

6-2-09 #17



LAW OFFICES OF TIMOTHY M. TRUAX

tim@truaxlaw.com

May 29, 2009

VIA FACSIMILE & U.S. MAIL

Honorable Members of the Board of Supervisors, County of Orange
c/o Clerk of the Board Ms. Darlene J. Bloom
333 West Santa Ana Blvd., Room 465
Santa Ana, CA 92702-0687

2009 MAY 29 PM 3:20
CLERK OF THE BOARD
ORANGE COUNTY
BOARD OF SUPERVISORS

Re: John Wayne Airport - Construction of Terminal C and
Improvements to Terminals A & B; Project No. 281-281-4200-P201;
Board Agenda Item #17 at June 2, 2009 Meeting

Dear Honorable Members of the Board of Supervisors:

I represent The Whiting-Turner Contracting Company ("Whiting-Turner"), the apparent low bidder on the above-referenced project. I write today to provide additional information to the Board in connection with Item #17 on the agenda for your regularly scheduled Board meeting on June 2, 2009. In addition to this letter, Whiting-Turner intends to be present at that meeting and provide additional input at that time.

To summarize Whiting-Turner's position, its bid should be accepted, in accordance with the Instructions to Bidders published by John Wayne Airport, in the amount of \$98,996,795. Therefore, we believe it is premature for the Board to authorize the return of Whiting-Turner's bid bond, as proposed in Agenda Item #17.

We recognize that the Board has not yet taken action on the award of a contract for the project. Until the Board has concluded that Whiting-Turner is not entitled to an award of the contract in the amount stated above, it is premature to take action to return Whiting-Turner's bid bond.

Rather than re-state in this letter the legal authorities and other reasons why the contract should be awarded to Whiting-Turner in the amount of \$98,996,795, I am attaching the various letters between John Wayne Airport and Whiting-Turner which detail the various steps which have brought us to this point in time. These letters are as follows:

- 1. April 1, 2009 letter from Len Cannatelli of Whiting-Turner to Larry Serafini of JWA, describing the math error that Whiting-Turner made in an immaterial portion of its bid form;
2. April 6, 2009 letter from L.G. Serafini to Len Cannatelli of Whiting-Turner stating that Whiting-Turner is the apparent low bidder, with a bid amount of \$98,989,817.10;

Honorable Members of the Board of Supervisors, County of Orange
c/o Clerk of the Board Ms. Darlene J. Bloom
May 29, 2009
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3. April 8, 2009 letter from L.G. Serafini to Len Cannatelli of Whiting-Turner responding to Whiting-Turner's April 1, 2009 letter and requesting clarification;
4. April 8, 2009 letter from Len Cannatelli of Whiting-Turner to Mr. Serafini of JWA setting forth Whiting-Turner's position with respect to its low bid and the possible return of its bid bond;
5. April 27, 2009 letter from Timothy M. Truax to Mr. Serafini providing a more thorough summary of the legal authorities supporting the award of the contract to Whiting-Turner; and
6. May 7, 2009 letter from L.G. Serafini of JWA to Len Cannatelli of Whiting-Turner stating JWA's position that the contract should not be awarded to Whiting-Turner.

As indicated in the above letters, Whiting-Turner certainly did make an error in completing the bid form. However, if JWA follows its own procedures for evaluating the bids, that mistake is immaterial. This is readily apparent from JWA's April 6, 2009 letter, wherein it is stated that Whiting-Turner was the low bidder, with a bid amount of \$98,989,817.10.

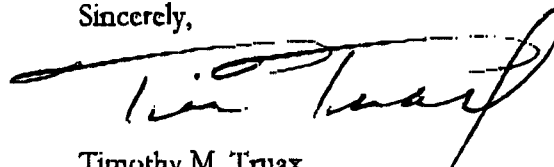
To be clear, if the Board decides that Whiting-Turner's bid cannot be accepted in the amount of \$98,996,795, then Whiting-Turner has made a mistake on its bid form that will entitle it to the return of its bid bond, pursuant to Public Contract Code section 5103.

However, if JWA simply follows its own procedures, then the contract should be awarded to Whiting-Turner. This will mean that the County will save more than \$2 million as compared to the next lowest bidder. This is consistent with California law, which provides that the competitive bidding statutes are "enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest." (Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal.4th 161, at p.173, 36 Cal.Rptr.2d 521.)

