

EST. 1929

MILLER MORTON CAILLAT & NEVIS, LLP

ATTORNEYS AT LAW

July 12, 2018

Via E-Mail and FedEx
bheinzelman@srcity.org

Brian Heinzelman, PE
City of Santa Rosa
Transportation and Public Works Dept.
69 Stony Circle
Santa Rosa, CA 95401

Re: Alvarado Ave and Vallejo St Water and Sewer Improvements
Capital Projects Engineering Divisions, City of Santa Rosa, California
Contract Number: CO2004 ("Project")
Michael O'Shaughnessy Construction, Inc. response to bid protest of Argonaut
Constructors

Dear Mr. Heinzelman:

We are counsel for Michael O'Shaughnessy Construction, Inc. ("O'Shaughnessy") in connection with the bid protest of Argonaut Constructors ("Argonaut") in connection with the above-referenced Project.

We have reviewed Argonaut's bid protest, and for the reasons stated herein the protest is entirely without merit and should be rejected in whole.

Argonaut's protest is based on two arguments of technical non-compliance. First, Argonaut asserts that O'Shaughnessy failed to comply with the bid requirements by omitting two pages of text in the bid documents (pages 124 and 129), that did not require any input from the contractor, from its bid submission.

1. The Omission of Pages 124 and 129 From the Bid Submission is Not Grounds for Rejection of O'Shaughnessy's Bid.

As a threshold issue, we note that these two excluded pages are not required bid forms to be submitted at the time of bid. Specifically, section 2-133A of the Invitation for Bids for the Project sets forth the required submissions, and reads in relevant part:

The bid forms to be submitted at the time of and with the bid are:

1. Unit Price Schedule;
2. List of Subcontractors;
3. List of Previous Similar Jobs;

Brian Heinzelman, PE
 Alvarado Ave and Vallejo St Water and Sewer Improvements
 July 12, 2018
 Page 2 of 4

4. Noncollusion Declaration;
5. Bid Guaranty Information and Bidder's Information and Signature;
and
6. Bid Guaranty (Bid Bond or alternate security).

Nowhere in Section 2-133A does it require that the bidder submit a copy of any additional pages of text from the instruction to bidders.

O'Shaughnessy complied and properly submitted all required bid forms. For this reason alone, Argonaut's first protest should be rejected. Argonaut, however, attempts to boot-strap an argument that omitting pages 124 and 129, somehow results in a modification of the contract requirements that:

- "effectively carving out those provisions from MOS' bid"; and
- "MOS [...] could have used that failure as a bid mistake to withdraw its bid after having a last look at all other bids."¹

These assertions, however, are based on self-serving conclusory statements, and are unsupported by any authority. The reason for the lack of authority is clear – there is no such authority in existence.

The claimed ability to modify the contract by "carving out provisions" is simply incorrect. The scope of work for the Project is defined by the Instructions to Bidders, all documents, contracts, plans, specifications and other contract documents incorporated therein. Under Argonaut's reasoning, all contract documents would need to be included in the bid submission in order to eliminate the possible "carving out of provisions". Such a rule is clearly not the law therefore Argonaut's argument must be rejected.

Argonaut's argument that the omission would permit O'Shaughnessy to withdraw its bid is likewise without merit. Ignoring the fact that pages 124 and 129 were not required to be submitted, it is unclear as how even a mistaken omission of these pages would serve as grounds for relief from the bid.

The grounds for relief from a bid due to a mistake set forth in California Public Contract Code §5103. Specifically, in order to be entitled to relief due to a mistake, the bidder must demonstrate that the mistake:

- Made the bid materially different than he or she intended it to be;² and

¹ See Page 2 of Argonaut Bid Protest

² Public Contact Code §5103(c)

Brian Heinzelman, PE
Alvarado Ave and Vallejo St Water and Sewer Improvements
July 12, 2018
Page 3 of 4

- Was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.³

Despite Argonaut's self-serving and conclusory claims to the contrary neither of these elements is present here. The omission of pages 125 and 129 did not impact O'Shaughnessy's bid in any form, nor was it a mistake in filling out the bid.

2. The Bid Bond is Properly Signed and Executed

Argonaut's second argument that the bid bond is not properly signed and sealed by O'Shaughnessy is unclear and is apparently based on a misunderstanding of the bid bond requirements.

First, the bid bond is signed by Michael O'Shaughnessy of Michael O'Shaughnessy Construction Inc. and Charles M. Griswold, on behalf of Merchants Bonding Company (Mutual). Mr. Griswold's is notarized, and accompanied by a sealed and notarized power of attorney attesting to his authorization to execute the bid bond.

It is unclear, why Argonaut asserts that the signed bid is not binding or otherwise non-responsive. Argonaut may be trying to argue that a formal seal by O'Shaughnessy, in addition to its own signature, and notarized and sealed signatures on behalf of Merchants Bonding Company (Mutual), is somehow required for an enforceable bid bond. Such an argument is without merit.

In California, corporate seals are not necessary to bind a corporation. For example, while California Corporations Code § 207, permits a corporation to adopt, use, and alter a corporate seal, the "*failure to affix a seal does not affect the validity of any instrument.*"⁴ Section 1929 of the Civil Code, moreover, unequivocally states "*All distinctions between sealed and unsealed instruments are abolished.*"

Argonaut's claim that the bid bond is unsigned is demonstrably incorrect. The claim that the bid bond is somehow invalid or unenforceable due to the lack of a corporate seal by is O'Shaughnessy is legally incorrect, and has no bearing on the responsiveness of O'Shaughnessy's bid.

O'Shaughnessy remains ready, willing, able, and committed to performing the work on the Project in accordance with the terms of its bid and the Contract Documents. Argonaut's bid protest is entirely without merit and should be rejected summarily.

We thank you for your consideration of this submission; please do not hesitate to contact me with any questions or clarifications.

³ Public Contract Code §5103(d)

⁴ Cal Corp Code §207(a)

Brian Heinzelman, PE
Alvarado Ave and Vallejo St Water and Sewer Improvements
July 12, 2018
Page 4 of 4

Very truly yours,

MILLER, MORTON, CAILLAT & NEVIS, LLP

By:


GREGORY J. KORBEL

GJK/jct

698154_1