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September 25, 2014

Mr. John McMillan  
Deputy Division Chief  
State of California  
Department of Transportation  
Division of Engineering Services  
Office Engineer, MS 43  
1727 30th Street  
Sacramento, California 95816-8041  
Phone: (916) 227-6280; Fax: (916) 227-6282

*Via Fax (916) 227-6282 & Overnight Carrier*

RE: Caltrans Contract #03-1A8424

Subject: Bid Protest

Dear Mr. McMillan,

Granite Construction Company (Granite) hereby protests the potential award of the above referenced Contract to Qualcon Contractors, Inc. (Qualcon), the apparent second low monetary bidder. Qualcon's bid contains material deviations, warranting rejection of its bid. Qualcon provided an incomplete Caltrans Bidder DBE Commitment Form. Qualcon did not identify any DBEs it intended to use. Moreover, Qualcon's DBE Commitment Form was also not consistent with the Subcontractor List Form and thereby adversely affected Caltrans' ability to make bid comparisons. In contravention of Caltrans' mandatory bid requirements, Qualcon's Subcontractor List and DBE Commitment forms are wholly inconsistent. Furthermore, Qualcon did not comply with Caltrans' subcontractor listing requirements and may not have timely and properly extended its bid.

On August 6, 2014, Teichert Construction (Teichert) submitted the apparent low monetary bid on the Contract, Qualcon submitted the apparent 2<sup>nd</sup> low monetary bid on the Contract and Granite timely submitted the apparent third low bid (thus having standing for this protest). On August 14, 2014, Caltrans found Teichert's bid, as well as Qualcon's bid non-responsive due to failure to comply with the DBE specifications. Thereafter, on September 18, 2014, Caltrans rescinded its August 14<sup>th</sup> letter finding Qualcon's bid non-responsive. By this letter, Granite notifies Caltrans of material defects in Qualcon's bid. Caltrans' initial finding of non-responsiveness was correct and should be reinstated as Qualcon failed to timely submit a complete DBE commitment and satisfy Caltrans' specifications. As a result, Qualcon's apparent low bid is non-responsive and should therefore be rejected.

The Department is required to award its construction contracts to the lowest responsive bidder via competitive bidding. As Caltrans aptly stated in its June 24, 2014 letter to Diversified Concrete Curting, Inc. (Diversified) relating to Contract No. 03-4M8404, wherein Caltrans found Diversified non-responsive for failure to comply with the DBE submittal requirements set forth in the DBE Commitment form and bidding instructions:

*"A basic rule in competitive bidding is that bids must conform to the listing requirements and the Department's own bidding instructions and if it does not conform, it may not be accepted."*

(Emphasis added.) Caltrans' foregoing summary properly summarizes the law governing competitive bidding. "The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition. (See legis. intent declared in Pub. Cont. Code, § 10300; [citations omitted].) Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with

bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money. [Citations omitted.] The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements. [Citation omitted.]” *Konica Business Machines USA, Inc. v. Regents of University of California* (1988) 206 Cal. App. 3d 449, 456-457; see also *MCM Constr. v. City* (1998) 66 Cal. App. 4th 359, 369. The acceptability of “substantial” rather than strict compliance is suspect when some bids meet the specifications fully and others do not (as is the case here). *Konica, supra*, 206 Cal. App. 3d at 454.

Accordingly, a bid that does not strictly conform to the call for bids cannot be accepted if the variance could have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders. In other words, a public agency can only waive a deviation from bid specifications that is inconsequential and not material. A bid containing a material deviation must be rejected as non-responsive. See 47 Ops.Cal.Atty.Gen. 129, 130 (1966); *Konica, supra*, 206 Cal. App. 3d at 454; see also *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal. App. 4th 1432 (court reversed the city’s waiver of a bid requirement, where the requirement was held material and hence not waivable). Factors considered in determining whether a deviation is a minor irregularity or material departure include whether the deviation could be a vehicle for favoritism, affect the amount of the bid, influence potential bidders to refrain from bidding, or affect the awarding entity’s ability to make bid comparisons. *Konica, supra*, 206 Cal. App. 3d at 455.

