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VIA FACSIMILE (916) 227-6282 AND U.S. MAIL

December 5, 2014

John C. McMillan
Deputy Division Chief
Division of Engineering Services
State of California, Department of Transportation
P.O. Box 168041, MS-43
Sacramento, CA 95816-8041

Re: Contract No. 03-4F3404
03-Pla,Nev-80-69.3/69.8,0.00/R2.3
Bids Opened: 10/15/14
Response to Letter Dated 11/21/14

Dear Mr. McMillan:

My office represents A. Teichert & Son, Inc. dba Teichert Construction ("Teichert"). Please consider this letter a protest of Caltrans' determination that Teichert's bid on Contract No. 03-4F3404 is nonresponsive. Caltrans erroneously claims that Teichert's bid is nonresponsive because the DBE form is allegedly inconsistent with the Subcontractor List form as it relates to ABSL Construction ("ABSL"). Contrary to Caltrans' claim, Teichert was not required to list ABSL on the Subcontractor List form because ABSL will not be acting as a subcontractor on the project. Rather, ABSL will be renting operated equipment to Teichert at a daily rate.

A leading treatise on California Construction law describes, in relevant part, the current state of the law with respect to lessors of operated equipment:

One who merely rents construction equipment to others need not have a contractor's license. This exemption is not expressly provided for by statute but arises from case law interpreting Bus & P C §§7026 (definition of "contractor") and 7028 (unlawful to operate without a contractor's license). A lessor of equipment is not required to be licensed when the work performed is under the direct supervision and control of another and there is no agreement to achieve any particular result. See, Andrew v. Conner (1951) 101 CA2d 621 (plaintiff provided equipment and operator at hourly rate for clearing and grading). As long as the work is directly supervised by another, an equipment lessor is not required to

John C. McMillan
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have a license even though it is self-described as a subcontractor and listed in the telephone book as a "contractor." Rodoni v. Harbor Eng'rs (1961) 191 CA2d 560 (rental and operation of earth-moving equipment at hourly rate; plaintiff made profit over cost of maintaining equipment and paying employees).

California Construction Contracts, Defects, and Litigation (Cal CEB, updated November 2013)
§1.27

Thus, California courts have long recognized that "a person or company in the business of supplying equipment or hiring out laborers to be supervised by others does not act in the capacity of a contractor. . ." Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal.App.4th 152, 166. In that case, Contractors Labor Pool, Inc. was in the business of supplying temporary workers to licensed construction contractors. Although employed by the temporary agency, the workers would be supervised and controlled by the contractor. Therefore, Contractors Labor Pool, Inc. was not required to have a contractor's license.

The central factor in the published cases is the degree of supervision that will be exhibited by a general contractor over the purported subcontractor. For example, in Dahl-Beck Electric Co. v. Rogge (1969) 275 Cal.App.2d 893, the court upheld the jury's finding that the defendant backhoe operator was not a subcontractor. Again, the main focus of the Court's analysis was the degree of control the contractor had over the backhoe operation. The evidence showed that the contractor directed the equipment operator "where to dig, when to come to work and what degree of care was required." Id. at 901.

ABSL Will Not Be a Subcontractor on the Project

With respect to Contract No. 03-4F3404, Teichert describes on the DBE form that ABSL will be providing "Cold Plane Machine Rental." (Attachment 1). The ABSL rate quote submitted with Teichert's DBE form demonstrates that ABSL has proposed to rent its operated equipment for a daily rate (Attachment 2). ABSL listed two types of grinders for rent leaving it up to Teichert to choose the appropriate one for the project. ABSL is not providing a superintendent and all supervision and direction will come from Teichert. For example, Section 16 of the quote places all the responsibility of locating utilities on Teichert.

16) All utilities within mill grade are to be located and marked by customer. It is the sole responsibility of the lessee or renter (customer) to follow the requirements of the regional notification center law pursuant to Article 2 (Commencing with Section 4216) of Chapter 3.1 of division 5 of Title 1 of the California Government Code. Customer assumes sole responsibility for and all subsequent liabilities coincident with following the requirements of the regional notification center law. Furthermore, customer agrees to be responsible for all damage to both utilities themselves and to our company's equipment by reason of ABSL equipment encountering unmarked utilities.

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If ABSL was acting as a subcontractor, it would be responsible for locating utilities, as well as complying with the plans and specifications. In contrast, the rental agreement places no responsibility on ABSL, other than providing a piece of operated equipment at a daily rate. Therefore, regardless of whether ABSL has a contractor's license, it will not be performing subcontract work on the project and was not required to be listed.

