

COPELAND LAW FIRM, APC

Northern California Office:

19201 Sonoma Hwy., Suite 106
Sonoma, California 95476

ofc: 424/234-9701

Southern California Office:

528 Palisades Dr., Suite 540
Los Angeles, California 90272

email: sbc@copelandlawpc.com

fac: 866/288-371

Via Federal Express

October 10, 2013

State of California
Department of Transportation
John McMillan
Office Engineer for Bid Protests
1727 30th St., MS-43
Sacramento, CA 95816-8041

RE: Bid Protest by Mendocino Construction Services, Inc. on Contract
No. 01-378164

Dear Mr. McMillan:

This Firm generally represents Argonaut Constructors ("Argonaut") and has been asked to address a bid protest by Mendocino Construction Services ("MCS") to an award of a contract to Argonaut for California Department of Transportation ("Caltrans") for project no. 01-378164 ("Project"). This letter represents Argonaut's response to MCS' baseless bid protest.

As you are aware, Argonaut is the lowest responsible and responsive bidder for the Project bid. What can be interpreted from MCS's October 4, 2013 bid protest letter is MCS' sole challenge to the award of a contract to Argonaut is MCS' unfounded belief Argonaut failed to take steps to meet the good faith effort to use DBE subcontractors/suppliers. Without any legal authority or citation to bid packet language, MCS generally concludes that Argonaut's failure to obtain 8% DBE participation makes its bid nonresponsive. MCS' conclusion is unsupported by legal authority and is contradicted by the bid packet and mandatory contents thereof timely submitted by Argonaut.

MCS' allegation is simply spurious and untrue and is not a legal ground to deny award of the contract to Argonaut as the lowest responsible/responsive bidder.

First and foremost, the Project bid documentation states what is considered responsive and nonresponsive with regard to DBE commitments:

“Failure to submit this required DBE information [Pages 12-14 of the bid packet and the Good Faith Efforts forms if the goal is not met] will be grounds for finding the bid nonresponsive.” (emphasis added)

The grounds for non-responsiveness are defined by the bid documents as the failure to submit pages 12-14 and the Good Faith Efforts form, not the failure to reach the 8% DBE goal. MCS does not allege a failure by Argonaut to submit those documents – Argonaut timely submitted those pages completed with its DBE information contained therein.

Second, contrary to MCS’ allegations, the failure to obtain 8% DBE participation does not make a bid nonresponsive. DBE participation is defined by the bid packet as a “goal.” The 8% is not defined as “requirement” for bid responsiveness, nor would it be so allowed by controlling California and Federal law. MCS’ entire premise to its bid protest is gutted by MCS’ mistaken assumption that the 8% goal is a responsiveness requirement. Whether certain DBE subcontractors/suppliers were available to MCS and not to Argonaut is irrelevant. MCS does not argue that Argonaut received bids from DBE suppliers/subcontractors and then opted not to use them. MCS also does not argue that Argonaut discriminated against certain DBE suppliers/subcontractors. In fact, no such evidence exists because Argonaut does not engage in discrimination. There is simply no requirement nor any supporting evidence for MCS’ bid protest.

Caltrans Standard Specifications dictate when DBE goals have not been reached by the lowest responsive bidder, the bid remains responsive so long as the bidder then submits the Good Faith Efforts Documentation and supporting backup, which Argonaut timely supplied. Specifically, Standard Specification No.2-1.12B(1) states:

“Meet the UDBE goal shown on the Notice to Bidders or demonstrate that you made adequate good faith efforts to meet this goal.” (emphasis added)

Standard Specification 2-1.12B(3) then sets forth what must be contained in the Good Faith Efforts Submittal to meet the good faith efforts:

“If you have not met the UDBE goal, complete and submit the Good Faith Efforts Documentation form with the bid showing that you made adequate good faith efforts to meet the goal. Good faith efforts documentation must include the following information and supporting documents, as necessary: 1. Items of work you have made available to UDBE firms. Identify those items of work you might otherwise perform with your own forces and those items that have been broken down into economically feasible units to facilitate UDBE participation. For each item listed, show the dollar value and percentage of the total bid. You are responsible to demonstrate that sufficient work to meet the goal was made available to UDBE firms. 2. Names of certified UDBEs and dates on which they were solicited to bid on the project. Include the items of work offered. Describe the methods used for following up initial solicitations to determine with certainty whether the

