

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
1727 30th STREET
P. O. BOX 168041
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PHONE (916) 227-6280
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*Flex your power!
Be energy efficient!*

May 22, 2013

Facsimile: (602) 437-1821

Kurt L. Clink, President
Truesdell Corporation of California, Inc.
1310 W. 23rd Street
Tempe, AZ 95282

02-3E6304
02-Las,Plu,Teh-32, 36, 139, 299-Var
B.O. 03/19/2013

Dear Mr. Clink:

The Department of Transportation (Caltrans) received the attached letter on behalf of the Truesdell Corporation of California, Inc. dated May 2, 2013, in response to the nonresponsive bid finding on May 1, 2013. Truesdell requests Caltrans to consider the inconsistency in its DVBE documents as an immaterial deviation and allow Truesdell to employ Titan to perform work described as Water Pollution Control Program Plan.

The Office of Business and Economic Opportunity, Contract Evaluation Unit (CEU) conducted a review of the DVBE summary and found that Titan did not provide a quote for work described as bid item 6, Water Pollution Control Program Plan, and as such disallowed this item. This error resulted in a reduction in the DVBE commitment, thus Truesdell did not meet the 3 percent goal of the contract.

As you are aware, all decisions on contract awards must be made in accordance with the law (including case law) and the law only allows awards based on the face of the bid. Caltrans cannot negotiate with a bidder. These belated commitments are not in the bid. Truesdell should be aware that an award of this contract would easily be declared invalid and any expenses incurred by Truesdell would only be compensated at cost and without mark up.

Caltrans upholds its original finding of a goal not met for this contract and will proceed to award the contract to the lowest responsible and responsive bidder provided all requirements are met.

If you have any questions, please contact Mulissa Smith, Contract Branch Chief, at (916) 227-6228.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. McMILLAN", written over a printed name.

FA
JOHN C. McMILLAN
Deputy Division Chief
Office Engineer
Division of Engineering Services

Attachment

GIBBS GIDEN ATTORNEYS AT LAW
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REPLY TO LOS ANGELES OFFICE
AUTHOR'S E-MAIL: SKORNBLATT@GGLTSW.COM
FILE NO.: 1020.022

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OF COUNSEL
ALFRED FADEL &

RETIRED PARTNER
KENNETH C. GIBBS
(Full-Time Neutral)

May 2, 2013

VIA FACSIMILE, E-MAIL, AND U.S. MAIL

John C. McMillan, Deputy Division Chief
Mulissa Smith, Contract Branch Chief
State of California, Department of Transportation
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, CA 95816-8041

Fax: (916) 227-6282
john.mcmillan@dot.ca.gov
mulissa.smith@dot.ca.gov

Re: **Contract No. 02-3E6304**
Response of Truesdell Corp. to Bid Rejection

Dear Mr. McMillan and Ms. Smith:

Our office represents Truesdell Corporation of California, Inc. ("Truesdell"), the low bidder on California Department of Transportation ("Caltrans") Contract No. 02-3E6304 ("Contract"). On behalf of Truesdell, we submit this response to your letter dated May 1, 2013, regarding Truesdell's DVBE participation. Truesdell will achieve the required DVBE participation for the Contract and any perceived inconsistency between Truesdell's DVBE and SBE forms is both irrelevant and a waivable immaterial irregularity. As Truesdell is the lowest responsive and responsible bidder, Caltrans should award the Contract to Truesdell.

A. Introduction

Caltrans' letter dated May 1, 2013, states that the Office of Business and Economic Opportunity, Contract Evaluation Unit ("CEU") concluded that the Water Pollution Control Program was not included in Titan DVBE's ("Titan") bid to Truesdell, and therefore the CEU made a downward adjustment of Truesdell's DVBE participation, resulting in participation under the required 3%. Based on this reduced participation level, Caltrans contends that Truesdell is not eligible for award of this Contract. Truesdell, however, does have the required DVBE participation because Titan will provide a Water Pollution Control Program. Although it might not have been Truesdell's intent to identify Titan for this work on the Certified DVBE Summary

GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP

May 2, 2013
Page 2

form, Truesdell has nevertheless committed to employ and pay Titan for the work, and will do so. Moreover, any perceived inconsistency between the Certified DVBE Summary form and the Certified Small Business Listing for the Non-Small Business Preference form is inconsequential.