Caltrans' Prior Decisions Support Teichert's Protest

The conclusion that ABSL will not be acting as a subcontractor and is not required to be identified on the Subcontract List is further supported by past decisions of Caltrans. On Contract No. 06-0K6504, general contractor Jaxon Baker, Inc. (Baker) was the apparent low bidder on the project. Granite Construction protested the award of the contract to Baker alleging, among other things, that ABSL should have been listed as a subcontractor. On that point, Caltrans correctly concluded that ABSL was not acting as a subcontractor and was not required to be listed. (Attachment 3).

Caltrans determined that Baker made arrangements with ABSL to rent only the equipment and operator, and that ABSL was "capable of supplying/renting the equipment (including the operator) as part of its business practice." Caltrans further states that the work "will be under the full supervision and direction of Baker" and ABSL's role is "limited to supplying/renting the required equipment (including operators). . ." Furthermore, the equipment operator of ABSL's equipment "will only receive direction from Baker" and no ABSL superintendents will be present at the construction site.

This is precisely the same arrangement Teichert has with ABSL. ABSL has only quoted an operated daily rate for the grinder, and Teichert will be supervising and directing the use of the grinder. ABSL will not have a superintendent at the construction site.

Similarly, on Contract 04-235624, MCM Construction alleged that Flatiron West listed K&G Concrete Pumping (K&G) on its DBE form but failed to list K&G as a subcontractor (Attachment 4). Caltrans concluded that K&G was only listed for concrete pumping and was not required to be identified on the Subcontractor List form. Like ABSL, K&G has a contractor's license (#957787), but the service it was providing to Flatiron West was not "subcontractor" work and it was not required to be listed as a subcontractor.

In summary, Caltrans should be consistent with its determinations of subcontractor listing issues. In the Baker and Flatiron matters, Caltrans correctly followed applicable California law and concluded that subcontractor listings were not required. In the present case, Caltrans has deviated from California law and issued a determination that is contrary to how it has ruled in the past.

John C. McMillan
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For the reasons set forth above, Teichert requests that Caltrans rescind its determination that Teichert's bid on Contract No. 03-4F3404 was nonresponsive, and award the project to Teichert as the lowest responsive and responsible bidder.

Thank you for your attention to these matters.

Very truly yours,

DOWNEY BRAND LLP



Scott D. McElhern

Attachment

cc: Eric Stannard, Teichert Construction (via e-mail)

SDM:mpd

1392065.1

ATTACHMENT 1

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION
Contract No.: 03-4P3404 Project ID: 0314000147
Bidder Name: A. Teichert & Son, Inc. dba Teichert ConBidder ID: VC0000013950
CALTRANS BIDDER - DBE - COMMITMENT
DES-OE-0102.10C (NEW 6/2012)

Bid Item No.
Various
Item of work and description of services to be subcontracted or materials to be provided.
Erosion control and underdrain supplies
FOR CALTRANS USE ONLY

Name of DBEs (Must be certified on the date bids are opened - include Caltrans certification #, DBE address and phone number) (Indicate 2nd and lower tier subcontractors)
Triumph Geo-Synthetics, Inc #9076
1235 N. Grove St, Anaheim, CA 92806
888-775-7545
Dollar amount DBE 34,279.72

Bid Item No.
31, 32
Item of work and description of services to be subcontracted or materials to be provided.
Delineator Class 2 and Underdrain Marker
FOR CALTRANS USE ONLY

Name of DBEs (Must be certified on the date bids are opened - include Caltrans certification #, DBE address and phone number) (Indicate 2nd and lower tier subcontractors)
Frank Medina General Engineering #14717
10096 Ahart Rd, Oroville, CA 95966
530-743-0744
Dollar amount DBE 6,975.00

Bid Item No.
16
Item of work and description of services to be subcontracted or materials to be provided.
Cold Plane Machine Rental
FOR CALTRANS USE ONLY

Name of DBEs (Must be certified on the date bids are opened - include Caltrans certification #, DBE address and phone number) (Indicate 2nd and lower tier subcontractors)
ABSL Construction #5270
29393 Pacific St, Hayward, CA 94544
510-727-0900
Dollar amount DBE 16,300.00

ATTACHMENT 2

15/14 11:43AM PDT 5162586272 9162586272 -> 2099832375

Pg 1/2

ABSL Construction

29393 Pacific Street, Hayward, CA 94544
TE: (510) 727-0900 Fax: (510) 727-0912

Contractors License A-621781
SMBE & DBE Certification CT-005270

**Bid Quotation
AC Grinding**

Project Name: CA DOT Project 03-3F3404
Project Number: 03-3F3404
Bid Date: 10-15-14
Location: California

BID, AC Grinding

Minimum Daily Charge \$ 3000.00

This price is for a 48" inch cold planer machine, **Wirtgen W 120 F**. Up to 10 inches depth. \$100.00 additional for night work. \$400.00 per hour overtime. \$400.00 additional for Saturday work. \$800.00 additional for Sunday work.

