 University Ave., Suite 104C
Los Gatos, CA 95032

Re: City of Fortuna Police Facility Remodel Project (CIP No. 9104)
Bid Protest

Dear Mr. Robb:

I write on behalf of my client, the City of Fortuna ("City"), in response to the bid protest letter dated January 9, 2023, that you submitted to the City on behalf of your client, Adams Commercial General Contracting, Inc. ("Adams"), with regard to bidding for the above-referenced project ("Project"). You assert that the City must reject the low bid submitted by Sequoia Construction Specialties ("Sequoia") because Sequoia's Subcontractor List form listed a subcontractor for landscaping, J&G Lawn ("J&G"), with an expired Department of Industrial Relations ("DIR") registration number.

A. BACKGROUND

Bids for the Project were opened by the City on January 5, 2023. Sequoia was the apparent low bidder. The City determined that the DIR registration numbers had expired for two of the firms listed on Sequoia's Subcontractor List form: J&G and Redwood Glass. There were no other concerns about Sequoia's low bid, which was otherwise determined to be responsive.

Within two working days following the bid opening, by letter dated January 9, 2023, Sequoia notified the City in writing that both of these entries on the Subcontractor List form were due to inadvertent error. Sequoia explained that Redwood Glass was being used as a supplier, and not as subcontractor. Accordingly, Sequoia was not required to include Redwood Glass on its

Subcontractor List form pursuant to Public Contract Code section 4104, and as a supplier, Redwood Glass was not required to be registered with the DIR pursuant to Labor Code section 1725.5. With respect to J&G Glass, the subject of Adam's bid protest, Sequoia explained that this was an inadvertent error and that Sequoia proposed to replace J&G with All Area Landscaping ("All Area"), which is currently registered with the DIR.

B. ANALYSIS

1. Pursuant to Labor Code section 1771.1, inadvertent listing of an unregistered subcontractor is not grounds for protest or for considering a bid nonresponsive if the unregistered subcontractor is replaced by a registered subcontractor.

An inadvertent error in listing a subcontractor who is not registered with the DIR is governed by Labor Code section 1771.1, which provides that this "shall not be grounds for filing a bid protest or grounds for considering the bid nonresponsive" provided the inadvertent error is corrected by any one of the three manners specified therein, as set forth in this excerpt (emphasis added):

"(c) An inadvertent error in listing a subcontractor who is not registered pursuant to Section 1725.5 in a bid proposal **shall not be grounds for filing a bid protest or grounds for considering the bid nonresponsive**, provided that **any** of the following apply:

(1) The subcontractor is registered prior to the bid opening.

(2) Within 24 hours after the bid opening, the subcontractor is registered and has paid the penalty registration fee specified in subparagraph (E) of paragraph (2) of subdivision (a) of Section 1725.5.

(3) The subcontractor is replaced by another registered subcontractor pursuant to Section 4107 of the Public Contract Code.

(d) **Failure by a subcontractor to be registered** to perform public work as required by subdivision (a) **shall be grounds under Section 4107 of the Public Contract Code for the contractor, with the consent of the awarding authority, to substitute a subcontractor who is registered** to perform public work pursuant to Section 1725.5 in place of the unregistered subcontractor."

Sequoia has timely notified the City in writing that its listing of J&G was inadvertent and that it will replace J&G with All Area, which is registered with the DIR. Sequoia has initiated this

substitution consistent with the requirements of Public Contract Code sections 4107(a)(5) and 4107.5, by providing written notice of the error within two working days after the bid opening as required by Public Contract Code section 4107.5. Sequoia has further indicated in writing its intent to timely submit affidavits regarding the error as further specified in Public Contract Code section 4107.5.

2. Cure by substitution is available under Labor Code section 1771.1 regardless of the duration of the lapse in the listed subcontractor's DIR registration, and regardless of whether the listed subcontractor renews its DIR registration within 24 hours.

You have alleged that Sequoia's listing of J&G was "clearly not inadvertent given that the registration expired more than a year and a half ago." Apart from the fact that this is mere conjecture as to inadvertence, there is no such time limit in Labor Code section 1771.1. The terms of Labor Code section 1771.1 apply without regard as to when or why the listed subcontractor was not registered at the time of bid.

You have also alleged that the subcontractor listing error cannot be cured because J&G did not renew its DIR registration with 24 hours. However, that is only one of the three available options for curing an inadvertent listing such as this under Labor Code section 1771.1(c), quoted above. Here, Sequoia has taken steps to cure the error in the manner specified under Labor Code section 1771.1(c)(3), and has done so consistent with the requirements of Public Contract Code sections 4107(a)(5) and 4107.5.

