



Clean Water • Healthy Environment • Flood Protection

April 15, 2021

J. Andrew Howard
Alston & Bird
333 South Hope Street, 16th Floor
Los Angeles, CA 90071

Subject: Bid Protest by Kiewit Infrastructure West Co.
Received April 5, 2021
Final Decision by the Designated Engineer
Anderson Dam Tunnel Project
Project No. 91864005, Contract No. C0663

Dear Mr. Howard:

This correspondence provides the final decision of the Designated Engineer of the Santa Clara Valley Water District (Valley Water) regarding the bid protest received April 5, 2021, submitted by Kiewit Infrastructure West Co. (Kiewit), pertaining to the Anderson Dam Tunnel Project (ADTP).

On March 30, Valley Water received a total of five bid proposals with Flatiron West, Inc. (Flatiron) submitting the apparent top-ranked best value proposal. Kiewit's protest contends Flatiron and a member of another prequalified bidder, Dragados USA, Inc. (Dragados), which bid as Dragados USA, Inc./Obayashi Corporation Joint Venture (Dragados/Obayashi JV), share common ownership by Actividades de Construccion y Servicios (ACS) and should be disqualified pursuant to the requirement stated in Valley Water's Instructions to Bidders, paragraph 18. DISQUALIFICATION OF BIDDERS which provides:

- A. Submittal of more than one Bid from an individual, firm, partnership, corporation, or a combination thereof under the same or different names, will not be considered. If there is reason for believing that collusion exists among the bidders, none of the participants in such collusion will be considered for award of this Contract.

Valley Water has carefully considered Kiewit's protest and finds that it pertains to the content of the bid documents and was therefore submitted late and in a manner that undermines the purposes of competitive bidding, and as a substantive matter, lacks merit. For the reasons explained in this response, Valley Water has determined Kiewit's bid protest is without merit.

1. Facts

Valley Water provides an overview of the bid process for context. The bid documents are available from Valley Water's website (after execution of a required Nondisclosure Agreement), where they have been published throughout the bid process.

August 18, 2020: Valley Water issued the Prequalification Application for General Contractors Seeking to Bid on the ADTP and invited potential bidders to prequalify for the Project. The Prequalification Application announced Valley Water's intent to ensure a competitive process,



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stating in its first paragraph: "if fewer than 4 firms are prequalified, Valley Water intends to solicit bids without requiring prequalification."

August 25, 2020: Valley Water's Board of Directors adopted a Resolution Approving Best Value Contractor Selection for the Anderson Dam Tunnel Project (ADTP).

October 7, 2020: Valley Water published the only public portion of the prequalification applications, Contractor Information, disclosing the name, contact information, and license information for all contractors submitting prequalification applications.

November 25, 2020: Valley Water published the Final Prequalified Contractors List. Among the prequalified applicants were Kiewit, Flatiron, and Dragados/Obayashi JV.

January-February 2021: In January 2021, Valley Water published a Notice to Bidders and Instructions to Bidders for the ADTP. In February and March, Valley Water published a series of addenda, at least two of which incorporated the prequalification list as part of the bid documents. February 17, 2021 Addendum No. 1 at 1 ¶ 3; Mar. 2, 2021 Addendum No. 3 at 2 ¶ 4.

March-April 2021: The deadline to protest the form or content of the bid documents expired on March 25, 2021. Five bids were received and opened on March 30, 2021. Flatiron was deemed the apparent top-ranked best value bidder, based on a combination of price and qualifications. Kiewit was ranked second and Dragados/Obayashi JV third. Valley Water received Kiewit's bid protest on April 5, 2021.

2. Kiewit's protest is late.

As a procedural matter, Kiewit waived its opportunity to protest Flatiron and Dragados/Obayashi JV's bids. Valley Water published the ADTP Prequalified Contractor Information (public record) on October 7, 2020 and the ADTP Final Prequalified Contractors List on November 25, 2020. Both documents were reposted as part of the Bid Documents on Valley Water's website and incorporated into various addenda to the Notice to Bidders and Instruction to Bidders. See, e.g., Feb. 17, 2021 Addendum No. 1 at 1 ¶ 3; Mar. 2, 2021 Addendum No. 3 at 2 ¶ 4.

The Instructions to Bidders, paragraph 20. BID PROTEST requires protests to the form or content of the Bid Documents be received three days *in advance* of the bid opening pursuant to the Instructions to Bidders ¶ 20(A)¹:

- A. Any Bid protest relating to the form or content of the Bid Documents² must be submitted in writing to the Engineer as identified in the Special Provisions, Article 14.01. Engineer, The protest must be received before 5 p.m. three (3) business days in advance of the Bid opening. Any Bidder who fails to submit a protest before the Bid opening deadline will be

¹ Throughout its protest, Kiewit cites to Valley Water's rules and documents concerning purchasing, which are not relevant to Valley Water's public works' procurement process for the Anderson Dam Tunnel Project.

² The Instructions to Bidders defines Bid Documents as: "All documents to be considered when preparing a Bid. The Notice to Bidders, Instructions to Bidders, Proposal and all accompanying Bid Forms, Bidder's Bond or other Bidder's security, and Contract Documents." Instructions to Bidders ¶ 1.

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deemed to have waived any protest to the form or content of the Bid Documents.

- B. Any Bid protest unrelated to Paragraph A. must be submitted in writing to the Engineer identified in the Special Provisions, Engineer, Article 14.01. The protest must be received before 5 p.m. on the third business day following the Bid opening.
- C. The protest document must contain a complete statement of the basis for the protest. The protest must refer to the specific portion(s) of the Bid Documents that form the basis for the protest. The protest must include the name, address, and telephone number of the person representing the protesting party.
- D. The Engineer's final decision on a protest will be issued in writing no later than ten (10) calendar days following receipt of the protest.