Minimum Daily Charge \$ 4000.00 → @ 9 days = \$ 36,000

This price is for an 80" inch cold planer machine, **Wirtgen W 2000**. Up to 12 inches depth. \$150.00 additional for night work. \$500.00 per hour overtime. \$500.00 additional for Saturday work. \$1000.00 additional for Sunday work.

Mobilization \$300 each way @ 1ea = \$ 300

\$3,300

Portland cement concrete grinding is excluded from this quotation.
Removal of Asphalt Concrete over gutter damages can't be guaranteed by ABSL.
ABSL Construction will cold plane as close as possible to existing manholes, water valves, and other obstructions in cutting plane. Handwork and placing temporary asphalt layers around these objects or at pavement edge for safety requirements are excluded.
Contractor to post streets with "No Parking" signs prior to subcontractor's phase of work, provide water or water meter and provide traffic control during cold planing operation.
All areas to be ground shall be clearly marked by the general or the job inspector.
A minimum of two weeks notice is requested prior to move in.
Anything not specifically included in this price should be considered excluded.
ABSL Construction does not accept backcharges due to machine breakdown during operation above the machine's daily rental fee.
Back charges will only be based on the time the machine is broken and will reflect the cost of the equipment for that time. All other costs due to the equipment breakdown will not be charged to ABSL Construction.
All teeth over pre complete set will be charge to the contractor.
ABSL does not accept force account rates of retention.
This quotation will be part of our contract or purchase order agreement and is valid till a new change of the rates.
If you have any questions regarding the above quote please call me at (916) 284-3588 Todd Wheeler
Todd Wheeler

1010-01

15/14 11:43AM PDT '9162586272' -> 2099832375

PG 11

ABSL Construction

29393 Pacific Street, Hayward, CA 94544
TE (510) 727-0900 Fax (510) 727-0912

Contractors License A 621781
SMBE & DBE Certification CT-005270

GRINDING JOB AGREEMENT

The prices set forth above are based on the following assumptions and are subject to change under conditions set forth below.

- 1) A minimum daily rate is any part of an 8 hour day and overtime will be charged for work done other than a regular weekday shift.
- 2) Modification to the work may require a change in the quote.
- 3) Unless otherwise indicated the unit prices are based on ABSL performing all the work included on the proposal. If ABSL does not receive a contract for all the work, the unit prices are subject to adjustment.
- 4) The unit prices are based on the estimated quantities in the bid proposal. If the quantity of the item changes by 25% or more the unit price is subject to equitable adjustment.
- 5) All teeth over one complete set will be charge to the contractor.
- 6) Prices are good for 30 days from the date of this proposal, after that date the prices are subject to adjustment.
- 7) In the event there is an increase in the cost of fuel of more than 50.50 per gallon during the performance of this contract, ABSL will be entitled to a \$75.00 per day fuel surcharge. The base cost of fuel shall be established on the bid date of the contract by reference to the Weekly Retail On-Highway Diesel Prices for California, as published by the U.S. Department of Energy, on its web site at www.10to10a.doe.gov/og/info/wandp/diesel.asp.
- 8) If ABSL cannot proceed with its work as scheduled due to others, standby time will be charged at the following rate: \$425.00 per hour.
- 9) Downtime for equipment becoming stuck in wet or muddy sub-grade conditions will be charged at a stand-by time rate until removed. Additional equipment required for removal will be charged at a time and materials basis.
- 10) This proposal to be attached and made part of any and all resulting contracts.
- 11) The above price does not include permits, fees, bonding, state or local taxes.
- 12) This is a proposal only for the purpose of establishing a price for work as outlined. In the event ABSL is the low bidder a formal contract or PO suitable to both parties shall be prepared and fully executed.
- 13) Repairs of damage to ABSL equipment due to unmarked or buried obstructions, i.e. valve boxes, manholes covers, concrete, steel fence posts, steel pipe or excessive depth asphalt will be billed at time and material for repairs.
- 14) Backcharges to ABSL must be communicated by contractor in a written notice within 72 hours from the time of occurrence for backcharges.
- 15) Unless otherwise agreed to in writing prior to start of work, payment is due and payable within 30 days of billing, and no retention to be withheld on payments.
- 16) All utilities within mill grade are to be located and marked by customer. It is the sole responsibility of the lessee or renter (customer) to follow the requirements of the regional notification center law pursuant to Article 2 (Commencing with Section 4216) of Chapter 3.1 of Division 5 of Title 1 of the California Government Code. Customer assumes sole responsibility for, and all subsequent liabilities coincident with following the requirements of the regional notification center law. Furthermore, customer agrees to be responsible for all damage to both utilities themselves and to our company's equipment by reason of ABSL equipment encountering unmarked utilities.
- 17) Items not specifically included are considered to be excluded. If you have any questions please call.

