

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME	February 28, 2014, 1:30 p.m.	DEPT. NO	42
JUDGE	HON. ALLEN SUMNER	CLERK	M. GARCIA
MERCER-FRASER COMPANY, Petitioner, v. ALDERPOINT COUNTY WATER DISTRICT, et al. Respondents. <hr/> VAN METER LOGGING, INC., et al. Real Parties in Interest.		Case No.: 34-2013-80001670	
Nature of Proceedings:		Motion for Preliminary Injunction	

Following is the court's tentative ruling denying the motion for preliminary injunction scheduled for February 28, 2014, at 1:30 p.m., in Department 42.

INTRODUCTION

This is a bid protest case. Petitioner Mercer-Fraser and Respondent Cal Electro both bid on a water system construction contract. Cal Electro's bid was lower and it was awarded the contract. Mercer-Fraser believes Cal Electro should not have been awarded the contract, and seeks a preliminary injunction prohibiting payment on the contract pending a determination on the merits. For the reasons stated below, the motion is denied.

FACTUAL BACKGROUND

Respondent Alderpoint County Water District ("the District") owns and operates an aging water system that provides water to approximately 74 primarily residential connections in Humboldt County. (Lund Decl., ¶ 3.) Water is taken from the Eel River and piped into a redwood tank, where it is treated with chlorine. (*Id.*, ¶ 4.) From there, the water is piped to a pumping station, and then to a second redwood tank. (*Id.*) Both tanks are deteriorating and leaking badly. (*Id.*, ¶ 5; Gregson Decl., ¶ 3, Ex. A.) As of

January 2014, it was estimated the two tanks were leaking 21,600 gallons per day. (Saylor Decl., ¶¶ 5-6, Exs. A-C.)

California regulations require the District to treat its water by filtration and disinfection. The District does not have a filtration system. (Horn Decl., ¶ 5.) It disinfects its water with chlorine. However, because of the way the system was designed, not all of its customers receive water that has been properly disinfected. (Saylor Decl., ¶¶ 3-4.) As a result, some of its customers have been advised to boil their tap water before using it. (Horn Decl., ¶ 6, Ex. A.)

The District is funded primarily through user fees, which are insufficient to cover the cost of upgrading its water system. In 2012 or 2013, it obtained a grant from Respondent Department of Public Health (“DPH”) to upgrade its water system to meet safe drinking water standards. (Horn Decl., ¶ 6, Ex. B.)

In July 2013, the District published a Project Manual soliciting bids to replace its water system. The Manual was lengthy, and included both an Advertisement for Bids and Instructions to Bidders. The Advertisement for Bids states:

Bidders *shall submit as part of the bid package* a list of *three (3) or more references* for prior projects which the Contractor has installed *of similar scope*. Projects shall have been completed *within the last five (5) years*. Failure to submit prior project list shall be grounds for rejection of the bid.

(Gregson Decl., Ex. B, 100-1 [emphasis added].) The Instructions to Bidders states:

To demonstrate Bidder’s qualifications to perform the Work prior to award, *within five working days of OWNER’S request, Bidder shall submit* written evidence...as may be called for below:

- A. The names, addresses, and phone numbers of *three* owners or operators who have constructed *similar projects in the last five years* who can testify to:
1. Scheduling, budget management, and responsiveness of the Contractor; and
 2. Installation, performance, and workmanship.

(*Id.*, 200-1 [emphasis added].)

Cal Electro submitted a bid for \$1,419,700, but did not include references with its bid. (Gregson Decl., Ex. C.) Mercer Fraser submitted a bid for \$1,591,000. (*Id.*, Ex. D.) It included references with its bid. (*Id.*)

The bids were opened August 12, 2013. (Gregson Decl., ¶ 7.) Upon request, Cal Electro submitted a list of references the next day. (*Id.*, ¶ 10.)

Cal Electro's was the lowest bid, and it was awarded the contract.

