

COUNTY OF SAN LUIS OBISPO
PUBLIC WORKS DEPARTMENT
OFFICE MEMORANDUM

TO: Paavo Ogren, Public Works Director
VIA: Dave Flynn, Deputy Public Works Director
FROM: Jeff Werst, Design Division Manager *JBW*
SUBJECT: Discussion of Response Letter from UNKS (dated 5/31/12)
DATE: June 7, 2012

PURPOSE

The purpose of this memorandum is to discuss and provide responding comments to the letter from UNKS Construction, Inc. (dated June 1, 2012) that was sent in response to the Department's "Intent to Reject Bid for Los Osos Wastewater Project, Collection System Areas A & D, Contract No. 300448.08.01.AD" (dated 5/31/12).

DISCUSSION

1. Bid Form, Section 00410 Unks did not submit a bid price for Item No. 24

From the letter:

- a. "Bid Item 24 was left blank inadvertently and not included in the total bid amount of \$24,008,836.42."
- b. "It is Unks intention to bore the area covered by Item 24 so as not to disturb the commercial businesses by open cut trenching. In any event, the \$113,000 for Item 24 will not effect Unks performance."

Response:

- a. The Engineer's estimate for Bid Item 24 was \$271,275, and the average bid price of the other bidders (excluding the non-bid by UNKS) was approximately \$211,000. Regardless, the Bid Form was required to be completed and Bid price indicated for each Bid Item listed, in accordance with Paragraphs 13.02 and 14.01.A of Section 00200, "Instructions to Bidders," and UNKS' failure to do so has been identified by our Department as an irregularity with their bid submittal.
- b. The letter indicates that UNKS intends to "bore the area covered by Item 24 so as not to disturb the commercial businesses by open cut trenching." However, this item of

work includes repair or restoration of concrete driveways, cross gutters and sidewalks that may be necessary throughout the Project Site and boring may not be possible in all such cases. Their statement, post bid opening, that this entails \$113,000 worth of work cannot be verified and was not subject to competitive bidding.

2. GFE Documentation Summary Form, Section 00490. Unks did not complete Sections 1, 6 or 7

From the Letter:

- a. "No MBE or DBE quotas were mandated by Owner for Unks to meet; therefore, Unks will be performing most of the work in-house, keeping costs down by not including additional markup for subcontractors. For this reason, Unks did not look to meet any quotas."
- b. "It should be noted that Unks is a DBE."
- c. "GFE Form Section 1 was left blank because local DBE participation contacted Unks by e-mail and telephone and there was no need for Unks to advertise. Unks had plenty of participation from MBEs, DBEs & WBEs. As required, Unks listed the selected DBEs, MBEs & WBEs in Sections 00480 and 00485."

Response:

- a. This Contract is subject to 40 CFR 33 entitled "Participation by Disadvantaged Business Enterprises in United State Environmental Protection Agency Programs." The objective of 40 CFR 30 is to ensure nondiscrimination in the award of contracts under EPA financial assistance agreements, such as the Clean Water State Revolving Funds Program. It is the County's responsibility, to ensure that all DBEs, including potential subcontractors for equipment, supplies, construction, and services, have the opportunity to compete in this Project. UNKS' desire to perform the work "in-house" does not preclude it from adhering to Contract requirements and 40 CFR 33, in particular relating to outreach efforts for DBE firms.
- b. UNKS failed to submit a "Disadvantaged Business Enterprise Contractor Subcontractor Certification" Form, Section 00495, indicating that UNKS is a certified DBE.
- c. The GFE form was required to be completed, signed, and submitted with the Bid to document the efforts that Bidders took, prior to bid opening, to ensure DBEs had the opportunity to participate in the Project. UNKS submitted an incomplete GFE form which was not signed and failed to meet the requirements of the Contract Documents. It should be noted that as a requirement of the funding received from the State Water Resources Control Board and as a condition of approval, the County is required to certify that the bidder performed a good faith effort.
- d. It should also be noted that along with leaving Sections 1, 6, and 7 blank on the GFE Form, UNKS did not properly complete Sections 2, 3, and 4. UNKS included a list of three subcontractors in Section 2 of the GFE Form, but did not include copies of

