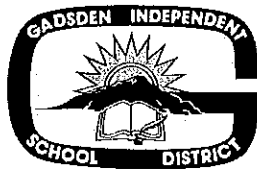


SUPERINTENDENT
Cynthia Nava

CHIEF FINANCIAL OFFICER
Steven W. Suggs



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October 22, 2010

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**Re: Bid Protest Determination
On Track Pre-Kinder at Chaparral NM Phase 1 and Phase 2 - 2010
GISD Project No.09-10-26
GISD Bid 10-11-04**

Ms. Beisman and Gentlemen:

In my capacity as the Central Purchasing Agent for the Gadsden Independent School District [GISD], I received the bid protest of Warren Construction ["Warren"], submitted by its attorney, dated September 29, 2010, wherein Warren protested the apparent low bid of Classic Industries, Inc. ["Classic"], which bid was submitted on September 28, 2010. A copy of the Bid Tabulation Sheet, establishing that Classic was the low bidder, is attached [see Attachment #1], as is Warren's bid protest letter [Attachment #2].

Pursuant to my authority under NMSA 1978 §13-1-174, I informed Classic of the protest and requested that it or its representative provide me with its response to the issue[s] raised in Warren's bid protest. I received Classic's response, through its attorney, dated October 6, 2010 [Attachment #3]. As part of my "due diligence" in investigating the contentions in the bid protest, I consulted with and received the analyses and opinions on the issue[s] presented by the protest from the Project Architect [Rembert Alley] and the GISD attorneys [Cuddy & McCarthy, LLP]. Based upon my investigation and analysis, I hereby determine that the bid protest is without merit and will be rejected.

[A] The Protest.

Essentially, Warren's protest is based upon its position that the Classic bid was defective, and thus non-responsive, because two of the subcontractors listed by Classic on the Subcontractor Listing form submitted with its bid [Attachment #4] did not have Public Works registration numbers listed, which Warren contends they were required to be by NMSA §§13-4-13.1 and 13-4-33(F). The subcontractors in question [Scenic Landscapes, LLC and Rumie's Excavation and Construction, LLC] were indeed named as subcontractors by Classic without any Public Works registration numbers being

listed for them. Thus, the facts are not in dispute. The controlling issue in this bid protest is whether state law requires that such Public Works registration numbers had to have been listed for Rumie's and Scenic. If so, the Classic bid was defective and may be considered non-responsive. If not, the Warren protest must be rejected.

[B] Discussion and Analysis

The language of the controlling statute [§13-4-13.1] is as follows:

“13-4-13.1. Public works contracts; registration of contractors and subcontractors.

A. Except as otherwise provided in this subsection, in order to submit a bid valued at more than sixty thousand dollars (\$60,000) in order to respond to a request for proposals or to be considered for award of any portion of a public works project greater than sixty thousand dollars (\$60,000) for a public works project that is subject to the Public Works Minimum Wage Act [13-4-10 NMSA 1978], the contractor, serving as a prime contractor or not, shall be registered with the division. Bidding documents issued or released by a state agency or political subdivision of the state shall include a clear notification that each contractor, prime contractor or subcontractor is required to be registered pursuant to this subsection. The provisions of this section do not apply to vocational classes in public schools or public post-secondary educational institutions.

B. The state or any political subdivision of the state shall not accept a bid on a public works project subject to the Public Works Minimum Wage Act from a prime contractor that does not provide proof of required registration for itself.

C. Contractors and subcontractors may register with the division on a form provided by the division and in accordance with workforce solutions department rules. The division shall charge an annual registration fee of two hundred dollars (\$200). The division shall issue to the applicant a certificate of registration within fifteen days after receiving from the applicant the completed registration form and the registration fee.

D. Registration fees collected by the division shall be deposited in the labor enforcement fund.”

The registration requirement contained in §13-4-13.1 is ambiguous as to whether subcontractors must be registered and their Public Works registration numbers listed in any bids where, as here, the entire project costs more \$60,000, or whether such listing is only required where the subcontractor's portion of the project costs more than \$60,000. In this case, Classic has established to my satisfaction

that the total cost of the work of each the two subcontractors is less than \$60,000. I agree with Classic's attorney that the statutory requirement should not be read as applying in this case, since the work bid by the two listed subcontractors was less than \$60,000 each. This reading is also shared by our architect [Mr. Alley] and by our attorneys.