Mercer-Fraser immediately filed a bid protest, complaining Cal Electro's bid was not responsive because (1) it failed to include references with its bid, and (2) the references it submitted upon request were not for similar projects. (Pet., Ex. C.) The District rejected the bid protest on August 21, 2013, noting the Advertisement for Bids and the Instructions to Bidders appeared to be in conflict and thus created confusion about when references had to be submitted – with the bid, or upon request. The District found the discrepancy may have confused the bidders and should not be used to penalize Cal Electro. (Pet., Ex. D.) It also found all bidders – including Cal Electro – were qualified to perform the work. (Pet., Ex. E.) On October 14, 2013, all interested parties were informed the District had awarded the contract to Cal Electro. (Pet., Ex. H.)

Mercer-Fraser filed a petition for writ of mandate shortly thereafter – on October 22, 2013. In January 2014, it filed the present motion for a preliminary injunction, seeking to enjoin DPH from making payments to either the District or Cal Electro pending a resolution on the merits. It does not seek to enjoin the District from making payments to Cal Electro, and it does not seek to enjoin Cal Electro's work.

ANALYSIS

A preliminary injunction preserves the status quo until a final determination of the merits. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) In deciding whether to issue a preliminary injunction, the court considers two interrelated factors: (1) the likelihood Mercer-Fraser will prevail on the merits; and (2) the interim harm the parties will suffer if an injunction is not issued compared to the interim harm they will suffer if it is. (*White v. Davis* (2003) 30 Cal.4th 528, 554; *Butt v. State of California* (1992) 4 Cal.4th 668, 667-678; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.) The more likely it is that Mercer-Fraser will ultimately prevail, the less severe must be the harm that it alleges will occur if the injunction does not issue, and vice versa. (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.)

As the moving party, Mercer-Fraser has the burden of establishing it has a reasonable probability of prevailing, and the balance of harm tips in its favor. (*Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 640; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 356.) Where, as here, Mercer-Fraser seeks to enjoin a public agency from performing its duties, its burden may be even higher:

Where . . . the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or

agencies from performing their duties. [Citations.] This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury.

(Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471.)

Because a preliminary injunction restrains the defendant's actions prior to a trial on the merits, it is considered an *extraordinary* and *drastic* remedy, and will not be granted lightly. (*Id.*; *Fleishman v. Superior Court* (2002) 102 Cal. App. 4th 350, 356.)

1. Likelihood of success on the merits

This petition is brought pursuant to Code of Civil Procedure section 1085. The court's inquiry is thus limited to determining whether the District's actions were arbitrary and capricious, entirely lacking in evidentiary support, or whether it failed to follow proper procedures. (*Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44 Cal.App.4th 1391, 1399.) There is a presumption the District's actions were proper; Mercer-Fraser has the burden of proving otherwise. (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 368.)

As a general rule, public entities must put significant public contracts out to bid and award the contract to the *lowest responsive and responsible bidder*. (*MCM Construction, supra*, 66 Cal.App.4th at 368.) It is undisputed Cal Electro was the lowest bidder. The sole question raised by the petition is whether (1) its bid was responsive and (2) it is a responsible bidder.

A. Cal Electro's bid was responsive

A bid is *responsive* if it promises to do what the bidding instructions require. (*MCM Construction, supra*, 66 Cal.App.4th at 368.) Mercer-Fraser claims Cal Electro's bid was not responsive because it failed to include references, which were instead provided only upon request.

It is well established that a bid which substantially conforms to a call for bids may be accepted if the variance is not consequential. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 904-05.) To be considered inconsequential, a variance "must neither give the bidder an unfair competitive advance nor otherwise defeat the goals of insuring economy and preventing corruption in the public contracting process." (*Id.* at 906)

These considerations must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. They must also be

viewed in light of the public interest, rather than the private interest of a disappointed bidder. ‘It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal . . . of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid.’

(*Id.* at 908-09.)

At this preliminary stage of the proceeding, the court finds Mercer-Fraser is not reasonably likely to establish Cal Electro’s bid was non-responsive, much less that any non-responsiveness was consequential.