Whiting-Turner urges the Board to postpone any action on the return of its bid bond (as requested in Agenda Item #17), until after the Board has concluded that the Instructions to Bidders published by JWA should not be followed and that Whiting-Turner is not entitled to an award of the contract in the amount of \$98,996,795.

As indicated above, Whiting-Turner intends to be present at your June 2, 2009 meeting and will be happy to address any questions or concerns the Board has at that time.

Sincerely,



Timothy M. Truax

Honorable Members of the Board of Supervisors, County of Orange
c/o Clerk of the Board Ms. Darlene J. Bloom
May 29, 2009
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Enclosures

cc (via email only):

Mr. Len Cannatelli

Mr. Jeffrey Dodds

G. C. WHITING
(1803-1072)

FOUNDED 1909

WILLARD HACKERMAN
PRESIDENT AND CEO

THE WHITING-TURNER CONTRACTING COMPANY

(INCORPORATED)

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3 Corporate Park, Suite 100
Irvine, California, 92606
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BRIDGES, CONCRETE

WRITER'S DIRECT NUMBER IS

April 1, 2009

Department Airport Director Facilities
3160 Airway Avenue
Costa Mesa, CA 92626

Reference: Construction of Terminal C and Improvements to Terminals A & B
No: 281-281-4200-P201

Dear Mr. Larry Serafini

Thank you for the opportunity to provide our bid for the referenced project.

After reviewing the bid form we realized we had inadvertently transposed two digits in our Alternate Bid (2A + 2B) total on page 6 of the bid form.

The correct Alternate Bid (2A + 2B) should read \$98,996,795 and not \$89,996,795 as recorded.

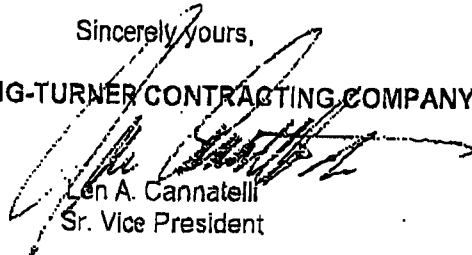
As you can see when you add up the total Alternate Bid Amount (2A.01 – 2A.19) with the total amount of Additive or Deductive bid items to the Alternate Bid (2B.01-2B.15) you will recognize that those numbers confirm our \$98,996,795 bid amount.

Please accept this as notice that the Total Alternate Bid (730 days) Including Additive or Deductive Bid Items To Alternate Bid (2A+2B) to be \$98,996,795.

Thank you for your consideration in this matter.

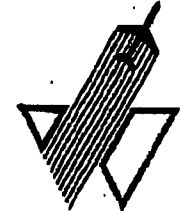
Sincerely yours,

THE WHITING-TURNER CONTRACTING COMPANY



Len A. Cannatelli
Sr. Vice President

Cc: Jeff Dodds
Ben Franco
Greg Blasic



**JOHN WAYNE
AIRPORT**

Orange County, California

Alan L. Murphy
Airport Director

April 6, 2009

Mr. Len A. Cannatelli
The Whiting-Turner Contracting Company
3 Corporate Park, Suite 100
Irvine, CA 92606

Subject: John Wayne Airport
Airport Improvement Program
Construction of Terminal C and Improvements to Terminals A & B
281-281-4200-P201

Reference: Thank you and Bid Evaluation

Dear Len A. Cannatelli:

The John Wayne Airport staff wants to thank you for your participation in the bidding of the Construction of Terminal C and Improvements to Terminals A & B project at John Wayne Airport. We appreciate the time and effort that your team spent with our staff before the bid date to collaborate on solutions for this exciting project for the County of Orange.

We first began communicating with you and your staff starting with the Contractor Outreach meetings in September 2007, which was then followed by the Contractor pre-qualification process that started in August 2008. Subsequently, your staff accepted our 95% construction documents package in November 2008 as an opportunity for an early review of the upcoming bid documents. This was then followed by the actual bidding phase beginning on January 27, 2009. Your team asked many excellent contractual and technical questions regarding the bidding documents during the bid period thereby allowing the JWA team time to clarify the construction documents through addenda. Your comments and suggestions are expected to result in fewer change orders during the construction phase.