solicitations, phone records, or fax confirmations. Based on the letter, the three subcontractors listed in Section 2 of the GFE actually solicited UNKS. It should also be noted that of the firms listed in Section 2 of the GFE Form, Statewide Safety and Signs is not a DBE and a DBE Contractor Subcontractor Certification Form was not submitted for Kritz Excavating and Trucking. UNKS marked "Yes" to the question in Section 3 of the GFE Form, but did not provide any explanation as to how they established delivery schedules in a way that encouraged and facilitated DBE participation. UNKS also marked "Yes" to the question in Section 4 of the GFE Form, but did not provide a list of items made available to DBE firms.

3. Bid Bond, Section 00430 OIC is not an insurer authorized to do business in California.

From the letter:

- a. "Your letter states that OICM Insurance is not authorized to do business as an insurer in California. This is incorrect. There appears to be a conflict between the project specs and 2011 Federal law regarding the Bid, Payment and Performance Bonds. Federal law provides, in part, that federally aided projects on a State level fall under the new Federal Excess Surplus guidelines. The surety company does not need to be licensed in the State where the contractor resides or the State where the project is being performed. The Surety only needs to be licensed in its home State where the bond is being issued. Unks Bid Bond was issued by a California licensed insurance Agent. Because Federal Funds are financing the Los Osos Wastewater project, the owner can accept OIC Marianas Insurance Corporation under this 2011 Law." It should be noted that CalTrans and other State agencies and public municipalities in California have ongoing contracts bonded by OICM. I am attaching the following documents that were provided to County Staff regarding OICM authority to issue surety bonds in California:
 - i. Letter dated May 26, 2012 re bonds issued by OICM
 - ii. Business License dated 8/22/11
 - iii. Certificate of Authority dated January 23, 2012
 - iv. Insurance License dated January 23, 2012

Response:

- a. It appears that the "2011 Federal law" that the letter is referring is the "Nonadmitted and Reinsurance Reform Act." County Counsel's research has disclosed no support for any argument that the Nonadmitted and Reinsurance Reform Act preempts the County's right to include specific criteria in its contract documents that sets forth minimum requirements for surety companies providing bonds under the construction contract. It does not appear that either UNKS or OIC have made a valid case that they have met the requirements of the Contract Documents with regard to the surety. The submitted provider is not per the criteria listed in the contract documents.

- b. Note: UNKS submitted a 30-page fax to the Public Works Department fax machine on Wednesday afternoon, 6/6/12. With a cover sheet, the fax contained a NAIC website search for complaints against and financial information for OIC (12 pages), Insurance Code Title 12, Chapter 3503 Surety Bonds (9 pages), portion of 31 CFR, Part 223 (7 pages), and a one-page described as being “conditions of Bid Bond to comply with statutory requirement.” After review of the documents with County Counsel, it was determined that the documents did not provide compelling argument to dispute the Public Works Department’s determination that the surety did not meet the requirements of the contract documents. It should be noted that the Insurance Code Title 12, Chapter 3503 documents were from the State of Texas.

4. Additional comments from the UNKS letter:

- a. From the letter: “With regard to bid preparation and ability to perform the contract, I am the RMO and Corporate Secretary of Unks. I have been working in underground construction since 1958. I have been a California licensed contractor since 1963, License No. 216273. I qualified for the General Engineering classification A in 1965 and the General Building classification B in 1969, License No 259020.”
- b. Response: According to the California Department of Consumer Affairs Contractors State License Board license look-up website, License No. 216273 does not exist, and License 259020 is inactive and not able to contract at this time. None of these listed License Numbers were part of the bid package.

RECOMMENDATIONS

After reviewing the UNKS response letter with County Counsel, it was determined that the letter did not provide sufficient basis to justify their request that our Department reconsider our recommendation to reject their Bid.

CC: John Waddell

Pat Foran