The question of whether a bid is responsive is a question of fact that can usually be determined from the face of the bid without outside investigation or information. (*Id.* at 906; *MCM Construction, supra*, 66 Cal.App.4th at 368.) Here, the bid documents are conflicting. As noted, those interested in bidding on the project were given not just the Advertisement for Bids, but the entire Project Manual, which also included the Instructions to Bidders. The Advertisement states bidders shall submit as part of the bid package three references for work of similar scope done within the past five. The Instructions state those references shall be submitted within five days of the District’s request.

As the District found, these provisions conflict – making it unclear whether references had to be submitted with the bid, or only upon request. Due to this conflict, the court finds (at least for purposes of this preliminary injunction) Cal Electro’s bid substantially conformed to the Project Manual as a whole, because it conformed to the procedure for submitting references outlined in the Invitation for Bids. This finding is further supported by a declaration from Cal Electro’s President, who states in his thirty years of experience as a contractor, references are normally provided to the owner upon request. (Meissner Decl., ¶ 11.) Mercer-Fraser provides no evidence to the contrary.

Mercer-Fraser argues the Advertisement and the Instructions are *not* inconsistent. They can be harmonized by interpreting the Advertisement to require bidders to submit references with the bid, and interpreting the Instructions to permit the District to request additional information about those references if it has questions about a bidder’s qualifications. Mercer-Fraser’s interpretation of the Project Manual is colorable. However, at this preliminary stage of the proceeding, the court finds Cal Electro’s and the District’s interpretation more reasonable. The purpose of competitive bidding requirements is to ensure taxpayers get the project they want at the lowest price practicable. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Auth.* (2000) 23 Cal.4th 305, 314.) The purpose is not to require potential bidders to painstakingly parse and correctly construe inconsistent or ambiguous provisions in lengthy bid documents. The public interest is not served by allowing a high bidder to

comb through a competitor's bid proposal looking for minor reasons to disqualify the low bidder. (*Ghilotti, supra*, 45 Cal.App.4th at 909.)

B. Cal Electro appears to be a responsible bidder

A bidder is *responsible* if it can satisfactorily perform the proposed work. (*MCM Construction, supra*, 66 Cal.App.4th at 368.) As our Supreme Court explained, determining whether a bidder is responsible does not involve examining the relative qualification of the bidders. (*City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861, 867.) Instead, a public entity is required to select the lowest bidder capable of performing the work, not the most qualified bidder. (*Id.*) Moreover, determining whether a bidder is responsible “is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment.” (*D.H. Williams Construction, Inc. v. Clovis Unified School Dist.* (2007) 146 Cal.App.4th 757, 764.)

Mercer-Fraser argues Cal Electro is not a responsible bidder: It failed to demonstrate it can satisfactorily complete the work because its references were not for similar projects completed in the past five years.

To demonstrate its qualifications, Cal Electro was asked to provide references for three similar projects constructed in the past five years. (Instructions to Bidders, 200-1.) As Mercer-Fraser correctly notes, many of Cal Electro's references were for projects completed more than five years ago or not yet completed. (Pet., Ex. B.) But Cal Electro submitted references for well over twenty projects, at least three of which were completed in the past five years. (*Id.*) That some of the projects were either too old or not yet completed is thus of no consequence. Cal Electro submitted references for at least three projects constructed in the past five years, as requested.

Mercer-Fraser argues the projects completed within the past five years are not sufficiently *similar* to be considered responsive references, and thus fail to demonstrate Cal Electro can satisfactorily perform the work. Mercer-Fraser does not discuss the substance of any of the references, noting only that “most” were for much smaller projects in terms of dollar amount; they “generally” involved only electrical work; and they “apparently” did not include similar water projects. (Opening Brief at 11:10-14.) Mercer-Fraser has the burden of proof, but fails to identify any specific deficiencies in Cal Electro's references. The court notes at least three of the projects Cal Electro completed in the past five years were for similar amounts (\$3 million; \$1.1 million, and \$1.3 million), and at least one involved work on a water system (the Klamath Sewer Forcemain Relocation).