**Qualcon’s Bid is Materially Defective and Should Be Rejected As Non-Responsive**

Qualcon’s bid contains material deviations, warranting rejection of its bid.

**A. Qualcon Did Not Comply With Caltrans’ Mandatory DBE Requirements**

The Contract is a Federal Aid Project with a DBE goal of 12 percent. Per Section 2-1.12B(2), *DBE COMMITMENT SUBMITTAL*, and 2-1.33, *BID DOCUMENT COMPLETION AND SUBMITTAL*, of the revised Standard Specifications, the low bidder and 2nd low bidder were required to: (a) complete and submit the completed Caltrans Bidder DBE – Commitment form no later than 4 p.m. on the 4th business day after bid opening and (b) submit written confirmation from each DBE shown on the form stating that it will be participating in the Contract. Per Section 2-1.33, *BID DOCUMENT COMPLETION AND SUBMITTAL*, bidders were required to complete all forms in the Bid Book. In particular, bidders were required to complete certain forms and submit information at the times shown on the following table:

Bid Form Submittal Schedule				
Contract type	Forms to be submitted at the time of bid	Forms to be submitted no later than 24 hours after bid opening <sup>a</sup>	Forms to be submitted no later than 4 p.m. on the 2nd business day after bld opening <sup>a</sup>	Forms to be submitted no later than 4 p.m. on the 4th business day after bid opening <sup>a</sup>
All contracts	<ul style="list-style-type: none"> <li>Bld to the Department of Transportation</li> <li>Business name and location; description of subcontracted work on the Subcontractor List</li> <li>Opt Out of Payment Adjustments for Price Index Fluctuations<sup>c</sup></li> </ul>	<ul style="list-style-type: none"> <li>Bid item nos. and percentage of bid item subcontracted on the SubcontractorList<sup>b</sup></li> </ul>	--	--
Non-federal-aid contracts only	<ul style="list-style-type: none"> <li>California Company Preference</li> <li>Request for Small Business Preference or Non-Small Business Preference<sup>o</sup></li> </ul>	--	<ul style="list-style-type: none"> <li>Certified Small Business Listing for the Non-Small Business Preference<sup>o</sup></li> </ul>	<ul style="list-style-type: none"> <li>Certified DVBE Summary<sup>d</sup></li> </ul>
Federal-aid contracts only	<ul style="list-style-type: none"> <li>Small Business Status</li> </ul>	--	--	<ul style="list-style-type: none"> <li>Caltrans Bidder - DBE - Commitment<sup>e</sup></li> <li>Good Faith Efforts Documentation - DBE<sup>f</sup></li> </ul>

Caltrans' specifications warn bidders that "Failure to submit the forms and information as specified results in a nonresponsive bid."

Caltrans' Bidder DBE Commitment Form requires bidders to identify:

- (a) the DBEs the bidder is committing to utilize for the project (including the name of the DBE, Caltrans DBE certification number, address and phone number);
- (b) the bid item no.(s) of the work the listed DBE will be performing;
- (c) the item(s) of work and description of services to be subcontracted or materials to be provided by the listed DBE; and
- (d) the amount of credit to be claimed for each listed DBE; and
- (e) the total claimed DBE participation

By signing the DBE Commitment form, the bidder commits to utilizing the listed DBEs. This form mandates that: "Failure to submit the required DBE information *will* be grounds for finding the bid nonresponsive." (Emphasis added). The DBE Commitment Form further provides: "IMPORTANT: Identify all DBE firms being claimed for credit, regardless of tier. Names of the First Tier DBE Subcontractors and their respective items(s) of work listed above must be consistent, where applicable, with the names and items of work in the 'Subcontractor List' submitted with your bid."

Qualcon's bid and associated DBE submittal did not satisfy these requirements. First, Qualcon provided an incomplete Caltrans Bidder DBE Commitment Form. Specifically, Qualcon left an entire column of the form blank. The column Qualcon failed to complete included material information most critical to the DBE Commitment form, namely the name, DBE certification no., and contact information (address and phone number) for the DBE(s)

Qualcon was committing to utilize. While Qualcon submitted DBE quotes, such submittal satisfied only one of several obligations imposed on all bidders. Simply submitting those quotes did not commit Qualcon to utilize any DBE(s). The DBE commitment generates from the signed DBE Commitment Form, which Qualcon failed to complete. In Qualcon's signed DBE Commitment Form, Qualcon did not commit itself to use any particular DBEs. To the contrary, Qualcon did not identify any DBEs it intended to use. Qualcon's omission of the entire fourth column of the DBE Commitment Form and failure to include information material to the DBE commitment, render Qualcon's bid non-responsive.