JWA evaluated the bid results of the P201 Construction of Terminal C and Improvements to Terminals A & B project which were received by the Clerk of the Board on April 1, 2009. In accordance with the Instructions to Bidders and the Bid Form, JWA tabulated the bid price submitted by each bidder as shown on attached matrix.

The ranking of bidders from the apparent lowest bidder to the apparent highest bidder is as follows:

1. Whiting-Turner Inc.: Alternate Bid (2A+2B)	\$98,989,817.10
2. McCarthy: Alternate Bid (2A+2B)	\$100,959,468.71
3. Whiting-Turner: Base Bid (1A+1B)	\$101,384,744.30
4. PCL: Alternate Bid (2A+2B)	\$101,589,533.00
5. Clark: Base Bid (1A+1B)	\$104,636,934.75

3160 Airway Avenue

Costa Mesa, CA

92626-4608

949.252.5171

949.252.5178 fax

www.ocair.com



The Whiting-Turner Contracting Company
April 6, 2009
Page 2 of 2

6. PCL: Base Bid (1A+1B)	\$104,711,081.00
7. Clark: Alternate Bid (2A+2B)	\$104,836,934.75
8. Hunt: Base Bid (1A+1B)	\$107,207,698.27
9. Hunt: Alternate Bid (2A+2B)	\$109,782,326.37
10. Turner: Base Bid (1A+1B)	\$110,051,660.60
11. Turner: Alternate Bid (2A+2B)	\$111,563,707.46
12. McCarthy: Base Bid (1A+1B)	\$124,605,329.90

Any bidder who alleges a grievance by the proposed award of the contract to the lowest responsive bidder may submit a protest by 5:00 PM on April 13, 2009 to Mr. Larry Serafini, Deputy Airport Director - Facilities located at 3160 Airway Avenue, Costa Mesa, California 92626.

Protests shall contain the following information:

1. The name, address and telephone number of the protester
2. The signature of the protester or the protester's representative
3. The Project Number
4. A detailed statement of the legal and/or factual grounds for the protest
5. The form of the relief requested

Again, I want to thank you for your collaborative efforts with our staff.

Sincerely,

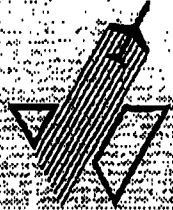


L.G. Serafini, P.E.
Deputy Airport Director, Facilities

Attachment: Bid Evaluation Summary

cc:

San Chang, Sr. Professional Engineer, Airport Development
Danilo Simich, Parsons, Program Manager
Greg Blasic, Parsons, Terminal C Project Manager
Sarah Stewart, Parsons, Administrative Assistant



**JOHN WAYNE
AIRPORT**

Orange County

**Alan L. Murphy
Airport Director**

April 8, 2009

Sent by Fax: 949-863-0864

Mr. Len A. Cannatelli
The Whiting-Turner Contracting Company
3 Corporate Park, Suite 100
Irvine, CA 92606

Subject: John Wayne Airport
Airport Improvement Program
Construction of Terminal C and Improvement to Terminals A & B
281-281-4200-P201

Dear Mr. Cannatelli:

We received your April 1, 2009 letter. We are unable to determine whether that letter is intended to constitute a request to be relieved of your bid based on mistake under the Relief of Bidders Act, Public Contract Code (PCC) Section 5100, et seq.

PCC Section 5104 requires that a bidder seeking relief establish, among other things, that:

"He or she gave the public entity written notice within five working days, excluding Saturdays, Sundays and state holidays, after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred."

Enclosed is a copy of page 6 of your Bid Form, setting forth your bid as follows: "Eighty nine Nine hundred ninety six seven hundred ninety five \$89,996,795"

Today, April 8th is the fifth working day after the opening of the bids on April 1, 2009, and therefore is the last day for providing written notice required by PCC section 5104. Accordingly, please advise us in writing, before the close of business today, as to whether or not you request relief from your bid of \$89,996,795. Please note that John Wayne Airport will not recommend award of the contract to The Whiting-Turner Contracting Company at the revised bid amount of \$98,996,795 set forth in your April 1, 2009 letter.

Please note that in my April 6th letter to you listing bid amounts for the various bidders, I stated Whiting-Turner's apparent bid amount to be \$98,996,795. That amount was erroneous. The County hereby withdraws, and corrects, such statement.

