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April 30, 2015

VIA FACSIMILE AND U.S. MAIL

John C. McMillan
Deputy Division Chief
Office Engineer
Division of Engineering Services
P.O. Box 168041, MS-43
Sacramento, CA 95816-8041

**Re: Bld Protest of J.F. Shea Construction, Inc.
Caltrans Contract #02-3E7714**

Dear Mr. McMillan:

As you know, J.F. Shea Construction, Inc. submitted a bid protest letter to Caltrans regarding the above project on April 15, 2015, and Mercer-Fraser responded to J.F. Shea's protest by submitting a letter from its attorney, Jennifer Dauer, on April 27, 2015. On behalf of J.F. Shea, this letter responds to Ms. Dauer's letter.

In her letter, Ms. Dauer admits that Mercer-Fraser's bid is defective in that it fails to provide information required by the DBE – Commitment form for this project. However, Ms. Dauer then argues that the defect should be waived because, according to Ms. Dauer, the deviation is "immaterial." J.F. Shea respectfully disagrees with Ms. Dauer's argument.

The information omitted by Mercer-Fraser was plainly and expressly required by Caltrans' DBE – Commitment form. Caltrans undoubtedly had good reasons for requiring bidders to provide that information. It is presumptuous at best for Mercer-Fraser's counsel to dismiss that information as immaterial or unnecessary, which is essentially what she has done.

Moreover, even if the defect in Mercer-Fraser's bid is one which Caltrans, in the exercise of its sound discretion, could waive, Caltrans most definitely is not required to grant the requested waiver. The applicable legal principle is stated in *MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal.App.4th 359, 373-374 (1998) as follows:

No case cited by MCM holds that where the City *can* waive a deviation it *must* do so. ... [The legal] authorities [cited by MCM] do not support the proposition that the contracting agency *must* waive deviations from bid requirements where it has the power to do so. These cases and others like them, which address the issue whether and under what circumstances a deviation from bid specifications is waivable by the agency, use permissive language to describe the agency's power to waive immaterial deviations: ... "The rule of strict compliance with bidding requirements *does not preclude* the contracting entity from waiving

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inconsequential deviations." (Citation omitted). ... Clearly the foregoing language is not mandatory, but permissive.

In this instance, even if Caltrans concludes that it is legally permitted to grant the requested waiver, it should not do so in this instance, for at least three reasons. First, the defects in Mercer-Fraser's bid pertain to key information which Caltrans expressly requires in order to permit it to quickly and efficiently review the many, many DBE – Commitment forms which it receives each week. Bidders should not be permitted to disrupt this process by carelessly omitting material information requested by Caltrans, and Caltrans should not be required to make assumptions about what information should have been included in the blank spaces left by Mercer-Fraser on its DBE – Commitment form. Second, in the long run, the integrity of Caltrans' bidding process will be compromised if it is not conducted on a level playing field, i.e., if all bidders are not required to conform to the same requirements whether or not it is convenient or expedient for them to do so. Third, Mercer-Fraser, like all of the other bidders, was on notice that: "Failure to submit the forms and information specified may result in a nonresponsive bid." (See section 2-1.33 of the Specifications.)

In conclusion, J.F. Shea's bid protest is meritorious, and Caltrans should exercise its discretion to reject Mercer Fraser's bid as non-responsive. J.F. Shea was and is the lowest responsive and responsible bidder for this project.

Very truly yours,



Robert W. O'Connor

ROC:

cc: Jennifer Dauer (Via Email)
Logan Hanson (Via Email)
Kirk Johnson (Via Email)
Ed Kernaghan (Via Email)



Facsimile Cover Sheet

TO	PHONE NO.	FAX NO.
John C. McMillan, Deputy Division Chief Division of Engineering Services		916-227-6282

FROM: Vimi Sharma
Direct Phone: (916) 551-2929
Fax: (916) 442-2348

DATE: April 30, 2015

RE: Bid Protest of J.F. Shea Construction, Inc.

PAGES: 3 (including cover page)
Original to Follow by U.S. Mail

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IF YOU DO NOT RECEIVE ALL OF THE TRANSMITTED PAGES, PLEASE CALL VIMI SHARMA AT (916) 551-2929.

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