GREAT AMERICAN INSURANCE GROUP

301 East Fourth Street, 24th Floor, Cincinnati, OH 45202-4201
P.O. Box 2119, Cincinnati, OH 45201

fax 888.290.3706 (U.S. Only)
fax 513 369 5027

GreatAmericanInsurance.com

Sent Via Email and US Mail

April 29, 2021

Indian River County Board of Commissioners
Mr. Dylan Reingold
Indian River County Attorney
1801 27th Street
Vero Beach, FL 32960
Dreingold@ircgov.com

| | | | |
|---|---|---|---|
| RE: | Principal | : | Ahtna Marine & Construction Company, LLC |
| | Obligee | : | The Board of County Commissioners Indian River County, Florida |
| | Bond No. | : | 3346057 |
| | File No. | : | 932506663 |
| | Project | : | Sector 3 Beach and Dune Restoration Project, IRC-1925 |
| | Claimant | : | The Board of County Commissioners Indian River County, Florida |

Dear Mr. Reingold:

Great American Insurance Company ("Great American") is in receipt of the bid bond claim filed by The Board of County Commissioners of Indian River County, Florida (the "Board") under the bond referenced above. This letter is to advise you of my decision to deny the claim at this time for the reasons set forth herein.

Great American issued Bid Bond No. 3346057 ("Bond") on behalf of our principal, Ahtna Marine & Construction Company, LLC for the Sector 3 Beach and Dune Restoration Project, IRC-1925 ("Project"). The guaranty secured by the Bond is as follows:

> "if the Owner accepts the bid of the Contractor within the time specified in the bid documents, or within such time period as may be agreed to by the Owner and Contractor, and the Contractor either (1) enters into a contract with the Owner in accordance with the terms of such bid, and gives such bond or bonds as may be specified in the bidding or Contract Documents, with a surety admitted in the jurisdiction of the Project and otherwise acceptable to the Owner, for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof; or (2) pay to the Owner the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the owner may in good faith contract with another party to perform the work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect."

The terms of the bond require Ahtna to either enter into the construction contract contemplated by the bid, or in the alternative, pay to the Owner (the Board) the difference between the bid and the amount the Board may in good faith contract with another party to perform the work covered by said bid. So long as Ahtna, the primary obligor under the Bond, is in compliance with the same, then Great American's obligation, as the secondary obligor, is void.

The Board demanded payment from Great American in the amount of $856,934.09 under subparagraph (2) of the bond because Ahtna submitted a bid on the project for $17,138,681.81 but did not enter into the contract in accordance with the bid as set forth under subparagraph (1) of the bond.

Ahtna's obligation under the bond, if any, is to "pay to the Owner the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the owner may in good faith contract with another party to perform the work covered by said bid…" The amount specified in Ahtna's bid is $17,138,681.81. The Board did not contract with another party to perform the work covered by Ahtna's bid. The Board rejected all other bids for the Project. According to the County Memo dated September 16, 2020 ("Charest Memo")[1], the Board did not have sufficient resources to fund the Project beyond Ahtna's bid price. Accordingly, it could not have "in good faith" entered into a contract with one of the other bidders, because it was financially unable to do so. Therefore, the difference between the amount specified in Ahtna's bid and the amount for which the Board may have contracted with another party to perform the work is $0. Since the damage calculation for Ahtna as the primary obligor, is $0, then Great American, as the secondary obligor is also not liable for any damages. As a result, the claim is denied at this time.

The Board's position, as set forth in Mr. Reingold's email to Great American dated February 1, 2021, is that it suffered damages as a result of Ahtna's failure to enter into the construction contract, and the calculation of those damages should be measured by the difference between Ahtna's bid and the combined value of the contract between the Board and Guettler Brothers Construction, LLC ("Guettler"), which covers a portion of the work in Ahtna's bid, and a future contract, to be bid and performed at a later date, which will encompass the remaining portion of the Project not performed by Guettler.

Assuming the bid bond was intended to cover a re-bid for similar, but different projects, an assumption which I dispute, the Board still has suffered no damages pursuant to subparagraph (2) of the bond at this time. The new contract with Guettler is in the amount of $11,987,010.00 which is less than Ahtna's original bid. Ahtna's liability, if any, is based upon the difference between its original bid, and a substitute contract amount for the work covered by their bid. The difference is $0 because the Guettler contract is not greater than Ahtna's bid.

Additionally, the work in the Guettler contract is not the same work covered by Ahtna's bid. The re-bid consists of only a portion, approximately one half the size and scope, of the original Project that Ahtna and others based their bids upon. Further, the bids, project specifications, and ultimately the work for Sector 3 Phase 1 were based on a new set of plans issued pursuant to a survey conducted in July 2020[2]. This new set of plans changed the requirements of the project from the plans issued for the original Project which were based on a survey from July 2018. To date the Board has not solicited bids nor completed Sector 3 Phase 2 and therefore a complete comparison of the projects cannot be conducted at this time. Accordingly, the damage calculation for Ahtna as the primary obligor remains at $0, and therefore Great American, as secondary obligor is also not liable for any damages. As a result, the claim is denied at this time.