Thank You,

Todd Wheeler

1010-01

ATTACHMENT 3

Jun 11 12 02:34p Received JAXON ENTERPRISES Jun 11 2012 03:39pm (530) 241-8108 p.4

STATE OF CALIFORNIA - BUSINESS TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZBAUM, Director

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
1727 30th STREET
P. O. BOX 168041
SACRAMENTO, CA 95816-8041
PHONE (916) 227-6280
FAX (916) 227-6151
TTY 711

FILE COPY



Flex your power!
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Facsimile: (831) 768-4021

May 15, 2009

Mr. David R. Grazian, Vice President
Granite Construction Company
P. O. Box 50085
Watsonville, CA 95077

06-OK6504
06-Fre, Kin-39,198,269-Vax
B.O. 4-1-09

Dear Mr. Grazian:

The Department issued a bid ranking change notice letter dated April 14, 2009 in which W Jaxon Baker, Inc. (Baker) was determined to be the low bidder on this contract (06-OK6504). Subsequently, the Department received protest letters from Granite Construction Company (Granite) dated April 23, 2009, April 28, 2009 and May 7, 2009 (attached). In its letters, Granite alleges that Baker violated Section 4100 et seq. of the Public Contract Code for failing to list companies performing subcontracting work in amounts in excess of \$11,902.80 (½ of 1 percent of Baker's bid). According to Granite, Baker failed to list the following companies on its "Subcontractor List" form:

1. D & B Equipment and Supplies, Inc. (D & B) for Item 13 "Tack Coat" for \$16,800.
2. ABSL Construction (ABSL) for Item 8 "Cold Plane Asphalt Concrete Pavement" for \$19,200.
3. Asphalt Dike Construction, Inc. (ADC) for Item 10 "Imported Material (shoulder backing)" for \$9,200.

The Department has investigated your protest and responds as follows:

1. Baker made arrangements with D&B, ABSL and ADC to rent only the equipment and operators for Item Nos. 13, 8 and 10 respectively. The aforementioned companies are capable of supplying/ renting the equipment (including the operator) as part of their business practice.
2. The work under Items Nos. 13, 8 and 10 will be under the full supervision and direction of Baker. D&B, ABSL and ADC roles are limited to supplying/ renting the required equipment (including operators) for said items only. The equipment operators of D&B, ABSL and ADC equipments will only receive directions from Baker. No D&B, ABSL or ADC superintendents will be present at the construction site.

1

Received
Jun 11 12 02:34p JAXON ENTERPRISES

Jun 11 2012 03:39pm
(530) 241-8108 p.5

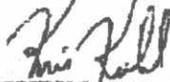
Mr. Grazian
May 18, 2009
Page 2

Based on the above, the Department concludes that D&E, ABSL and ADC are not subcontractors. Their role in the contract is limited to supplying/ renting the equipment (including operator). Baker did not violate said Section 4100 et seq. and therefore, the Department denies Granite's protest.

A copy of this letter will be included in the Resident Engineer's file for contract administration. He/She will be on notice that D&E, ABSL and ADC are supplying and renting equipment and operators for Item Nos. 13, 8 and 10 on this contract.

