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February 4, 2013

**VIA FACSIMILE TRANSMISSION – (916) 227-6282 and U.S. MAIL**

John C. McMillan  
Deputy Division Chief  
Division of Engineering Services  
State of California, Department of Transportation  
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1727 – 30<sup>th</sup> Street  
P.O. Box 168041  
Sacramento, CA 95816

Re: Caltrans Contract No. 04-014084  
Our File No. 7594.1

Dear Mr. McMillan:

We represent C. Overaa & Co. ("Overaa"), the lowest monetary bidder for the above-referenced contract (the "Contract") after the low bidder Zovich & Sons asked to be relieved of its bid. Overaa's bid is \$2,326,000 lower than the bid of the next low bidder, F&H Construction ("F&H").

In your letter to Overaa dated February 1, 2013, you asked Overaa to respond to F&H's protest letter dated January 29, 2013, and specifically with regard to Overaa's subcontractor listings for DVBE Trucking & Construction Co., Inc. ("DVBE Trucking") and Bertolussi & Walkins, Inc. ("Bertolussi & Walkins"). We are responding on Overaa's behalf.

In its protest letter, F&H points out that the dollar amounts calculated by multiplying the percentages in Column 3 of the Subcontractor List that Overaa submitted after bid, by the amounts of the bid items, do not match the dollar amounts which Overaa included in the other post-bid documents which Overaa submitted along with its post-bid Subcontractor List (the DVBE Summary and the Certified Small

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Business Listing for the Non-Small Business Preference). These dollar amounts do not match because in Column 3 of Overaa's post-bid Subcontractor List, Overaa put the percentages of its total bid for each listed subcontractor and related bid items, rather than the percentages of the bid items. This is clearly apparent just by looking at Overaa's bid and post-bid submission.

For example, Overaa listed Foundation Constructors for all of the pile work on the project (Bid Items 56, 57, 58, 59, 60, 61). The total amount Overaa included in its bid for this work is \$1,492,328. In Column 3 of its post-bid Subcontractor List, Overaa put: 4.5%. Since Overaa listed Foundation Constructors for all of the pile work, Foundation Constructors obviously would not be performing only 4.5 percent of that work. Looking at it on a dollar basis, the total of the bid items for the pile work is \$1,492,328. If one were to take only 4.5 percent of these bid items, the total amount would be only \$67,155. Obviously, all of the pile work on this project could not be performed for \$67,155. However, multiplying 4.5 percent by the total amount of Overaa's bid, one obtains the amount of \$1,409,086 which corresponds with the amount Overaa included in its bid for the pile work: \$1,492,328 (the difference between the two numbers being Overaa's overhead and profit).

This same sort of analysis could be performed for all subcontractors listed by Overaa. For example, Overaa listed a subcontractor to perform all of the electrical work on the project, and yet put 15 percent in Column 3 of its post-bid Subcontract List for that subcontractor. It would not make sense for Overaa to state that the subcontractor was only performing 15 percent of the bid items constituting the electrical work, when Overaa has listed the subcontractor for all of that work.

Accordingly, the approximate dollar amount of each listed subcontractor's work can be derived by multiplying the percentages in Column 3 of Overaa's post-bid Subcontractor List by the amount of Overaa's total bid.

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Moreover, in Overaa's post-bid submission, Overaa correctly stated the dollar amounts of the work for both DVBE Trucking and Bertolussi & Watkins (as well as other subcontractors). For example, on both its Certified DVBE Summary and its Certified Small Business Listing for the Non-Small Business Preference ("Small Business Listing"), Overaa stated that the dollar amount for DVBE Trucking's trucking work would be \$95,000. Similarly, on its Small Business Listing, Overaa stated that the dollar amount for Bertolussi & Watkins' work would be \$370,000.

Overaa submitted its Certified DVBE Summary and its Small Business Listing together with its post-bid Subcontractor List. Accordingly, Overaa provided Caltrans the correct information regarding DVBE Trucking and Bertolussi & Watkins in this submittal.