Assuming, for purposes of analysis, the Board's contentions are true, that the Bond is intended to cover a re-bid of two smaller, different projects, assumptions which I dispute, Ahtna argues the Board is not entitled to any damages because its performance of the contract was excused for a number of reasons, including mistake, bad faith on the part of the Board, and impossibility of performance.

[1] Indian River County Memorandum from Eric Charest, Natural Resources Manager to Jason Brown, County Administrator.

[2] Sector 3 Phase 1 Bid Addendum 2 Issued November 5, 2020

Ahtna contends its estimator made a mistake calculating the sand required to fulfil the contract specifications and due to that mistake, it should be entitled to withdraw its bid, even if that withdrawal occurred outside of the 24-hour time period allotted in the invitation for bids. As noted in Ahtna's correspondence from Mr. Cook dated September 25, 2020 Florida Courts use a four-part analysis to determine whether a public contract bid may be withdrawn for equitable reasons. These factors are highlighted in *Dept. of Transp. v. Ronlee, Inc.* 518 So. 2d 1326 (Fla. 3rd DCA) and *State Bd. of Control v. Clutter Constr. Corp.* 139 So. 2d 153(Fla. 1st DCA):

(1) The bidder acted in good faith in submitting the bid;
(2) In preparing the bid there was an error of such magnitude that enforcement of the bid would work severe hardship upon the bidder;
(3) The error was not a result of gross negligence or willful inattention;
(4) The error was discovered and communicated to the public body along with a request for permission to withdraw the bid before acceptance.

Ahtna's position is that it meets the criteria set forth in *Ronlee* and should have been permitted to withdraw its bid based on the equitable ground of mistake. Ahtna's maintains it acted in good faith in submitting its bid, the bid miscalculation resulted in an error of $13,036,598.12[3] which would impose a severe hardship upon it if the bid were enforced, that the error was a mathematical mistake and not gross negligence, and that it withdrew its bid prior to acceptance and award of the contract by the Board.

The correspondence provided by the Board in support of the bond claim does not specifically address its position with respect Ahtna's ability to withdraw the bid based on a mistake. However, Ahtna presented its position on this specific issue, among others, to the Board through correspondence from Mr. Cook to the Board and Mr. Reingold dated September 21, 2020 and September 25, 2020, respectively. Despite this, the Board still awarded the contract to Ahtna and made a claim on the bid bond. Considering these actions, I must assume the Board disagrees with Ahtna's position and believes Ahtna was not entitled to withdraw its bid. Accordingly, it appears the Board and Ahtna disagree on whether the circumstances presented allow Ahtna to withdraw its bid based on a mistake. Each of the four factors cited in *Ronlee* are questions of fact and Ahtna has presented *prima facia* support that it can meet the standard. As a result of the foregoing discussion, issues of material fact exist concerning the claim by the Board on the Bond.

Ahtna also argues its performance of the contract was excused because the Board acted in bad faith in awarding the contract. Ahtna maintains the Board had no intention of entering into the construction contract with Ahtna when the award was made, rather it made the award merely as a pretext to make a claim on the bond and as result of this breach of good faith and fair dealing, its performance of the contract is excused, and no damages should be assessed. In support of this position, Ahtna cites the fact that the Board did not award the contract until its counsel, Mr. Cook, notified them that it was a prerequisite to making a claim on the bid bond, that the Board knew or should have known Ahtna's bid contained a mistake, and that the Board knew Ahtna was not capable of performing the contract when it made the award.

Article 19 of Bid Specifications permits the owner to reject any or all bids for a variety of reasons. Florida Courts have recognized "a public body has wide discretion in soliciting and accepting bids for public works contracts and its decision, when based upon an honest exercise of such discretion, will not be set aside by a court…" Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949) and "Public officers have a discretion in the awarding of contracts, yet that discretion may not be exercised arbitrarily or capriciously." *Id*.

