


**RGW CONSTRUCTION, INC.**

April 21, 2014

**via Facsimile**

John C. McMillan, Deputy Division Chief  
 Department of Transportation  
 Division of Engineering Services  
 Office Engineer MS 43  
 1727 30<sup>th</sup> Street  
 Sacramento, CA 95816-8041

Re: Contract No. 04-0A7104 – Response to MCM Construction, Inc.'s Supplemental Bid Protest Letters

Dear Mr. McMillan,

RGW Construction, Inc. submits this response to MCM Construction, Inc.'s supplemental bid protest letters dated April 17 and 18, 2014 regarding Cal Trans Contract No. 04-0A7104.

After boiling down MCM's two supplemental letters, it turns out that MCM has only raised a few additional points in support of the five issues it cited in its original April 3, 2014 bid protest letter. Most of MCM's two supplemental letters is simply a regurgitation of what MCM already said in its first letter. Despite now having had three cracks at it, MCM still has failed to demonstrate that any of these five issues is anything other than the type of minor and immaterial issue that Cal Trans has the broad discretion to – and routinely does – waive. Most importantly, MCM still has failed to explain how any of the five issues could result in bid shopping and a competitive advantage for RGW. This is because none of these issues rises anywhere near that level. (Unlike the errors in MCM's own bid, which RGW shall discuss later in this letter.)

With this said, RGW will now respond to the additional points that MCM raised first in its April 17 letter, and then in its April 18 letter. RGW shall address these points by reference to the same MCM Issue Numbers that RGW used in its April 11, 2014 response to MCM's original bid protest.

**MCM's April 17, 2014 Letter**

**MCM Issue No. 1**

MCM accuses RGW of misrepresenting the holding of California Attorney General Opinion No. 02-1012. (Attached as Exhibit B to RGW's April 11, 2014 bid response letter) In fact, it is MCM that misrepresents this holding to Cal Trans.

At the conclusion of the opinion, the Attorney General clearly and plainly states the holding: "We conclude that a public entity may accept a bid for the construction of a public works project that does not specify the business location of each listed subcontractor but does provide the state contractor's

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license number of each listed subcontractor from which the business location may be ascertained upon further inquiry.”

This is exactly the proposition for which RGW cited this opinion. The requirement of Public Contract Code section 4104(a)(1) that a bidder list both a subcontractor's name and location on its Subcontractor List is not mandatory as MCM suggests. Cal Trans clearly has the broad discretion to accept a bid where a subcontractor's location has been omitted if that location can be ascertained from an outside source, like the Contractor's State License Board. This is exactly the case with K&G Concrete.

Further, MCM fails to explain how this requirement of Public Contract Code section 4104(a)(1) could possibly be mandatory in light of the representative sampling of more than 20 projects that RGW has cited where Cal Trans awarded contracts to bidders who did not include a subcontractor's location on its Subcontractor List submitted on bid day or in its 24-hour subcontractor listing.

MCM does cite Contract No. 01-474414 as an example of where Cal Trans found a bid from Hayes & Sons, Inc. (“H&SI”) to be non-responsive because H&SI failed to provide the business location of two listed subcontractors. However, what happened there is distinguishable from the facts here. There, H&SI not only failed to list the locations of the two listed subcontractors, but H&SI also failed to include the “percentage of bid item subcontracted” for each of these subcontractors in Column 3 of its Subcontractor List. In addition, H&SI omitted this information for another of its listed subcontractors. (See Attachment 7 to MCM's April 18, 2014 bid protest letter) In reviewing H&SI's bid, Cal Trans obviously noted the multiple issues with H&SI's Subcontractor List and simply used short-hand to cite the location omission as the basis for rejection.

Lastly, MCM now claims that there is no way of telling from RGW's Subcontractor List whether RGW intended to use Central Striping or Centerline Striping on the project. This is simply ridiculous. RGW clearly wrote “Central Striping” on its Subcontractor List and on its 24 hour submission. In fact, as stated previously, RGW never even received a bid from Centerline Striping for this project.

#### MCM Issue No. 2

Here, MCM largely repeats its prior arguments about AC Dike and Imperial Shotcrete.

As RGW explained previously, RGW inadvertently overstated AC Dike's participation in its DBE submittal by \$1,491. The actual amount that RGW should have listed was \$8,562.60 and not \$10,054. This was simply a clerical error. The error is obviously not material as \$1,491 is only .003% of RGW's total bid price of \$52,751,741.20. MCM's assertion that Cal Trans' recognition of this clerical error would result in favoritism or bias is simply ridiculous. This minor and immaterial error is certainly something that Cal Trans is well within its rights to waive.