Moreover, it is obvious which the correct figures were in this submittal. For example, Overaa listed Bertolussi & Watkins for all of the landscape and irrigation work. On its Small Business Listing, Overaa correctly stated that the dollar amount of Bertolussi & Watkins' work is \$370,000. Yet, if one were to multiply the 1.2 percent stated in Column 3 of Overaa's post-bid Subcontractor List by the total amount of the landscape and irrigation bid items (Bid Items 42-48), one would only get approximately \$5,000, which is obviously not a sufficient amount to perform all of the landscape and irrigation work on the project. If one instead multiplies the 1.2 percent times the amount of Overaa's total bid, one gets approximately \$370,000, which corresponds with the \$370,000 set forth on Overaa's Small Business Listing. Accordingly, it is clear from Overaa's post-bid submission that the correct amount for Bertolussi & Watkins' work is the \$370,000 stated in Overaa's Small Business Listing. Moreover, since Overaa listed Bertolussi & Watkins for all of the landscape and irrigation work, Bertolussi & Watkins obviously would not be performing only 1.3 percent of that work. Similarly, if one were to multiply the .3 percent stated for DVBE Trucking in Column 3 of Overaa's post-bid Subcontractor List by the bid items listed, one would only get approximately \$6,000, rather than the \$95,000 which Overaa set forth on both its Certified DVBE Summary and its Small Business Listing.

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Overaa obviously erred in putting percentages of its total bid amount, rather than bid item percentages, in Column 3 of its Subcontractor List. However, this is an inconsequential, immaterial variance that can and should be waived by Caltrans.

It is well-settled California law that inconsequential deficiencies or irregularities in bids may be disregarded, even when the bid documents state that compliance is mandatory. E.g., *Ghilotti Construction v. City of Richmond*, 45 Cal.App.4<sup>th</sup> 897, 53 Cal.Rptr.2d 389 (1996); *Menefee v. County of Fresno*, 163 Cal.App.3d 1175, 210 Cal.Rptr. 99 (1985); *Diablo Beacon Printing & Publishing Co. v. City of Concord*, 229 Cal.App.2d 505, 40 Cal.Rptr. 443 (1964).

In *Konica Business Machines U.S.A. Inc. v. Regents of the University of California*, 206 Cal.App.3d 449, 454 (1988), the Court (quoting 47 Ops. Cal. Atty. Gen. 129, 130-131 (1966)), stated that 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 is inconsequential."

In *Ghilotti Construction Company v. City of Richmond*, *supra*, the Court stated the test for measuring whether a deficiency in a bid is a waivable deficiency as follows:

The test for measuring whether a bid is sufficiently material to destroy its competition's character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders.

Overaa's error in giving percentages of its total bid, rather than bid item percentages, in its post-bid Subcontractor List was clearly not material under this test. This irregularity did not affect the amount of Overaa's bid or give it an unfair advantage over other bidders.

The Subcontractor List submitted by Overaa fully complied with the requirements of the California Subletting and Subcontracting Fair Practices Act (Public Contract Code section 4100, et. seq.). As required by that Act, Overaa submitted with its bid a Subcontractor List which stated the name, location and portion of work to be performed by each subcontractor whose bid was in excess of one-half of 1 percent of

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Overaa's total bid. In addition, one can determine the approximate amount of each subcontractor's work by multiplying the percentage set forth in Column 3 of Overaa's post-bid Subcontractor List by the amount of Overaa's bid.

Moreover, with regard to both DVBE Trucking and Bertolussi & Watkins, in the same post-bid submission which included Overaa's post-bid Subcontractor List, Overaa also included a Certified DVBE Summary and Small Business Listing which correctly stated the dollar amounts of the work to be performed by each of them.

Also, because Overaa's bid was \$2,326,000 lower than F&H's bid, it is immaterial whether or not Overaa qualified for the DVBE preference or the Non-Small Business Subcontractor Performance. Overaa's bid would be more than \$2 million lower than F&H's bid, even without any such preference.

The Court in *Ghilotti Construction Company v. City of Richmond, supra*, in holding that deficiencies in a subcontractor listing were properly waived by the City of Richmond, stated that, in deciding whether deficiencies in a bid are waivable, a pragmatic approach must be used, which places the public interest above the interests of other bidders:

These considerations must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. "It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal . . . of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy." (*Judson Pacific-Murphy Corp. v. Durkee*, (1956) 144 Cal.App.2d 377, 383, 301 P.2d 97.)

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In *Domar, supra*, our Supreme Court emphasized the necessity of a pragmatic approach, placing the public interest above the interests of the bidders.

As set forth in *Ghilotti Construction Company v. City of Richmond*, above, it would certainly be a disservice to Caltrans and the public if a losing bidder, such as F&H, could convince Caltrans to cancel Overaa's lower bid based on minor, inconsequential technicalities, in order to get F&H's higher bid accepted. Here, such a result would cost Caltrans and taxpayers \$2,326,000.

Overaa respectfully requests that Caltrans reject F&H's protest, and award the Contract to Overaa.

Very truly yours,

SMITH & BROCKHAGE, LLP



Randall M. Smith

RMS:mt

cc: F&H Construction