Moreover, Mercer-Fraser fails to demonstrate that *only* water system projects can qualify as *similar* projects. As Mercer-Fraser itself acknowledges, Cal Electro's Class A contractor's license qualifies it to undertake all types of construction projects. Mercer-Fraser fails to demonstrate constructing a 115 kilovolt electrical substation for \$3 million or completing a \$1.1 million school remodel have no bearing on Cal Electro's ability to

satisfactorily replace the District's aging water system.¹ Mercer-Fraser may be able to prevail on this argument at the hearing on the merits. At this preliminary stage, however, it fails to establish a reasonable probability it will ultimately prevail in establishing Cal Electro is not a responsible bidder.

2. Interim Harm

The parties focus on entirely different interim harms. Mercer Fraser focuses on harm to the taxpaying public if an injunction is not issued.² The District focuses on the harm to its customers and the environment if an injunction is issued. The District has the better argument.

Mercer-Fraser argues it is not seeking to enjoin work on the contract. It only seeks to enjoin payment pending hearing on the merits. The District notes this is a distinction without a difference: enjoining DHP from making payments will bring work to a halt. According to Cal Electro's President, if payment is stopped the company will be unable to continue working on the project. (Meissner Decl., ¶ 18.) Mercer Fraser does not dispute this.

If work stops, the District's customers will continue receiving unsafe drinking water and the aging redwood tanks will continue leaking thousands of gallons of water per day during the worst drought in California's history. Additionally, stopping work would jeopardize the District's ability to complete the project on its limited budget. The court finds these compelling reasons not to grant the injunction.

Mercer-Fraser tries to dismiss this harm, arguing it is outweighed by the risk to taxpayers if DPH ends up paying construction costs on a contract that turns out to be void. At this early stage of the proceeding, the court finds the balance of harms does not justify the extraordinary remedy of a preliminary injunction, particularly given the court's finding Mercer-Fraser does not appear reasonably likely to prevail on the merits.

The court notes Public Contract Code section 5110 provides when a competitively bid public construction project is challenged, the contract may be entered into pending final decision on the challenge.³ This evidences the Legislature's intent that public

¹ See Pet., Ex. B, City of Ukiah/Orchard Substation and Orick Modernization and HVAC projects.

² Mercer-Fraser does not focus on harm to itself as the next lowest bidder. Indeed, it appears likely Mercer-Fraser would not be awarded the contract even if Cal Electro's bid were disqualified. The District states it cannot hire Mercer-Fraser under any circumstances because its bid exceeded the District's available funding for the project. (Horn Decl., ¶ 8.)

DPH argues the motion for preliminary injunction should be denied because Mercer-Fraser lacks standing to bring the petition. This challenge fails. Mercer-Fraser brings this action not just as a disappointed bidder, but as a taxpayer seeking to enjoin inappropriate expenditures of public funds. As such, it has standing. (See, e.g., *California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 569 [taxpayer standing sufficient to obtain mandate relief where object is to procure enforcement of public duty].)

³ The court does not opine at this stage whether section 5110 applies in this case.

projects like improving the District's water system not be shut down pending resolution of a bid protest.

CONCLUSION

The court stresses of the preliminary nature of this ruling. "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him." (*Continental Baking Co., supra*, 68 Cal.2d at 528.) At this stage of the proceeding, the court concludes DPH should not be enjoined from making payments to the District or Cal Electro pending a trial on the merits. Mercer-Fraser's motion for a preliminary injunction is thus denied.

The tentative ruling shall become the court's final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear. In the event this tentative ruling becomes the final ruling of the court, counsel for the prevailing party is directed to prepare a formal judgment, incorporating this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

The court prefers that any party intending to participate at the hearing be present in court. Any party who wishes to appear by telephone must contact the court clerk by 4:00 p.m. the court day before the hearing. (See Cal. Rule Court, Rule 3,670; Sac. County Superior Court Local Rule 2.04.)

In the event that a hearing is requested, oral argument shall be limited to no more than thirty (30) minutes per side.

If a hearing is requested, any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m. on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.