


MEMORANDUM 16-168

TO: HOMER CITY COUNCIL
FROM: ADAM W. COOK 
RE: LIBRARY GENERATOR BID PROTEST
CLIENT: CITY OF HOMER
FILE NO.: 506,742.901
DATE: SEPTEMBER 30, 2016

SUMMARY

The City Council should deny the bid protest by Steiner's North Star Construction. Steiner's bid was nonresponsive and, therefore, properly rejected by the Public Works Department. The City may award the advertised contract to Puffin Electric, Inc.

FACTUAL BACKGROUND

On September 8 through 15, 2016, the City advertised bids for installation of an emergency generator at the Homer City Library. The City's Request for Proposals ("RFP") contained several instructions to bidders that would later become important:

- Bids must be complete and manually signed by the bidder or bidder's representative;
- Part A of the bidder's response would consist of a bid schedule (describing the total cost of the Work) and either a bid bond or a cashier's check equivalent to 5% of the bid amount;
- Part B of the response consisted of a questionnaire to determine whether the bid was responsive (i.e. contained all elements required by the RFP) and responsible (i.e. the bidder had the necessary experience and qualifications to satisfactorily perform the Work);

- After opening Part B of the bids to ensure that each bid was responsive, the City would open Part A of the responsive bids to determine the lowest responsible and bonded bid;
- Bidders needed to provide a bid schedule at Part A of their proposal, with the schedule describing the proposed total cost of the Work; and
- The City reserved the right to “waive irregularities or informalities in the proposals,” but also insisted that “bids must be regular in every respect, and no alterations shall be made to the bid form.”

In an omission by the City, the forms attached to the RFP did not include a template for the bidder’s bid schedule. This meant that there was no specific place for bidders to list the total amount of their bid. Of course, the bidders would have to include the amount *somewhere* in order to submit a complete bid.

The City received three bids on September 22, 2016: Steiner’s North Star Construction, Inc. (“Steiner’s”) at \$23,575, Puffin Electric, Inc. (“Puffin”) at \$31,550, and Liberty Electric, at \$32,500. After opening Part B of each bid, and finding none disqualified, the City proceeded to open Part A and examine the bid schedules to determine the lowest bid.

Each bidder had submitted a bid schedule in the absence of a City template. In the case of Steiner’s, the bidder used the bid bond template to describe the cost of the Work. In the case of Puffin, the bidder prepared a separate bid schedule. One important difference was that Puffin signed its bid, whereas Steiner’s did not. As noted above, the RFP required signatures on all bids.

Public Works Director Carey Meyer determined that Steiner’s bid was nonresponsive and the City rejected the bid.¹ On September 23, Mr. Meyer advised the bidders and the City Manager that Steiner’s bid was nonresponsive and that he planned to recommend that the City Council accept Puffin’s bid.

On September 26, Steiner’s delivered a bid protest to the City Clerk. Steiner’s asserted the following:

- The City should have waived the signature requirement pursuant to its discretion to “waive irregularities or informalities;”
- The City waived the bid schedule requirement by accepting the Puffin bid, which did not use a template provided by the City, so the City should waive the signature requirement as well, out of fairness; and

¹ Puffin sent an email to the City Clerk on the day of the opening “protesting the bid results.” Although it did not specify, Puffin was apparently giving notice that it believed Steiner’s unsigned bid did not correspond to the RFP requirements.

- Steiner's used the bid bond form as a bid schedule, but it did not have to submit an actual bid bond because it had elected to submit a cashier's check, so the absence of a signature on a form that was not required is not important and therefore waivable.

ANALYSIS AND RECOMMENDATION

The RFP sets no protocol for a protest by an aggrieved bidder. The City Code is equally silent. The Procurement Policy and Procedures Handbook establishes a loose process. It describes the City Council as "the appellate authority with regard to whether a bid/proposal is responsive." The Handbook further specifies that "bids shall be reviewed for completeness," and only complete bids accepted. Also, bids are reviewed to determine if they are "strictly in accordance with the specific terms and evaluation criteria set forth in the Invitation for Bid."

Without any "protest protocol" to guide the Council's analysis, the best resource for analyzing Steiner's protest is general Alaska law regarding acceptance and rejection of bids by governmental entities. The City may reject Steiner's bid if the bid is "nonresponsive." See HCC 3.16.050(a). A bid is "nonresponsive" if it contains an error or omission that is a "material variance from a bid specification." *Lower Kuskokwim School Dist. v. Foundation Services, Inc.*, 909 P.2d 1383, 1386 (Alaska 1996). A variance is "material" if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Id.*; see also *Chris Berg, Inc. v. State, Dep't of Transp. & Pub. Facilities*, 680 P.2d 93, 94 (Alaska 1984).

Failure to sign a bid is a material variance. The signature is crucial because it indicates the bidder's intention to be bound to a contract with the City. See *Firth Const. Co., Inc. v. U.S.*, 36 Fed. Cl. 268 (1996) (upholding rejection of low bid that failed to contain an original signature or other satisfactory evidence that the bidder intended to be bound by the contract). Without the signature, the low bidder has the substantial advantage of "backing out" of the contract after winning the award, perhaps because it realized its bid amount was not sufficient. Any variance that gives a bidder the option of whether or not to be bound by its bid is a substantial advantage, and therefore a material variance. See 1 Bruner & O'Connor Construction Law § 2:85 (2016).

Steiner's submitted a nonresponsive bid. There is no signature accompanying Steiner's bid schedule, and thus there is a legitimate problem of whether Steiner's fully intended to be bound to the bid. While it is true that Steiner's signed other documents that accompanied the bid packet, the bid schedule is the critical item because it gives the price and therefore forms the contract itself. Because the bid was nonresponsive, the City acted pursuant to the City Code when rejecting the bid rather than waiving the omission as an "irregularity." Steiner's request that the City waive the requirement is unavailing. Even if the City opted to waive the variance, it would almost certainly face a bid protest from the next lowest bidder, and that protest would have considerably more traction than the one Steiner's has submitted.

Steiner's responds that a decision by the City to accept the unsigned schedule is equivalent to its decision to accept schedules not written on a City form. This argument has no merit. First, the City's omission of a template for the bid schedule, while unfortunate, requires some latitude with bidders on the form of submission of their schedules. The City was prepared to accept either a separately-prepared bid (in the case of Puffin) or the use of the bid bond template (in the case of Steiner's). These innovations did not constitute a material variance to the bid specifications because (1) there was no standardized form to "vary" from, and (2) in neither case did the bidder gain a substantial competitive advantage. The bid schedules, therefore, cannot be equated with a lack of a signature—a material variance). Fair assessment of the bids does not require that the City treat both the form of Puffin's schedule and the lack of Steiner's signature in the same way.

Finally, Steiner's argues that the City should not require it to sign a bid bond form that Steiner's was under no obligation to complete. This argument is also meritless. While it is true that Steiner's elected to submit a cashier's check and, therefore, did not need to complete the bid bond form, Steiner's used the form to present its bid schedule. As noted above, the bid schedule was the most important part of the bid. No matter where Steiner's described its bid, Steiner's needed to provide a signature to indicate its intent to be bound. The use of the bid bond form as a bid schedule converted the form from an unnecessary document to a necessary one, mandating a signature.

CONCLUSION

The City Council should affirm the denial of Steiner's bid protest by the Public Works Department. There is no impediment to an award to Puffin. Steiner's may choose to litigate the Council's denial by bringing suit in the Superior Court. While the City should be aware of this risk, the relatively small sum of the contract would seem to make such litigation overkill, and therefore unlikely.