UDBEs were interested and include the dates of the follow-up. Attach supporting documents such as copies of letters, memos, facsimiles sent, telephone logs, telephone billing statements, and other evidence of solicitation. You are reminded to solicit certified UDBEs through all reasonable and available means and provide enough time to allow UDBEs to respond. 3. Name of selected firm and its status as a UDBE for each item of work made available. Include name, address, and telephone number of each UDBE that provided a quote and its price quote. If the firm selected for the item is not a UDBE, provide the reasons for the selection. 4. Name and date of each publication in which you requested UDBE participation for the project. Attach copies of the published advertisements. 5. Names of agencies and dates on which they were contacted to provide assistance in contacting, recruiting, and using UDBE firms. If the agencies were contacted in writing, provide copies of supporting documents. 6. List of efforts made to provide interested UDBEs with adequate information about the plans, specifications, and requirements of the contract to assist them in responding to a solicitation. If you have provided information, identify the name of the UDBE assisted, the nature of the information provided, and date of contact. Provide copies of supporting documents, as appropriate. 7. List of efforts made to assist interested UDBEs in obtaining bonding, lines of credit, insurance, necessary equipment, supplies, and materials excluding supplies and equipment that the UDBE subcontractor purchases or leases from the prime contractor or its affiliate. If such assistance is provided by you, identify the name of the UDBE assisted, nature of the assistance offered, and date assistance was offered. Provide copies of supporting documents, as appropriate.

Argonaut submitted a completed Good Faith Efforts Documentation Form supported by 161 pages of documentation demonstrating Argonauts extensive efforts to solicit sufficient DBE participation in the work, thereby meeting each of the 7 requirements stated above. MCS' bid protest ignores this indisputable fact. Because Argonaut has complied with all Good Faith Effort requirements, its bid is responsive per se.

Third, MCS has not submitted any evidence demonstrating Argonaut failed to take reasonable actions to obtain sufficient DBE participation. In fact, Argonaut actively and aggressively sought DBE participation in soliciting subcontractor and supplier bids for this Project.

What matters under controlling law is not the actual participation rates achieved by any bidder, **but the bidder's efforts to obtain DBE participation**. MCS alleges no facts that Argonaut failed to make sufficient efforts to obtain sufficient DBE participation – merely that MCS found DBE bidders for certain line items which Argonaut did not find. This is not evidence of a lack of good faith effort by Argonaut, but evidence of better luck or knowledge of these subcontractors/suppliers from prior projects performed by MCS.

In protesting the good faith efforts of another bidder, MCS bears the burden under 49 C.F.R., Section 26, Appendix A, part I to demonstrate Argonaut failed to take reasonable actions in attempting to meet the DBE good faith goals of the contract. MCS' allegation that other line item DBEs were available to MCS is not evidence that Argonaut failed to meet good faith efforts to locate and use those DBEs. MCS has not submitted any evidence that these DBE submitted

bids to Argonaut. Nor has MCS alleged Argonaut failed to take reasonable efforts to locate DBE bidders. And even if such evidence did exist, which it does not, it would be a quantum leap to assume lack of good faith by Argonaut in choosing other line items subcontractors/suppliers. Moreover, Caltrans is given wide latitude, given the facts at hand, to determine that Argonaut has used good faith efforts in preparing its bid for the Project. See, 49 C.F.R., Section 26, Appendix A, part II.

Finally, under California law, a bid is non-responsive only when there is a failure to abide by a bid requirement which gives the bidder an unfair advantage over other bids – an unfair advantage is defined as any time the bidder is given any role in deciding whether the irregularity in its bid should be waived thus given favoritism to that bidder which was not given to other bidders. Valley Crest Landscape, Inc. v. City Council, (1996) 41 Cal.App.4th 1432. Examples of such favoritism is the failure to submit documentation which is listed in the bid as “required” or the allowance to change bid pricing after a bid submission is closed (as opposed to mistaken math corrections evident on the bid submission).

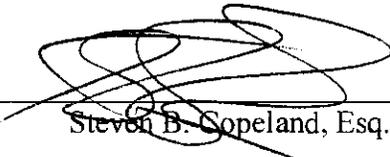
Here, there are no bid irregularities nor has Argonaut been granted any favoritism by Caltrans. Argonaut was not given the ability to submit a late DBE form nor a late Good Faith Efforts form nor missing documentation at a time later than other bidders. Nor was Argonaut allowed to change pricing after bid closing. There are simply no legal grounds under State law to find Argonaut’s bid nonresponsive.

Argonaut remains willing and able, as the lowest responsive/responsible bidder, to enter into a contract for the Project and to perform all Project work. Argonaut’s bid is responsive, its good faith efforts are compliant with all law and respectfully requests award of the Project by Caltrans.

Best regards,

COPELAND LAW FIRM, APC

By: _____


Steven B. Copeland, Esq.