3160 Airway Avenue
Costa Mesa, CA
92626-4608
(949) 252-5171
(949) 252-5178 FAX
www.ocair.com


L.G. Serafini, P.E.
Deputy Airport Director, Facilities

Enclosed as note



2B-15	Deduct for deletion of Builder's Risk Insurance in Total Base Bid (730 Days) Including Additive or Deductive Bid Items to the Base Bid (2A+2B)	Lump Sum	1	Deduct		\$ (1,453,023.00)
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2B- Total Amount of Additive or Deductive Bid Items to the Alternate Bid (2B.01 through 2B.15)

~~One thousand four hundred and fifty three thousand~~
 Dollars ~~one thousand four hundred and fifty three thousand~~
 \$ ~~1,453,023.00~~ 1,453,023.00

TOTAL ALTERNATE BID (730 DAYS) INCLUDING ADDITIVE OR DEDUCTIVE BID ITEMS TO ALTERNATE BID (2A-2B)

~~One thousand four hundred and fifty three thousand~~
 Dollars ~~one thousand four hundred and fifty three thousand~~
 \$ ~~1,453,023.00~~ 1,453,023.00

NOTES

1. Unless otherwise required by law, no bid (opened), or any part thereof, may be withdrawn by the bidder for a period of 120 days after the opening of bids.
 2. Bids are to be submitted for the entire work. Failure to complete and submit bids for both the Total Base Bid (including the Additive or Deductive Bid Items to the Base Bid), and the Total Alternate Bid (including the Additive or Deductive Bid Items to the Alternate Bid), shall render the bid non-responsive.
 3. At the time of opening bids, the County will evaluate the total amounts stated as the Total Base Bid (821 Days) including Additive or Deductive Bid Items (1A+1B) and the Total Alternate Bid (730 Days) including Additive or Deductive Bid Items (2A+2B). The County will determine the lowest bidder based on the Total Base Bid (821 Days) including Additive or Deductive Items (1A+1B) and the Total Alternate Bid (730 Days) including Additive or Deductive Bid Items, whichever is lowest. For example, if all seven Pre-qualified General Contractors submit responsive bids, the County will evaluate 14 Total Base Bid and Total Alternate Bid amounts, each of which will include all of the Additive or Deductive Bid Items. The responsive and responsible bidder who submitted the lowest bid of the 14 shall be awarded the contract, if it is awarded.
- The responsive and responsible bidder who submitted the lowest bid as determined above shall be awarded the contract, if it is awarded. The County shall not be precluded from adding to or deducting from the contract any of the additive or deductive items after the lowest responsive and responsible bidder has been determined.
4. The bidder shall set forth for each unit basis item of work a unit price and a total for the item, and for each lump sum item a total for the item, all in clearly legible figures in the respective spaces provided for this purpose. In the case of unit basis items, the amount set forth under the "Total Price" column shall be the extension of the unit price bid on the basis of the estimated quantity for the item.

G.W.C. WHITING
11803-18741

WILLARD HACKERMAN
PRESIDENT AND CEO

FOUNDED 1899

THE WHITING-TURNER CONTRACTING COMPANY

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BRIDGES, CONCRETE

WHITING DIRECT NUMBER IS

April 8, 2009

Department Airport Director Facilities
3750 Airway Avenue
Costa Mesa, CA 92626

Reference: Construction of Terminal G and Improvements to Terminals A & B
No: 281-281-4200-P201

Dear Mr. Serafini

We received today your correspondence of April 8, 2009 retracting your position of our apparent low bidder status with a bid of \$98,996,795 (correspondence received April 6, 2009). We are very disappointed in this decision and write to point out that our bid was completed in accordance with the instructions to Bidders, and should be accepted, with a total bid amount of \$98,996,795. Alternatively, and only in the event that our bid is not accepted at this amount, we must reluctantly withdraw our bid in accordance with Public Contract Code Section 5108.

As you know, there was a transposition error on Whiting-Turner's Bid Form on the item entitled "TOTAL ALTERNATE BID (730 DAYS) INCLUDING ADDITIVE OR DEDUCTIVE BID ITEMS TO ALTERNATE BID (2A + 2B)." As clearly shown on our Bid Form, our bid for Alternate 2A (\$95,392,995) plus our bid total for Alternate 2B (\$3,603,799) was incorrectly totaled as \$99,996,795 and should have been \$98,996,796. For the reasons explained below, and because this transposition error did not allow Whiting-Turner to have any advantage over any other bidder, our bid should be accepted by the County.