A. Truesdell's Bid is Responsive

On its Certified DVBE Summary form, Truesdell indicated that Titan DVBE ("Titan") will be preparing a Water Pollution Control Program, at a price of \$785. Truesdell has obtained a quote from Titan for the performance of this work (see Exhibit A attached hereto) and will honor its commitment to employ and pay Titan for this work. Truesdell's DVBE participation will therefore remain at 3.04%, as originally stated on its Certified DVBE Summary form, and Truesdell's bid is therefore responsive.

On its Certified Small Business Listing for the Non-Small Business Preference form, Truesdell indicated that Global Environmental Network, Inc. ("GENI") will be preparing a Water Pollution Control Program, at a price of \$785. While it was not Truesdell's intent to identify both Titan and GENI for this work, Truesdell has nevertheless committed to employ and pay both of them for the work, and will do so. Significantly, the Certified DVBE Summary form states that names listed on the form must be consistent with the Subcontractor List¹, not the Certified Small Business Listing for the Non-Small Business Preference form. The Certified Small Business Listing for the Non-Small Business Preference form does not indicate that entries on that form are supposed to be consistent with any other bid form. Therefore, Truesdell's commitment to employ both Titan and GENI for the preparation of a Water Pollution Control Program does not create any inconsistency in the bid, and Truesdell's bid is responsive.²

B. Any Inconsistency is a Waivable Inconsequential Irregularity

Even if this was determined be an inconsistency, that is an immaterial deviation that can and should be waived by Caltrans. A minor and inconsequential irregularity in a bid does not require Caltrans to reject the bid as non-responsive. Given the complexity of construction projects and public bidding paperwork, there will inevitably be some variation between bids and bid documents. This raises questions of whether a variation is "material" or "immaterial" and whether variations may be waived by the awarding authority. California's courts have long held that "a public entity may waive inconsequential deviations from contract specifications in a

¹ While the DVBE form and the Subcontractor are meant to be consistent, there is no corresponding entry regarding Titan DVBE's preparation of the Water Pollution Control Program because Titan DVBE is a consultant for that bid item, not a subcontractor and is not required to be listed.

² Note also that the Subcontractor Listing Law (Public Contract Code § 4100 et seq.) mandate that if two subcontractors are listed for the same work then the bidder is deemed to self-perform is inapplicable here for two reasons: (1) this issue does not relate to Truesdell's Subcontractor List, but rather to other bid forms; and (2) more importantly, these are consultants, not subcontractors, so none of the Subcontractor Listing Law applies to the Water Pollution Control Program work.

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Page 3

public contract bid." *Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 900; see also, *MCM Constr., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359.

The *Ghilotti* court explained that "[t]o be considered inconsequential, a deviation must neither give the bidder an unfair competitive advantage nor otherwise defeat the goals of insuring economy and preventing corruption in the public contracting process." *Ghilotti, supra*, 45 Cal.App.4th at 900. Explained another way, an "immaterial variation" is the failure of a bidder to meet a bid requirement that does not affect the bidder's commitment if it is awarded the contract, either because (1) the requirement is merely procedural and, in the particular case, the meaning of the bid is clear; (2) the requirement is substantive but it is satisfactorily met, although not in the precise manner contemplated by the bidding documents; or (3) the requirement not met is one calling for information that relates not to the performance of the obligation but to independently verifiable facts regarding the bidder's status. In short, an "immaterial variation" will not change the bidder's performance obligations as described in the bid documents and does not provide the bidder an unfair advantage over other bidders. See, *Konica Bus. Machs. U.S.A., Inc., v. Regents of Univ. of Cal.*, (1988) 206 Cal.App.3d 449.