Kiewit, despite knowing that Flatiron and Dragados were both prequalified for this Project, failed to submit a protest before the Bid opening deadline and therefore waived its protest. The purpose of this rule is to prevent bidders from compromising the integrity of the bid process by waiting to protest until after the bidders see where they are ranked relative to the best value bid, which is exactly what Kiewit did.

3. Kiewit waived its right to protest.

In addition to failing to submit its protest according to the Instructions to Bidders, Kiewit's wait-and-see approach also constitutes common-law waiver. "California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56. Kiewit's failure to protest before bids were opened is so inconsistent with its rights as to induce Valley Water's reasonable belief that Kiewit had relinquished that right.

4. Kiewit's protest lacks merit.

Kiewit's protest relies on the so-called one-bidder-one-bid rule stated in Valley Water's Instructions to Bidders, paragraph 18. DISQUALIFICATION OF BIDDERS which states:

- A. Submittal of more than one Bid from an individual, firm, partnership, corporation, or a combination thereof under the same or different names, will not be considered. If there is reason for believing that collusion exists among the bidders, none of the participants in such collusion will be considered for award of this Contract.

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4.1 Flatiron and Dragados are separate corporations.

As Kiewit acknowledges, Flatiron and Dragados are different corporations. Nevertheless, Kiewit asserts Flatiron and Dragados, or their mutual parent ACS, somehow violated the one-bidder-one-bid rule. Kiewit has not presented any authority to support its assertion.³

To the contrary, Kiewit relies entirely on statements taken out-of-context from *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209. In that case, the County changed the award criteria after bidders had submitted their bids. The Court cautioned that changing the rules after bids were submitted threatened the integrity of open competitive bidding. Kiewit emphasizes the court's concern about the mere potential for abuse, but does not appear to recognize that concern applies to "significant deviations" from the bid process.

Kiewit's reliance on that language in *Eel River* begs the question whether permitting bids from separate corporations with common ownership constitutes a significant deviation. On that question, Kiewit's protest fails. Paragraph 18 of the Instructions to Bidders is unambiguous. Its first sentence, which Kiewit relies on, bars "[s]ubmittal of more than one Bid from an individual, firm, partnership, corporation, or a combination thereof under the same or different names." Flatiron and Dragados each submitted one bid. They are not the same corporation. ACS did not submit any bids. Valley Water has not deviated from the rule, let alone violated it.

Accepting Kiewit's protest would, in fact, be more akin to the conduct in *Eel River* that the court cautioned against. The Prequalification Application, paragraph 1.C.2. APPLICATION SUBMISSION contained an analogous provision limiting applicants to a single application. Valley Water independently determined that commonly-owned corporations were separate applicants for the purposes of that rule and for paragraph 18 of the Instructions to Bidders. To change that determination now, essentially rewriting and expanding the one-bidder-one-bid rule, would effect an ex-post change in the rules that *Eel River* cautioned against.

4.2 There is no reason to suspect collusion between Flatiron and Dragados.

Kiewit's protest relies on the first sentence of paragraph 18, but the argument it makes falls more appropriately under the second sentence, which states: "If there is reason for believing that collusion exists among the bidders, none of the participants in such collusion will be considered for award of this Contract." This second sentence secures the integrity of the bid process and largely eliminates the risks Kiewit raises concerning bid manipulation by commonly-owned entities. It is obvious, moreover, why Kiewit does not rely on this part of paragraph 18; it requires some reason to believe collusion exists. Kiewit presents none. To the contrary, Kiewit's protest is quite open about the fact that it lacks evidence of actual collusion.

While the lack of any reason to suspect collusion is sufficient to reject Kiewit's bid, Valley Water notes three additional facts that reduce whatever risk of collusion may exist. First,

³ Kiewit's protest, for example, does not contend that Flatiron and Dragados are mere alter-egos or that either corporation has failed to respect corporate formalities. The information Kiewit provided regarding executives at ACS, Hochtief, Dragados, and Flatiron appears unremarkable. Similarly, ACS' statements about collective revenue growth are not evidence that Dragados and Flatiron are the same corporation.

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both Flatiron and Dragados/Obayashi JV signed the mandatory non-collusion affidavit pursuant to Public Contract Code § 7106. Second, Flatiron's parent Hochtief is a publicly-traded company, of which ACS owns approximately 52%. Third, Dragados submitted its bid as part of a joint-venture with Obayashi Corporation, which is unrelated to ACS and would have no incentive to collude with an ACS-affiliated company.

5. Conclusion

After a careful review of all submitted relevant information and materials in this matter, as Designated Engineer, I have determined that the Bid Protest submitted by Kiewit is without merit. Valley Water's award of the contract to Flatiron is entirely consistent with the requirements stated in its Instructions to Bidders and the spirit of competitive bidding. Kiewit's protest is late, waived, and without merit. Valley Water protects the integrity of its bid process; Kiewit would have Valley Water compromise that integrity to rewrite its rules after the bids have been opened. That would be unfair and unnecessary.

Staff will therefore recommend to Valley Water's Board of Directors (Board) that it award the contract to Flatiron, the prequalified contractor submitting the top-ranked best value proposal. The Board is scheduled to take action on staff's recommendation at its next regular meeting on Tuesday, April 27, 2021. The virtual meeting conducted on Zoom and open to the public, will commence at 6:00 pm.

If you have questions regarding this matter, please submit an e-mail at:
scvwdplanroom@valleywater.org.

Sincerely,

DocuSigned by:



Christopher Hakes, P.E.
Deputy Operating Officer
Designated Engineer

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