The Department will award the contract to Baker

Sincerely,



JOHN McMILLAN
Deputy Division Chief
Office Engineer
Division of Engineering Services

Attachments

- c: W. Jaxon Baker, Inc.
P. O. Box 994248
Redding, CA 96099-4248
Fax: (530) 243-0787

ATTACHMENT 4

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN Jr., Governor

DEPARTMENT OF TRANSPORTATION

DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER, MS 43

1727 30th STREET

P. O. BOX 168041

SACRAMENTO, CA 95816-8041

PHONE (916) 227-6299

FAX (916) 227-6282

TTY 711



*Flex your power!
Be energy efficient!*

March 18, 2014

Facsimile: (707) 746-0849

Richard Grabinski, Vice President
Flatiron West, Inc.
2100 Goodyear Road
Benicia, CA 94510

04-235624
04-SCI,SM-101-52.0/52.6, 0.0/0.6
B.O. 01/28/14

Dear Mr. Grabinski:

The Department of Transportation (Caltrans) is in receipt of the attached letter dated February 25, 2014, from Blaine Austin, Estimating Manager, Flatiron West, Inc. (Flatiron), in addition to the attached e-mail sent to John McMillan from Lillian Simon. Both items are in response to bid protests submitted by MCM and Ghilotti Bros./RM Harris, JV (Ghilotti).

The protest received from MCM alleges that Flatiron listed K&G Concrete Pumping (K&G) on its Disadvantaged Business Enterprise (DBE) Commitment form, but failed to list them as a subcontractor. It is also alleged that Flatiron enlarged the scope of work to be performed by O.C. Jones by adding bid item 57, Remove Concrete Barrier, and item 72, Imported Biofiltration Soil to work originally described as AC Paving and Cold Planing. The protest also alleges that on bid day Flatiron listed Silverado to perform work described as Bridge Demolition, however on its 24hr Subcontractors list form, enlarged the scope of work to include bid item 47, Remove Reinforced Concrete Box Culvert, and item 49, Remove Junction Box.

The protest received from Ghilotti alleges that on bid day Flatiron listed Highway Specialty to perform work described as CAS/Roadside Signs and Overhead Signs, however, on its 24hr Subcontractors list form added bid item 6, Type III Barricade and item 7, Channelizer (Surface Mounted).

Caltrans, in order to ensure fairness and maintain the integrity of the bidding process, must review and determine the validity of all protests received. Caltrans, in accordance with this business practice, did perform a review of all documents submitted by Flatiron, MCM and Ghilotti and determined the following:

- With respect to the protest submitted by MCM, K&G is only listed for concrete pumping on this project and therefore, Flatiron was not required to list them on the Subcontractor's List form.
- As the protest relates to O.C. Jones, removing the concrete barrier is not relative to the paving or cold plane work. The use of Imported Biofiltration soil is relative to drainage work and as such is not a part of paving and cold plane. Therefore, the scope of work related to O.C. Jones was improperly enlarged after the submission of the initial subcontractor form submitted on the day of bid.

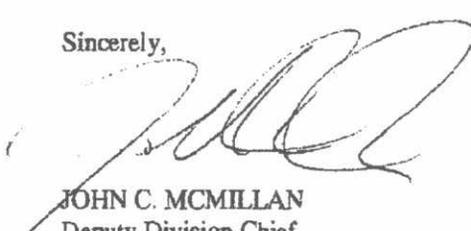
Mr. Grabinski
March 18, 2014
Page 2

- Silverado was identified on bid day to perform work described as Bridge Demolition. Flatiron improperly enlarged the scope of work on its 24hr submittal to include the removal of a reinforced concrete box culvert and removal of the junction box.
- With respect to the protest filed by Ghilotti, on bid day Flatiron identified Highway Specialty to perform work described as CAS/Roadside Signs and Overhead Signs. However, on its 24hr submittal enlarged the scope of work to include the additional work described as Type III Barricade and Channelizer (surface mounted). This also constitutes an improper change in the scope of work identified on bid day.

Based on the determinations above, Caltrans finds that the inclusion of the additional items after submission of the bid, which changes the scope of work listed on bid day, is a violation of the bidding instructions as well as the Public Contract Code. As such, the bid submitted by Flatiron is nonresponsive.

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

Sincerely,



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

Attachment(s)

DOWNEY | BRAND
ATTORNEYS LLP

FACSIMILE TRANSMISSION

Date: **12/5/2014 9:34:48 AM**

To:

Name	Fax	Phone
John C. McMillan	227-6282	

From:

File No.: **00000.00521**

Number of Pages, Including Cover: **16**

Message:

Please see attached correspondence from Scott McElhern, also being sent via U.S. Mail today.

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IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE PHONE 916/444-1000 AS SOON AS POSSIBLE.