3. In the unlikely event that the City does not consent to the substitution, these circumstances do not legally obligate the City to award the contract to a higher bidder.

Assuming J&G does not object to the substitution—and the City is unaware of any reason why it would given that it does not dispute that its DIR registration had lapsed—and "in the absence of compelling reasons to the contrary," Public Contract Code section 4107.5 mandates that the City, as the awarding authority, "shall...consent to the substitution of the intended subcontractor." The City is unaware of any "compelling reasons to the contrary" and finds none in the bid protest.

Once the City has consented to the substitution, pursuant to the express terms of Labor Code section 1771.1, there will be no grounds for protest or for rejecting the bid as nonresponsive. If, for any reason, the City concludes that it cannot consent to the substitution, that conclusion would not inexorably lead to an award to Adams. The City would still have the right to reject all bids and re-bid the Project.

Finally, it bears noting that this unsupported protest must be considered in light of well-established public policy favoring award to the low bidder. California courts have consistently held that allegations of nonresponsiveness must be evaluated from a practical, rather than speculative or hypertechnical perspective, and based on the public interest:

“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...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* (2014) 223 Cal.App.4th 1181, 1189; internal quotation marks omitted.)

C. CONCLUSION

The City appreciates Adams interest in the Project and welcomes its participation in future public works bids. However, for the reasons stated above, Adam’s bid protest lacks merit. The City has no obligation—and indeed no legal grounds—to reject Sequoia’s low bid while Sequoia seeks to correct the listing error as expressly authorized by Labor Code section 1771.1, and the request for substitution is proceeding as required by law.

Sincerely,

LAW OFFICE OF CLARE M. GIBSON



Clare M. Gibson

c: (via email)
Client
Sequoia Construction Specialties

Brendan E. Byrd

From: Clare Gibson <clare@claregibsonlaw.com>
Sent: Thursday, January 19, 2023 3:16 PM
To: Jonathan Robb
Cc: Merritt Perry; Brendan E. Byrd; William Kaufman; Angel Reyes
Subject: Re: City of Fortuna | Police Facility Remodel Project | City Response to Bid Protest
Attachments: Affidavits Of Correction Fortuna Police Remodel.pdf

Hi Jon,

I appreciate your advocacy on behalf of your client. However, I do not agree that the law compels the result you seek, i.e., award to a higher bidder—effectively paying a premium of \$173,770 of public taxpayers' money for the same work. This proposed outcome is contrary to a well-established body of law compelling award to the lowest responsive bidder, and contrary to the public policy upon which these laws are based. As frequently cited in the robust body of California law governing public bidding, "Competitive bidding laws are passed for the benefit and protection of the taxpaying public, not for the benefit and enrichment of bidders." (*MCM Construction, Inc. v. San Francisco* (1998) 66 Cal.App.4th 359, 373.)

Subdivision (c) of Labor Code section 1771.1 does not include the qualifiers you wish to read into it. And it does not give primacy to any of the three options it authorizes for cure when an unregistered subcontractor is listed by inadvertent error (emphasis added):

"(c) An inadvertent error in listing a subcontractor who is not registered pursuant to Section 1725.5 in a bid proposal shall not be grounds for filing a bid protest or grounds for considering the bid nonresponsive, provided that **any** of the following apply:

- (1) The subcontractor is registered prior to the bid opening.
- (2) Within 24 hours after the bid opening, the subcontractor is registered and has paid the penalty registration fee specified in subparagraph (E) of paragraph (2) of subdivision (a) of Section 1725.5."
- (3) The subcontractor is replaced by another registered subcontractor pursuant to Section 4107 of the Public Contract Code.

Nothing in this provision provides that option (c)(2) is the only available cure. Subdivision (c)(3) is equally available. As clearly stated in the statute, "any" of the three circumstances in (c)(1)-(3) are available to cure.

The purpose of this statute is to ensure that contractors and subcontractors bidding on public works projects are registered with the DIR and, with respect to subcontractors, to either get them registered ASAP or replace them with a registered subcontractor via statutory substitution. Section 1771.1 is not intended to weaponize bid protests to force public agencies to pay a premium for public works contracts due to routine human error. Indeed, the whole purpose and substance of subdivision (c) is to avoid exactly this scenario.

Further, there is no qualifier as to the magnitude of "inadvertent errors" lead to listing an unregistered. You are entitled to your opinion that Sequoia had ample time to check on J&G's registration, but that doesn't change the law. There simply are no such qualifiers, apart from the error being "inadvertent" which is open-

ended as to the nature or reasonableness of the error. (It is also redundant--since an "error" is by definition inadvertent.)