In the *Menefee* case, a disappointed bidder challenged award to the apparent low bidder, contending that the bid was nonresponsive because one of the pages of the bid proposal sheet had not been signed. The Court permitted the public agency to waive the defect of the unexecuted page and upheld award of the contract to the low bidder. In reaching its decision, a primary consideration of the Court was whether the low bidder obtained an unfair advantage over other bidders by failing to sign a page of its bid. If the absence of a signature would allow the bidder to avoid entering the contract, the Court reasoned, then it would have the unfair advantage of deciding whether it wanted the contract after bid opening. The Court found, however, that the bidder was bound by the terms of its bid and could not have refused to enter into the contract based on the defect in its bid. Therefore, the public agency was permitted to waive this "immaterial" defect.

Here, Truesdell's Certified DVBE Summary indicates that Titan will prepare a Water Pollution Control Program, and Truesdell's Certified Small Business Listing for the Non-Small Business Preference form indicates that GENI will prepare a Water Pollution Control Program. If Caltrans was to determine that this created an inconsistency in the bid, such an insignificant deviation will not entitle Truesdell to seek relief from its bid under Public Contract Code section 5103, as this "mistake" was not one that made the bid materially different than intended and was not due to an error in judgment. See, *Menefee v. County of Fresno*, (1985) 163 Cal.App.3d 1175. The two listings do not change Truesdell's performance obligations, do not give Truesdell an unfair competitive advantage, and do not relieve Truesdell from being bound by the terms of its bid. Moreover, Truesdell stands by its commitment to pay both Titan and GENI for the work. Therefore, even if Caltrans determines that Truesdell's DVBE and SBE forms create an inconsistency (although Truesdell contends it does not), Caltrans can and should waive this immaterial defect.

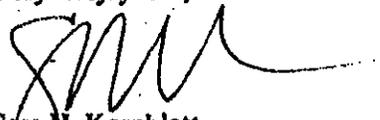
GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP

May 2, 2013
Page 4

Moreover, there are no allegations or evidence, that this alleged inconsistency in Truesdell's bid affected the amount of Truesdell's bid, gave Truesdell an advantage over other bidders, constituted a vehicle for favoritism, influence potential bidders to refrain from bidding, or affected the ability of Caltrans to make bid comparisons. See, *Ghilotti, supra*, 45 Cal.App.4th 897. Under California law, the analysis of whether or not to reject a bid must be based on actual, not hypothetical, considerations. See, *MCM Const., supra*, 66 Cal.App.4th 359. It is "well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential." *Ghilotti, supra*, 45 Cal.App.4th at 904. The only thing that would be accomplished by rejecting Truesdell's bid would be to increase the cost of the Contract by more than \$86,000 (7.5%); such waste of taxpayer funds should not be tolerated.

For the reasons set forth herein, Truesdell's bid should be deemed responsive. We therefore request that Caltrans proceed with award of the Contract to Truesdell, the lowest responsive and responsible bidder.

Very truly yours,



Sara H. Kornblatt
for GIBBS GIDEN LOCHER TURNER
SENET & WITTBRODT LLP

Enclosure

cc: Kurt L. Clink, President, Truesdell Corporation of California, Inc. (via email only)

05/02/2013 THU 16:31 Received
FAX

May 2 2013 04:34pm

006/007

EXHIBIT A

MAY-2-2013 14:25 FROM:

TO: 16024371821

P.1/1

Attn: Kirk



P.O. BOX 492336
REDDING, CA 96049-2336

CDOT #02-386304

Bid Date 3/19/2013

AMMENDED ROUTE

5/2/2013

WATER POLLUTION CONTROL PLAN - \$785.00

Bid Item #2 CONSTRUCTION AREA SIGNS - Furnished, Installed, Removed

(84 Total CS-1 ONLY signs) = \$18,000.00

USA provided by Titan DVBE at rate of \$850.00 unless otherwise specified by Prime Contractor.

