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REPLY TO LOS ANGELES OFFICE
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FILE NO.: 1020.022

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May 2, 2013

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

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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

▲ A PROFESSIONAL CORPORATION

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 List[1], 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.

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.

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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)

EXHIBIT A

Attn: Kirk

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

CDOT #02-3EG304 Bid Date 3/19/2013

AMMENDED QOUTE **5/2/2013**
WATER POLUTION 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
RATESDOES 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.

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FACSIMILE TRANSMISSION

FROM: Sara H. Kornblatt, Esq. **DATE: May 2, 2013** **PAGES (incl. cover sheet): 7**

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CLIENT/MATTER:	Name: Truesdell/Bid Protest		
	No.: 1020.022		
ATTACHED PLEASE FIND:	Response of Truesdell Corp. to Bid Rejection		

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