In this case, the instructions to Bidders provide, in part, as follows:

2. BIDS

Bids to receive consideration shall be made in accordance with the following instructions:

- A. Bids shall be made upon the Bid Form document included herewith. All items shall be properly filled in and the total amounts in 1A, 1B, 2A and 2B are to be stated both in writing and in figures. . . ."

HEADQUARTERS: BALTIMORE, MARYLAND



OFFICES NATIONWIDE

The Whiting-Turner Contracting Company

There is no requirement in the Instructions to Bidders that the total for items 1A and 1B is to be stated separately, likewise for items 2A and 2B. Whiting-Turner has correctly stated its total bid for each of these items, which is all that the Instructions to Bidders requires. The "total" item on the bid form, based on these instructions, appears to be irrelevant.

Moreover, the Instructions to Bidders go on to state how the County will evaluate the bids:

8. AWARD OR REJECTION OF BIDS

- A. At the time of opening bids, the County will evaluate the total amounts stated as the Total Base Bid (821 Days) including Additive or Deductive Bid Items (1A + 1B) and the Total Alternate Bid (730 Days) including Additive or Deductive Bid Items (2A + 2B). The County will determine the lowest bidder based on the Total Base Bid (821 Days) including Additive or Deductive Bid Items (1A + 1B) and the Total Alternate Bid (730 Days) including Additive or Deductive Bid Items, whichever is lowest. For example, if all seven Pre-qualified General Contractors submit responsive bids, the County will evaluate 14 Total Base Bid and Total Alternate Bid amounts, each of which will include all of the Additive or Deductive Bid Items. The responsive and responsible bidder who submitted the lowest bid of the 14 shall be awarded the contract, if it is awarded.
- B. The responsive and responsible bidder who submitted the lowest bid as determined above shall be awarded the contract, if it is awarded. The County shall not be precluded from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined."

This indicates that the County will evaluate the bids based on the totals for items 1A and 1B, and for 2A and 2B, not on anything else. Here, Whiting-Turner's bid total for items 2A and 2B is \$98,986,795. That there is a transpositional error in adding these two numbers does not change this fact.

In Pozar v. Department of Transportation (1983) 145 Cal.App.3d 269, 193 Cal.Rptr. 262, the appellate court issued a writ of mandate directing Caltrans to follow its own procedures, as outlined in its Instructions to bidders, in a case where a bidder made a math error on its bid form. The same result may be obtained by Whiting-Turner in this case. This conclusion is supported by the fact that the bid error did not give Whiting-Turner any advantage over any other bidder. Even at its correct bid amount, Whiting-Turner's is still the lowest responsive bid, by more than \$2 million. Conversely, if Whiting-Turner's error had resulted in a much greater number being shown on the TOTAL line, it still would have been the low bidder based on the correct total for items 2A and 2B, and the County would benefit from awarding the contract to Whiting-Turner.

Indeed, the Instructions to Bidders expressly permit the County to accept modifications to Whiting-Turner's bid that benefit the County:

9. MODIFICATIONS AFTER BID OPENING

A modification that is received from an otherwise successful bidder and that makes the terms of the bid more favorable to the County will be considered any time it is received and may thereafter be accepted."

The Whiting-Turner Contracting Company

Here, there technically is no modification to the bid, because the correct amounts were set forth for items 1A, 1B, 2A, and 2B. It is only the total for items 2A and 2B that is incorrectly written. Nevertheless, to the extent that the County wishes to deviate from its Instructions to Bidders and rely on the "total" number as opposed to the underlying items 2A and 2B, Whiting-Turner's requested correction will only facilitate the award of the contract to the lowest bidder and will result in a savings of more than \$2 million. In addition, that correction will not give Whiting-Turner any advantage over any other bidder.

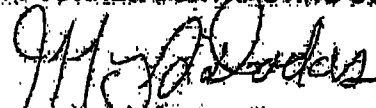
We therefore request that our bid of April 1, 2009 be accepted and that the contract be awarded in accordance with the County's Instructions to Bidders, with a total contract price of \$98,996,795.