Based on the documentation provided in support of the claim, it is unclear whether the Board intended to award the contract to Ahtna until after Mr. Cook raised the issue in his September 21, 2020

[3] Charles Bowen of Ahtna email to Jennifer Hyde, Indian River County Purchasing Manager dated September 14, 2020.

correspondence in which he advised the Board any claim on the bond would be untimely because the contract had not been awarded. Up to that point, the correspondence among Indian River County staff, specifically the preparation and revisions to the Charest Memo appears to show the Board intended to make a claim on the bond without regard to any award of the contract. Also, the agenda for the September 22, 2020 board meeting does not contain any reference to an award of the contract to Ahtna or any approval for the same. The power point presentation by Mr. Szpyrka to the Board at the September 22, 2020 meeting contains several options for the Board to consider, but awarding the contract was not an option in the prepared presentation. At the meeting, however, Mr. Szpyrka advised the Board that staff would not pursue the options presented but instead would change their recommendation based on Mr. Cook's letter of September 21, 2020[4]. Ahtna's position is further supported by an email from Mr. Reingold to Mr. Szpyrka dated September 21, 2020, in which, after reading Mr. Cooks September 21, 2020 letter advising a bond claim is pre-mature, he states "…If we want to pull the bond, we may wish to state that we request the Board award the contract to Ahtna and if they refuse, authorize the staff to pull bond. That would negate one of his [Mr. Cook's] arguments." The following day, the contract was awarded to Ahtna and the bond claim followed shortly thereafter.

Ahtna further argues the Board knew Ahtna could not perform the contract, but despite this knowledge, made the award anyway. In support of this position Ahtna states the Board knew the bid contained a material mistake, that the Board knew it did not have the requisite experience for the project and that performance was an impossibility.

In addition to Ahtna advising the Board via telephone and written correspondence that the bid contained a mistake, Ahtna also cites to the disparity among bids as a reason the Board knew or should have known the bid contained an error, prior to Ahtna's communication of the same to them. After Ahtna's bid of $17,138,681.81, the remaining bids were $29,000,250.00; $36,236,131.70; and $42,455,384.00. These bids range from 169% to 247% more than Ahtna's. It is reasonable to conclude the disparity among the bids would have alerted the Board that a problem may exist with Ahtna's bid. The Board did, in fact, direct their consulting engineer take a closer look at the bid as well as Ahtna's qualifications once the bid was received. The consultant, APTIM, issued a memo dated September 15, 2020 ("APTIM Report")[5] and advised the Board that Ahtna did not have prior experience with projects of the same nature or scope as the Project initially bid. The Indian River County purchasing department also contacted Ahtna[6] directly to get additional information on its prior experience and noted that Ahtna's bid package did not provide sufficient evidence of experience or qualifications to complete the project. Ahtna ultimately advised the Board that it was unable to provide a prior work history to meet the technical specifications requirement as requested by Ms. Hyde[7]. Despite this, the Board later awarded the contract to Ahtna. The APTIM Report also noted that several other similar projects in the region were currently bidding or in the beginning stages which made the sand from the approved inland sources scarce and increased prices. It is unclear from the APTIM report whether the permitted upland sources were capable of providing the amount of sand required by the Project. As a result of the foregoing, issues of material fact exist concerning the claim by the Board on the Bond.

Finally, Ahtna also contends that compliance with the construction contract was an impossibility, and as a result it should have been relieved of any obligation to enter into the contract with the Board. "In Florida, the doctrine of impossibility of performance refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to

---

[4] Video of September 22, 2020 Board Meeting at 1:38:00
https://ircgov.granicus.com/player/clip/283?view_id=1&meta_id=125160&redirect=true

[5] APTIM Memo from Nicole S. Sharp, P.E. to Eric Charest, Natural Resources Administrator, Indian River County

[6] Jennifer Hyde, Indian River County Purchasing Manager email to Anthony Cavo of Ahtna dated September 10, 2020

[7] Anthony Cavo of Ahtna email to Jennifer Hyde dated September 13, 2020

perform." *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA) Ahtna maintains that when it re-calculated its bid to correct the mistake that caused the bid error, its sand supplier advised them it was unable to supply the amount of sand needed for the project. This was communicated to the Board via Mr. Cook's September 25, 2020 correspondence. As noted above, the availability of sand was a concern of the Board's consulting engineer, APTIM. The APTIM Report notes that only one of the sand suppliers approved by the Board provided quotes to any of the bidders and this was likely due to the number of similar projects in the region which may cause a shortage of sand. As a result of the foregoing, issues of material fact exist concerning the claim by the Board on the Bond.

When a genuine issue of material fact exists between a principal and claimant, Great American, as surety, cannot replace a trier of fact. As a result of the disputes of fact identified herein, the claim is denied at this time.

Great American's position relative to this claim is based upon the information provided to date. To the extent you have information, documentation, or legal support which you believe may support a different conclusion, please feel free to provide such information to me for review. Should you have any questions concerning your claim please feel free to call me at (513) 579-6327.

The denial of this claim, as well as any action taken in the past, or hereafter, is taken with a complete and full reservation of rights available to a surety under its bond, in equity and any applicable law, including the time limitation to bring an action on the bond, and/or suit against Great American. Further, nothing in this letter should be construed as an admission of liability on the part of Great American under the above-mentioned bond.

Sincerely,

Great American Insurance Company

Holden F. Moore

Cc: Ahtna Marine & Construction Company, LLC