Moreover, as a practical matter, even if there were such a qualifier, Sequoia did not have over a year to check on the DIR registration. Errors such as this are routine because subcontractor price quotes are customarily transmitted to prime bidders during the final minutes before the bid deadline. This strategy avoids the evils of bid-shopping and bid-peddling, consistent with the objectives of the Subletting and Subcontracting Faire Practices Act, as stated in Public Contract Code section 4101. The bid runner typically has to rush to choose the best price for each category, then to fill in the subcontractor list form and the resulting final bid price during these final minutes before bids are due. Sure, in a perfect world, perhaps prime bidders such as Sequoia and Adams would check the DIR registration number for every possible subcontractor that might submit a price quote during the final minutes before the bid deadline. But that's not what the law requires. And that's not the world we live in.

California has a robust body of bidding law that addresses this practical reality. See, e.g., *Great West Contractors, Inc. v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425, 1428 [setting forth an extensive bibliography in footnote 1]--a case that is also instructive in this context for excoriating a public agency's improper attempts to justify awarding to a higher bidder as "favoritism most foul." (Id. at 1429.)

The law is similarly clear in Public Contract Code sections 4107(a)(5) and 4107.5, which collectively govern substitution based on error, including, per Labor Code section 1771.1, erroneous listing of an unregistered subcontractor. (There's room for debate as to whether the provisions of PCC section 4107.5 apply here since Labor Code section 1771.1 only references PCC section 4107, but in an abundance of caution, we are electing to follow PCC section 4107.5 as well.)

Section 4107.5 effectively mandates consent to substitution following a public hearing when the contractor, the listed subcontractor, and the replacement subcontractor submit affidavits that a clerical error was made. Affidavits have been submitted from all three parties in this regard. See attached. Accordingly, this matter will be brought before the City Council to act on the request for substitution.

The overarching thrust of the law governing public works contracts is to ensure award to the lowest responsible bidder in support of express Legislative objectives and findings set forth in Public Contract Code section 100, including "protecting the public with the misuse of public funds" and providing "fair opportunity" in the bidding process. It would be manifestly unfair—not to mention unlawful—to misconstrue and misapply Labor Code section 1771.1 to reject a responsive low bidder in favor of a higher bidder.

Finally, it is again important to bear in mind that the City has no legal obligation to award the contract at all, let alone to award it to your client. It has broad discretion to reject all bids. See, e.g., *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 516. Your client has no reasonable expectation, as a matter of law, to the award of this contract regardless of the action the City Council takes in response to the pending substitution request.

Best,
Clare

Please note that I will be out on vacation from 1/25/23 through 2/17/23.

Clare M. Gibson

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From: Jonathan Robb <jrobb@smwb.com>
Sent: Wednesday, January 18, 2023 9:51 AM
To: Clare Gibson <clare@claregibsonlaw.com>
Cc: Merritt Perry <mperry@ci.fortuna.ca.us>; Brendan E. Byrd <bbyrd@ci.fortuna.ca.us>; will@acgcinc.com <will@acgcinc.com>; ana@acgcinc.com <ana@acgcinc.com>; William Kaufman <wkaufman@smwb.com>; Angel Reyes <areyes@smwb.com>
Subject: RE: City of Fortuna | Police Facility Remodel Project | City Response to Bid Protest

Dear Ms. Gibson,

Thank you for your email. Upon the City's receipt of the declarations from Sequoia, please forward them to me. As you know, inadvertent clerical error is a specific standard requiring in part that Sequoia actually intended to list All Area. We disagree with your comment that the bid protest was based upon conjecture; Sequoia had a year and a half to perform a due diligence review of J&G's DIR registration. It seems they failed to do so. We intend to review the declarations ourselves via voluntary disclosure or a public records request, as we cannot understand from these facts how Sequoia missed this fundamental and basic requirement.

Even if Sequoia presents adequate declarations under code, the 24-hour rule applicable to DIR registrations is the more specific statute because of its express call-out of DIR registrations.

Thank you for your attention. Please do not hesitate to contact me with any questions.

Best Regards,
Jon Robb

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From: Clare Gibson <clare@claregibsonlaw.com>
Sent: Friday, January 13, 2023 9:48 AM

To: Jonathan Robb <jrobb@smwb.com>

Cc: Merritt Perry <mperry@ci.fortuna.ca.us>; Brendan E. Byrd <bbyrd@ci.fortuna.ca.us>

Subject: City of Fortuna | Police Facility Remodel Project | City Response to Bid Protest

Dear Mr. Robb,

Please see attached on behalf of my client, the City of Fortuna. Kindly confirm receipt via reply email so that I'll know that I have correctly keyed in your email address.

Best,
Clare

Please note that I will be out on vacation from 1/25/23 through 2/17/23.

Clare M. Gibson

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