Bid Item #3 TRAFFIC CONTROL

TMA TRUCK NOT INCLUDED IN LANE CLOSURE RATE

2 Man Lane Closure: Includes all cones, all advanced portable warning signs, night beacons, barricades, 1 arrow board and closure truck as needed (one mile one direction at a time)

8 hr shift- \$1500.00 over time billed at \$90.00 per man hr (Does not include TMA truck)

***Minimum charge on Short Shifts or Short Notice Cancellations (less than 24 hrs) \$1000.000**

Additional Lanes or Ramps closed with same crew same shift - \$195.00 each - Includes all additional cones, advanced portable warning signs, night beacons if needed, ramp closure barricades if needed and/or 1 additional arrow board if needed

TMA CRASH TRUCK- \$400.00 day/ \$1650.00 week/ \$6000.00 month (bare rental)

\$1000 Delivery/Pickup Charge. Please make sure to schedule the truck as they go fast.

THIS RENTAL IS AS AVAILABLE ONLY

2 Man Flagging Crew: Includes all cones and all advanced portable warning signs as needed for one mile one direction at a time (additional charges for additional cones and signs if needed)

8 hr shift- \$1450.00 over time billed at \$90.00 per man hr

***Minimum charge on Short Shifts or Short Notice Cancellations (less than 24 hrs) \$1000.000**

RATES DO NOT INCLUDE .5 LUNCH REQUIRED IF NOT RELIEVED BY CONTRACTOR

Additional Flaggers- 8 hr shift \$725.00 over time billed at \$90.00 per man hr

***Minimum charge on Short Shifts or Short Notice Cancellations (less than 24 hrs) \$300.00**

RATES DOES NOT INCLUDE .5 LUNCH REQUIRED IF NOT RELIEVED BY CONTRACTOR

All Night Work is billed an additional \$3.50 per man hr

Pilot Car with Operator: Includes operator (no mileage charge)

8 hour shift - \$895.00 overtime billed at \$110.00 per hr.

***Minimum charge on Short Shifts or Short Notice Cancellations (less than 24 hrs) \$500.00**

Signatory to Northern California Laborers

Bid Item #4 PORTABLE CHANGEABLE MESSAGE BOARDS

\$1400.00 a month, \$750.00 week, \$300.00 a day, \$200 Delivery Charge Per Board.

Boards are rented with Titan Traffic ONLY.

Prices are good for 30 days from the date of this proposal, after that, prices are subject to adjustment. There will be no retention held on Traffic Control. There MUST be a 2 week notice before start of work. If this project falls in a per diem area, contractor will be charged an additional \$24.00 per day per man. Traffic control bid item based on a minimum of 5 consecutive days. Anything less than 3 days will be charged a Mobilization fee of \$500 per crew. Items not specifically included are considered to be excluded. All bid items are subject to a formal contract or PO suitable to both parties prior to any work starting. All bid items are subject to availability at the time of project start date. Titan DVBE Ref#1249460. Please call William Schroyer/ Lori Smith with questions 530-246-7836.

GIBBS GIDEN ATTORNEYS AT LAW

LOCHER TURNER SENET & WITTBRODT LLP

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REPLY TO LOS ANGELES OFFICE

FACSIMILE TRANSMISSION

FROM: Sara H. Kornblatt, Esq.

DATE: May 2, 2013

PAGES (incl. cover sheet): 7

RECIPIENT	COMPANY	FAX NUMBER	TELEPHONE
John C. McMillan Mulissa Smith	State of California, Dept. of Transportation Div. of Engineering Services	(916) 227-6282	(916) 227-6280
CLIENT/MATTER:	Name: Truesdell/Bid Protest		
	No.: 1020.022		
ATTACHED PLEASE FIND:	Response of Truesdell Corp. to Bid Rejection		

- FOR YOUR FILES
- FOR YOUR REVIEW
- FOR YOUR INFORMATION
- IN ACCORDANCE WITH YOUR REQUEST
- PLEASE COMMENT
- PLEASE TELEPHONE ME
- ALSO SENT VIA E-MAIL & U.S. MAIL
- PLEASE HANDLE

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**** Transmit Conf. Report ****

P. 1
CALTRANS CONTR AWARDS Fax 916-227-6282

May 22 2013 04:57pm

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916024371821	Normal	22:04:55pm	1'45"	8	# 0 K	

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN Jr., Governor

DEPARTMENT OF TRANSPORTATION

DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER, MS 43

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Sincerely,

JOHN C. McMILLAN
Deputy Division Chief
Office Engineer
Division of Engineering Services

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