Moreover, Qualcon's DBE Commitment Form, which did not list any DBEs, was also not consistent with the Subcontractor List Form and thereby affected Caltrans' ability to make bid comparisons. As mandated in Caltrans' specifications, bidders' DBE Commitment Form and Subcontractor List Form must be consistent. Qualcon did not list any DBE subcontractors on its DBE Commitment form, but listed several purported DBEs on its Subcontractor List Form. In addition, Qualcon listed bid item no. 142 on the Subcontractor List for Garcia Excavating & Paving (Garcia) (a DBE), but failed to list that bid item number anywhere on the DBE Commitment form. Similarly, Qualcon listed bid item no. 27 on the Subcontractor List for DBE Garcia, but failed to list that bid item number anywhere on the DBE Commitment form. In contravention of Caltrans' mandatory bid requirements, Qualcon's Subcontractor List and DBE Commitment forms are wholly inconsistent. Notably, such defect impacted the amount of DBE dollars claimed.

#### B. Qualcon Did Not Comply with Caltrans' Mandatory Subcontractor Listing Requirements

The Subcontractor Listing Law requires bidders for public contracts to set forth the following minimum subcontractor information in their bid proposal: (a) the names and locations of all subcontractors who will perform work in an amount in excess of one-half of 1 percent of the prime contractor's bid or \$10,000, whichever is greater [Cal. Pub. Contract Code, § 4104(a)]; and (b) the portion of the work which will be done by each such subcontractor [Cal. Pub. Contract Code § 4104(b)]. The purpose of the Subcontractor Listing Law is to prevent the practices of bid shopping and bid peddling that take place after award of the contract. Pub. Cont. Code §4101. The California legislature has determined that such practices often result in poor quality of material and workmanship to the detriment of the public. To help eradicate the practices, the statute requires prime contractors to list their intended subcontractors for designated portions of the work, and also prohibits the use of any other subcontractor for the designated work without first meeting certain legal requirements and obtaining the consent of the awarding authority. Pub. Cont. Code §4107.

Accordingly, Caltrans Revised Standard Specification Section 2-1.10 *SUBCONTRACTOR LIST*, requires bidders to list of the Subcontractor List, "each subcontractor to perform work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub Cont Code § 4100 et seq.). The Subcontractor List form must show the name, address, and work portions to be performed by each subcontractor listed. Show work portions by bid item number, description, and *percentage of each bid* item subcontracted." (Emphasis added). (See also Revised Standard Specification Section 2-1.33 – table above). Likewise, Caltrans Electronic Bidding Guide instructs bidders to complete the Subcontractor List folder as follows:

Enter firm name, city, state, description of work, bid item numbers, and percentage of each bid item numbers for each of your subcontractors performing work in excess of 1/2 of 1 percent of the total bid, or \$10,000, whichever is greater.

...

Multiple bid item numbers and percentages can be entered on each line of the Subcontractor List. *Separate each bid item number, or percentage by a space or a comma, when entering multiple bid item list numbers or percentages.* Do not enter words in the Bid Item Number field. If you would like to list a series of numbers, enter them individually or separated by a dash. (Ex. 2,3,4,5,6,7,8,9,10 or 2-10) Do not enter '2 through 10.'"

Bid Item(s) entered must be separated by a comma.

For each Bid Item entered, you *must enter a corresponding percentage separated by a comma.*

DO NOT USE SEMICOLONS (;) IN YOU INPUT.

Sample Data Entry:

Bid Item Number.: 2, 5, 13, 28    Percentage: 10, 100, 25, 35

(Emphasis added). Qualcon failed to comply with Caltrans' subcontractor listing requirements when listing each of the following subcontractors: St. Francis Electric, Don Garcia Excavating and Paving, Acacia Environmental Construction, Statewide Traffic Safety & Signs and Sierra View Equipment. Specifically, contrary to the specifications, Qualcon listed bid items without a corresponding percentage.

