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February 18, 2015

VIA FACSIMILE AND U.S. MAIL

Ms. Molly Yumikura
Contract Awards Analyst
Caltrans Office Engineer
P.O. Box 168041, MS 43
Sacramento, CA 95816-8041

**Re: Caltrans Contract #03-0F6904
Bid Protest of Myers & Sons Construction**

Dear Ms. Yumikura:

We are attorneys for Myers & Sons Construction. As you know, Myers submitted a bid protest to Caltrans on February 3, 2015. This letter replies to the response to Myers' protest sent by attorney Marcus Turner, on behalf of Timberworks, dated February 12, 2015. Timberworks' response to Myers' bid protest actually reaffirms rather than undercuts the merit of Myers' protest. Timberworks' bid must be rejected as stated in Myers' protest.

With respect to S.T. Rhoades, Timberworks admits that it changed the scope of work to be subcontracted to Rhoades from Bid Items 60, 67 and 71 (on its Subcontractor List) to Bid Items 60, 61, 66, 67 and 71 (on its DBE Commitment form), thereby impermissibly adding two bid items to the work to be performed by Rhoades. As stated in Myers' protest letter, this change is directly contrary to one of the bidding rules stated in Caltrans' bidding documents, i.e., the rule that the work listed on the DBE Commitment form "must be consistent, where applicable, with the names and items of work in the 'Subcontractor List' submitted with [the] bid."

In its response to Myers' protest, Timberworks attempts to explain away this discrepancy by alleging that it was caused by a "clerical error" made when filling out the DBE Commitment form. This explanation, even if true, actually affirms the validity of Myers' protest rather than undermining it.

Like the low bidder in *Valley Crest v. City of Davis*, 41 Cal.App. 4th, 1440 (1996), Timberworks alleges that it made a mistake in filling out its bid form and asks Caltrans, in effect, to allow Timberworks to correct its bid by deleting Bid Items 61 and 66 from its DBE Commitment Form with respect to S.T. Rhoades. Under the rule established in the *Valley Crest* case, this allegation and request by Timberworks means that Timberworks' bid must be rejected as non-responsive.

In *Valley Crest*, the low bidder, North Bay Construction, made a mistake in filling out the percentages of work it intended to have performed by subcontractors. When the mistake was brought to North Bay's attention, North Bay responded by stating that the subcontractor

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percentages listed in its bid were not correct and provided information to the City regarding what it alleged to be the correct percentages. The second low bidder, Valley Crest, contended in its protest that "since North Bay had made a mistake in its bid ... its only remedy was that provided in the relief of bid statutes." 41 Cal.App.4th 1432, 1440. In other words, North Bay could not correct its mistaken and its only remedy was to request relief from its bid under Public Contract Code section 5100 et seq.

The Third District Court of Appeal agreed with Valley Crest and held that North Bay's bid must be rejected. In doing so, the Court of Appeal rejected the argument that the mistake alleged by North Bay was not the type of mistake for which relief could be granted since it did not directly affect North Bay's bid price, stating that the "language of the statute does not support this narrow interpretation." The Court held:

"... North Bay had an unfair advantage because it could have withdrawn its bid. Misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical error. It makes the bid materially different and is a mistake in filling out the bid. ... That North Bay did not seek such relief is of no moment. The key point is that such relief was available. This, North Bay had a benefit not available to other bidders ... Its mistake, therefore, could not be corrected by waiving an 'irregularity.'" 41 Cal.App.4th 1440, 1442.

With respect to A.C. Dike, Timberworks' response misses the point. If Timberworks' Subcontractor List is correct and A.C. Dike will be performing Bid Item 66, then its DBE Commitment Form is incorrect since it states that both A.C. Dike and Rhoades will be performing that work. Once again, Timberworks admits that it made an impermissible change from its Subcontractor List to its DBE Commitment form, apparently due to another so-called clerical error, which under the rule established by the *Valley Crest Landscape* case means that Timberworks' bid must be rejected.

Accordingly, Myers' bid protest was and is meritorious, and Timberworks' bid must be rejected both because it violated the express requirements of Caltrans' bidding documents and because Timberworks has admitted that it made multiple mistakes in filling out its bid form.

Very truly yours,



Robert W. O'Connor

ROC:

cc: Clinton W. Myers (via email)
Mike Lewis (via email)
Marcus Turner (via email)



Facsimile Cover Sheet

| TO | PHONE NO. | FAX NO. |
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| Ms. Molly Yumikara, Contract Awards Analyst Caltrans Office Engineer | | 916-227-6282 |

FROM: Vimi Sharma
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DATE: February 18, 2015

RE: Caltrans Contract #03-0F6904
Bid Protest of Myers & Sons Construction

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Original to Follow by U.S. Mail

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