Alternatively, to the extent the County is not willing to accept our bid with a total amount of \$98,996,795, and elects instead to ignore its own Instructions to Bidders, then Whiting-Turner has no option but to reluctantly withdraw its bid, in accordance with Public Contract Code section 5703. If that is the route the County chooses to follow, please return our Bid Bond to 3 Corporate Park, Suite #100, Irvine, CA 92606.

Please contact the undersigned should you have any questions or wish to discuss this matter further.

Sincerely yours,

THE WHITING-TURNER CONTRACTING COMPANY


FOR Len A. Cannatelli
Senior Vice President

Cc: Jeff Dordie
Ben Franco
Greg Blasio
Timothy M. Truex, Esq.

*tim@truaxlaw.com*

April 27, 2009

VIA FACSIMILE & U.S. MAIL

Office of Airport Director
John Wayne Airport, Orange County
3160 Airway Avenue
Costa Mesa, CA 92626
Attn: Mr. L.G. Scrafani
Deputy Airport Director, Facilities

**Re: Construction of Terminal C and Improvements to Terminals A & B;
Project No. 281-281-4200-P201**

Dear Mr. Scrafani:

I represent The Whiting-Turner Contracting Company ("Whiting-Turner"), the apparent low bidder on the above-referenced project. I write pursuant to your conversation on Friday with Mr. Len Cannatelli of Whiting-Turner, in which you advised him to submit a more thorough summary of the legal authority supporting Whiting-Turner's position, thereby providing a more compelling argument for the award of the above-referenced construction contract to Whiting-Turner.

To summarize Whiting-Turner's position, it believes that its bid should be accepted, in accordance with the Instructions to Bidders published by John Wayne Airport ("JWA"), in the amount of \$98,996,794. Accordingly, Whiting-Turner believes it is premature for the Orange County Board of Supervisors to authorize the return of Whiting-Turner's bid bond, as proposed in Supplemental Agenda Item S47A on the Board's Agenda for its regularly scheduled meeting on April 28, 2009. Whiting-Turner therefore requests that John Wayne Airport take steps so that the portion of Supplemental Agenda Item S47A dealing with the return of Whiting-Turner's bid bond be pulled from consideration at this time.

1. Whiting-Turner's Bid.

As you know, Whiting-Turner is a pre-qualified bidder for this project. On April 1, 2009, Whiting-Turner timely submitted its bid to John Wayne Airport and in accordance with the Instructions to Bidders, set forth its total bid amount for each of items 1A, 1B, 2A and 2B. Whiting-Turner's total bid amount for item 2A was \$95,392,995, and its total bid amount for item 2B was \$3,603,799. The sum of these two items is \$98,996,794.

222 NORTH SEPULVEDA BOULEVARD, SUITE 2000 • EL SEGUNDO, CA 90245

PHONE 310.662.4755 • FAX 310.662.4795 • WWW.TRUAXLAW.COM

Office of Airport Director
John Wayne Airport, Orange County
April 27, 2009
Page 2

The Instructions to Bidders provide, in part, as follows:

"2. BIDS

Bids to receive consideration shall be made in accordance with the following instructions:

- A. Bids shall be made upon the Bid Form document included herewith. All items shall be properly filled in and the total amounts in 1A, 1B, 2A and 2B are to be stated both in writing and in figures. . . ."

There is no requirement in the Instructions to Bidders that the total of items 1A and 1B is to be stated separately; nor for items 2A and 2B. Whiting-Turner has correctly stated its total bid for each of these separate items, which is all that the Instructions to Bidders require. The "total" item on the bid form, based on these instructions, is completely irrelevant.

Nevertheless, because the bid form contained a space for it, Whiting-Turner did complete the bid form item entitled "TOTAL ALTERNATE BID (730 DAYS) INCLUDING ADDITIVE OR DEDUCTIVE BID ITEMS TO ALTERNATE BID (2A + 2B)." Unfortunately, as you know, after adding together items 2A and 2B, Whiting-Turner transposed the first two numbers of the sum. Instead of entering the correct sum of items 2A and 2B (\$98,996,794), Whiting-Turner transposed the first two numbers and entered \$89,996,795.¹ Upon discovery of this transposition error, Whiting-Turner immediately notified your office in writing. (See attached letter from Whiting-Turner dated April 1, 2009.)