### C. Qualcon May Not Have Timely Extended Its Bid

Granite also questions whether Qualcon timely submitted the paperwork necessary to extend properly extend its bid. As explained in Caltrans August 14<sup>th</sup> letter finding Qualcon's bid non-responsive, Caltrans is not obligated to offer an extension of the award period for a non-responsive bid. To extend a bid while resolving a dispute, the bidder must send its request to the Office Engineer no later than 4:00 p.m., two business days prior to expiration of the bid. Granite is not aware of Qualcon submitting the request form necessary to extend its bid.

In sum, Qualcon failed to satisfy the mandates contained in Caltrans' specifications. The bid tendered by Qualcon must be rejected as non-responsive because it contains material defects that violate Caltrans' bid requirements and would give Qualcon a competitive advantage and benefit not afforded other bidders (i.e. the benefit of not committing to utilize any DBEs and the opportunity to adjust subcontract work after the time allotted under the Subcontractor listing laws). Because Granite provided the low, responsive and responsible bid, it should be awarded the Contract. Granite is fully prepared to perform this job in its customary dependable and high quality manner.

Thank you for your time and consideration of this matter. If you have any questions or require additional information please contact me at your convenience.

Sincerely,



Chris Burke

Chief Estimator

Granite Construction Company - Nevada Region

Direct 775.352.1938 | Cell 775.813.0907 | Fax 775.358.0372

Enclosed:            Caltrans Correspondence from Contract #03-4M8404 (2 pgs.)

**DEPARTMENT OF TRANSPORTATION**  
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*Serious drought.  
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June 24, 2014

Facsimile: (775) 331-1572

Ken Mercurio, Manager  
 Diversified Concrete Cutting, Inc.  
 59 Coney Island Drive  
 Sparks, NV 89431

03-4M8404  
 03-NeV-80-21.2/28.1  
 B.O. 05/07/2014

Dear Mr. Mercurio:

The Department of Transportation (Caltrans) received the attached letter on June 17, 2014, from Diversified Concrete Cutting, Inc. (Diversified) in response to a nonresponsive bid finding for contract 03-4M8404 on June 9, 2014.

As stated in our earlier correspondence with Diversified, our nonresponsive finding was based on the fact that Northern Industrial Electrical (Northern) and Lindy's Cold Planing (Lindy's) was listed on its Caltrans Disadvantaged Business Enterprise (DBE) Commitment form to perform work described as Weight Station, Weather and Traffic Systems (Bid Items 22, 23, 24) and Lindy's Cold Planing to perform work described as Cold Plane Rental, but did not list these subcontractors on the Subcontractors List Form as required by the bidding instructions and as stated on the DBE Commitment form.

Furthermore, the aforementioned bid items meet the requirements that define a contractor under the Business and Professions Code 7025 (et. seq.) and the total amount of work provided to both subcontractors exceeded the requirements of Public Contract Code 4100 (et. seq.). Caltrans therefore maintains its determination that both Northern and Lindy's should have been listed as subcontractors on the Subcontractor List Form.

A basic rule in competitive bidding is that bids must conform to the listing requirements and the Department's own bidding instructions and if it does not conform, it may not be accepted. Consequently, based on the above factors, the Department has concluded that the failure of Diversified to list the aforementioned Subcontractors is a material deviation from the bidding requirements and that the bid submitted by Diversified is therefore nonresponsive.

Mr. K. Mercurio  
June 24, 2014  
Page 2

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

Sincerely,



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

Attachment



FAX TRANSMITTAL SHEET

❖ ATTENTION: MR JOHN McMILLAN

❖ COMPANY: CALTRANS

❖ FAX: (916) 227-6282

❖ DATE: 09 / 25 / 2014

NUMBER OF PAGES: 8  
(INCLUDING TRANSMITTAL)

❖ FROM: CHRIS BURICE  
GRANITE CONSTRUCTION COMPANY  
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PHONE (775)358-8792  
FAX (775)358-0372

RE: CONTRACT # 03-1A8424

MESSAGE: \_\_\_\_\_  
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