Since the statutory language is ambiguous a court will look to the interpretation given to the ambiguous language by the administrative agency responsible for enforcing the statute [which, in this case, is the Department of Workforce Solutions ("DWS")]. Here, in a letter/memorandum to owners and contractors by DWS [Attachment #5], DWS has given its interpretation of the statutory requirement, stating:

"NOTE: Any general contractors must be registered with the Labor Enforcement Fund prior to the bidding process or the bid shall be deemed invalid. All subcontractors or their **subcontractors bidding more than \$60,000** on a Public Works contract **MUST** be registered with the Labor & Industrial Division."
(emphasis added.)

This letter/memorandum very clearly interprets the statute as only requiring that subcontractors be registered when their subcontractor bids are in excess of \$60,000 [as opposed to the value of the whole project being in excess of \$60,000]. This "directive" or "interpretive memorandum" constitutes the interpretation of the Department with the responsibility for the enforcement of the statute and would be given great weight if the ambiguous provision were to be presented to a court for interpretation. Furthermore, the School District and the bidders have a right to rely upon that interpretation.

Additionally, the architect in this case took a similar and consistent position in the instructions to contractors in the Project Manual about subcontractor listing [Attachment #7], which states that the Subcontractor Listing shall be expanded **after** bid to include the Minimum Wage registration number. Therefore, there was no violation of statute or of the Project Manual requirements in Classic's not listing Minimum Wage Act registration numbers for the two subcontractors. Warren's protest is without merit and is hereby rejected. Given this conclusion, the cases cited by Warren's attorney are not relevant.

This project needs to be begun without delay. NMSA 1978 §13-1-173 provides:

"13-1-173. Procurements after protest.

In the event of a timely protest under Section 145 [13-1-172 NMSA 1978] of the Procurement Code, the state purchasing agent or a central purchasing office shall not proceed further with the procurement unless the state purchasing agent or a central purchasing office makes a determination that the award of the contract is necessary to protect substantial interests of the state agency or a local public body."

The funding for this project is from a legislative appropriation. The 2010 Legislature took back appropriations for capital projects which, although previously approved for funding, were not under contract at that time, in order to deal with the State's revenue shortfall. If GISD does not award this contract promptly, there is a significant danger that the Legislature, in its 2011 Session, may do the same with funds appropriated for projects not then under contract, in light of the continuing fiscal problems facing the State. If that were to occur, this project cannot be built. Thus, the award of the contract is necessary to protect the substantial interests of GISD. Therefore, I determine that there is justification for the immediate execution of the contract and issuance of the Notice to Proceed."

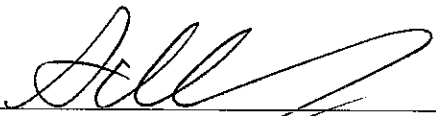
[C] Conclusions and Determination

1. The undersigned, as the Central Purchasing Agent of GISD, has the authority and responsibility to determine the protests addressed herein.
2. This Determination is issued within the timeframes permitted by the Public Purchases Act, the Procurement Code and within a reasonable time from the filing of the protests.
3. The invitation to bid and the entire bidding processing related to this procurement comply with the requirements of the Public Purchases Act, the Procurement Code and all New Mexico statutes governing public works contracts.
4. As a result of the Determination made herein rejecting the protest filed by Warren, Classic is determined to have been the lowest responsive bidder on the project and should be awarded the contract.
5. GISD shall proceed to promptly award the contract to Classic.
6. This Determination disposes of all aspects of the protest considered herein, but to the extent that any aspect of such protest is not specifically addressed in this Determination, such protest is rejected.
7. All parties are advised of their right to seek judicial review of the Determination contained herein, in accordance with Sections 13-1-175(B) and 13-1-183 NMSA 1978.
8. A copy of this Determination and the documents referred to herein shall be retained in the procurement file for this project maintained by the School District.
9. As Central Purchasing Agent, I am providing copies of this Determination to all bidders on this project and to any attorneys having appeared in this matter.

10. GISD may proceed with the award of the contract for this project, which action is deemed necessary to protect substantial interests of the GISD.

Date of Determination:

October 22, 2010



Steven W. Suggs, CPA
Chief Financial Officer
and Central Purchasing Agent

cc: Cynthia Nava, Superintendent
Rembert Alley
DND Contractors
Gencon
Gentry Construction
National Construction
Summit West Builders
White Sands Construction
Wooten Construction
Makwa Builders