2. JWA Notification.

On April 6, 2009, you notified Whiting-Turner that it was the apparent low bidder, with a bid amount of \$98,989,710. (See attached JWA letter dated April 6, 2009.) It appears from this notification that JWA has re-totaled all of the bid items included in Whiting-Turner's bid, including the multiplication of the unit prices stated therein times the estimated quantities of materials. This notification is consistent with the Instructions to Bidders, which state:

"8. AWARD OR REJECTION OF BIDS

- A. At the time of opening bids, the County will evaluate the total amounts stated as the Total Base Bid (821 Days) including Additive or Deductive Bid Items (1A + 1B) and the Total Alternate Bid (730 Days) including Additive or Deductive Bid Items (2A + 2B). The County will determine the lowest bidder based on the Total Base Bid (821 Days) including Additive

¹ The \$1 difference is the result of rounding of the component parts of the total.

Office of Airport Director
John Wayne Airport, Orange County
April 27, 2009
Page 3

or Deductive Bid Items (1A + 1B) and the Total Alternate Bid (730 Days) including Additive or Deductive Bid Items, whichever is lowest. For example, if all seven Pre-qualified General Contractors submit responsive bids, the County will evaluate 14 Total Base Bid and Total Alternate Bid amounts, each of which will include all of the Additive or Deductive Bid Items. The responsive and responsible bidder who submitted the lowest bid of the 14 shall be awarded the contract, if it is awarded.

- B. The responsive and responsible bidder who submitted the lowest bid as determined above shall be awarded the contract, if it is awarded. The County shall not be precluded from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined."

This indicates that JWA would evaluate the bids based on items 1A and 1B, and items 2A and 2B, not on anything else. Here, the sum total of Whiting-Turner's bid for items 2A and 2B is \$98,996,794. The fact there was a transposition error in entering the sum of these two numbers does not change this fact.

3. Legal Authority.

In Pozar v. Department of Transportation (1983) 145 Cal.App.3d 269, 193 Cal.Rptr. 202, the appellate court issued a writ of mandate directing Caltrans to follow its own procedures, as outlined in its instructions to bidders, in a case where a bidder made a math error on its bid form. This case is directly applicable to the situation here.

Pozar was a bidder on a project for Caltrans, on which Caltrans required the bidders to submit unit prices for various estimated quantities of materials. The Caltrans instructions stated that if there was a discrepancy between the unit price and the total amount stated for that item, the unit price would be used to determine the lowest bidder. Pozar had included in its bid a unit price of \$20 per ton for "binder (dust palliative)". The estimated quantity given by Caltrans was 90 tons. Therefore, the total for this item on Pozar's bid form should have been stated as \$1,800. However, Pozar incorrectly stated the total as \$18,000. If the larger total number was used, Pozar was not the lowest bidder. However, if the correct total number was used, Pozar was the lowest bidder.

Caltrans ultimately relied on the \$18,000 number and concluded that Pozar was not the lowest bidder. Pozar protested and sought relief from the Court. The Superior Court denied Pozar's request, but the Court of Appeals reversed that decision and issued a writ of mandamus directing Caltrans to follow its own procedures. In other words, Caltrans was directed to use the unit prices stated on Pozar's bid form to determine the lowest bidder.

Here, the Instructions to Bidders clearly state that the bids will be evaluated on the basis of the Base Bid (1A + 1B) and the Alternate Bid (2A + 2B). The Instructions to Bidders also do not require that the bidders perform the addition themselves, because, as stated above, there is no

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requirement in the Instructions to Bidders that the sum of the numbers be stated separately. The Instructions only require that each of the four numbers be stated separately, in both words and in numerals.

Accordingly, as in Pozar, a Court most certainly will conclude that JWA is required to follow its own procedures, and evaluate the bids on the basis of the four separate numbers, and not the sum totals of those numbers, as stated by the bidders.

4. Whiting-Turner's Transposition Error is Not Material.

As indicated above, Whiting-Turner certainly did make an error in completing the bid form. However, if JWA follows its own procedures for evaluating the bids, that mistake is immaterial. Because the Instructions to Bidders require that the bids be evaluated on the basis of (1A + 1B) and (2A + 2B), the sum totals for those equations (as mistakenly stated by Whiting-Turner on the bid form) are irrelevant to determining who is the lowest bidder.

In an abundance of caution, Whiting-Turner did notify JWA concerning its transposition error, and later advised JWA that should JWA not follow its own procedures for evaluating the bids, Whiting-Turner would be entitled to the return of its bid bond. That is still the case. If JWA is going to use the sum totals stated by Whiting-Turner as the basis for evaluating its bid, then Whiting-Turner has made a mistake on its bid form that will entitle it to the return of its bid bond, pursuant to Public Contract Code section 5103.

However, if JWA simply follows its own procedures, then the sum total of items 2A and 2B, as incorrectly stated by Whiting-Turner on its bid form, is immaterial. There is no material mistake, and Whiting-Turner would not be entitled to the return of its bid bond.

5. The Public Will Benefit from the Award of the Contract to Whiting-Turner.

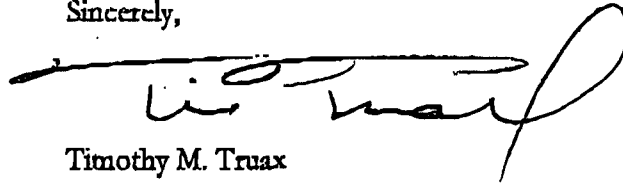
Should JWA properly follow its own procedures, and award the contract on the basis of items (2A + 2B), this will mean that Whiting-Turner is the lowest responsive, responsible bidder, by more than \$2 million. It obviously benefits the taxpayers of Orange County that JWA do so, thus saving them more than \$2 million that would be unnecessarily expended if the contract is awarded to the next lowest bidder. After all, the competitive bidding statutes are "enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest." (Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal.4th 161, at p.173, 36 Cal.Rptr.2d 521.)

Whiting-Turner urges JWA to follow the procedures outlined in its Instructions to Bidders, by relying solely on the separate numbers set forth in the bids for bid items 1A, 1B, 2A and 2B. Doing so will result in a total bid by Whiting-Turner of \$98,996,794. Whiting-Turner will thus be the lowest bidder and entitled to the award of the contract at that price.

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Please let us know as soon as possible whether JWA will be taking steps to pull from consideration by the Orange County Board of Supervisors Supplemental Agenda Item S47A, and please also let us know how JWA intends to proceed in this matter. Of course, if you have any questions, please feel free to contact me or Whiting-Turner directly.

Sincerely,

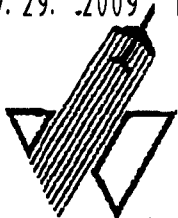


Timothy M. Truax

Enclosures

cc (via email only):

Mr. Len Cannatelli
Mr. Jeffrey Dodds



**JOHN WAYNE
AIRPORT**
ORANGE COUNTY

Alan L. Murphy
Airport Director

May 7, 2009

VIA E-MAIL

Mr. Len A. Cannatelli
The Whiting-Turner Contracting Company
3 Corporate Park, Suite 100
Irvine, California 92606

Subject: John Wayne Airport
Airport Improvement Program
Construction of Terminal C and Improvements to Terminals A & B

Dear Mr. Cannatelli:

We have reviewed your further letter dated April 27, 2009. After consultation with our counsel, John Wayne Airport cannot recommend to the Board of Supervisors the award of a contract to Whiting-Turner in the changed bid amount of \$98,996,795. We do not believe that the bid instructions authorize a procedure that would either allow the County to disregard as irrelevant the total lump sum stated by a bidder or allow a bidder to change its lump sum bid by correcting arithmetical or computational mistakes after bid submission. We believe that the provisions of the Bidders Relief Act should apply.

In your letter, you stated that if the County will not accept your changed bid of \$98,996,975, then you request the withdrawal of your bid and return of your bid bond in accordance with Public Contract Code Section 5103. Therefore, John Wayne Airport will recommend to the Board that it consent to your request to withdraw your bid and return your bid bond. A copy of the Agenda Staff Report making this recommendation is enclosed. This Agenda Staff Report is slated for discussion at the Board meeting of June 2, 2009.

I wish to thank you for your courteous handling of this matter, and hope that you will consider bidding on future County projects.

Sincerely,

L.G. Serafini, P.E.
Deputy Airport Director, Facilities

Enclosure

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