MCM's continuing assertion that RGW should have listed Imperial Shotcrete for Bid Items 127 and 128 also is without merit. As RGW explained previously, Imperial Shotcrete did not even quote this work and RGW will self perform it.

#### MCM Issue No. 4

MCM's continuing assertion that Central Striping did not quote Item 6 (Traffic Control System) is completely false, and flat-out ignores the revised Central Striping quote that RGW has presented. (See Attachment G to RGW's April 11, 2014 bid protest response letter)

### MCM Issue No. 5

MCM has failed to cite any new evidence or authority in support of its claim that RGW was required to list the supplier of operated water trucks (Tri-Valley Water Truck) as a subcontractor on its Subcontractor List. MCM also has failed to explain how such listing could possibly be mandatory in light of the 11 Cal Trans contracts cited by RGW in its April 11, 2014 bid protest response letter.

### MCM's April 18, 2014 Letter

#### MCM Issue No. 1

MCM mistakenly refutes RGW's example on contract 01-0A2304. As included in RGW's 4/11/14 letter, attachment C, Robert J. Frank failed to list the location of Apply A Line in its subcontractor listing. Robert J. Frank was awarded this contract.

The only new point that MCM raises on this issue is related to Cal Trans Contract No. 07-4T3204, which RGW cited as an example of Cal Trans exercising its broad discretion to allow modifications to a subcontractor listing form when awarding contracts. MCM fails to recognize that Cal Trans awarded that contract to Clean Cut Landscape which had not listed the location of its subcontractor, Global Environment. Therefore, what Cal Trans did with respect to that contract provides direct support for RGW's position here.

In its April 18, supplemental letter, MCM also repeats (for the third time) its baseless argument regarding RGW's listing of Central Striping. As MCM raises nothing of additional substance regarding this issue, RGW simply refers CalTrans to RGW's prior responses on this issue.

Based on the authorities and evidence that RGW has presented in its April 11, 2014 letter and in this letter, Cal Trans has the broad discretion to waive – and in fact routinely waives – the type of minor issues and irregularities that MCM is whining about in connection with this contract. MCM has completely failed to explain how any of these issues or irregularities could provide RGW with any material advantage or benefit not allowed the other bidders.

### MCM's Bid is Non Responsive

Unlike RGW's bid, MCM's own bid does contain material errors and omissions that afford MCM a competitive advantage over the other bidders. One example concerns the extensive work that MCM added after bid day to the scope of one of its listed subcontractors, Bay Cities Paving and Grading. (See Exhibit I which includes copies of MCM's bid day Subcontractor List and MCM's 24 hour subcontractor listing)

On the Subcontractor List which MCM submitted on bid day, MCM listed Bay Cities for the following work: Roadwork, Earthwork, Base, A/C Pave, Light Weight Fill, Underground, MSE Walls, SWPPP, Traffic Control(p), Ret Wall Excavation & Backfill, K Rail, Crash Cushions, Pavement Removal, and Box Culvert Ex/Backfill. However, on its 24 hour subcontractor listing form, MCM added the following items of work to Bay Cities' scope:

- Bid Item 14 Temporary Traffic Screen
- Bid Item 48 Remove Base and Surfacing
- Bid Item 53 Cold Plane Asphalt Concrete Pavement

Bid Item 54 Remove Concrete  
 Bid Item 55 Remove Concrete Barrier  
 Bid Item 62 Clear and Grub  
 Bid Item 63 Develop Water Supply  
 Bid Item 66 Structure Excavation Bridge  
 Bid Item 91 Lime  
 Bid Item 92 Lime Stabilized Soil  
 Bid Item 93 Class 4 Subbase  
 Bid Item 95 Asphaltic Emulsion (Curing Seal)  
 Bid Item 110 Geosynthetic Reinforcing Embankment  
 Bid Item 186 Rock Slope Protection

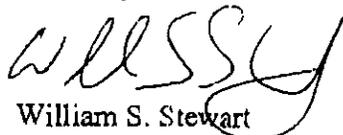
Comparing MCM's Subcontractor List to its 24 hour submission, it is clear that MCM did not intend to include Bid Items 14, 54, 55, 62, 63, 66 and 110 in Bay Cities' scope on bid day.

MCM may claim that these bid items are all covered by the fact that it included "Roadwork" in Bay Cities' scope on its Subcontractor List. However, "Roadwork" is not a catchall description of work available to MCM to add items of work to a subcontractor's scope on the 24 Hour Subcontractor Listing Form after bid day. "Geosynthetic Reinforced Embankment" is not "Roadwork" nor is it an MSE - Mechanically Stabilized Embankment. "Clear and Grub" is not "Roadwork" nor is it earthwork. "Remove Concrete Barrier and Remove Concrete" is demolition work, not "Roadwork." "Temporary Traffic Screen" is neither "Roadwork," "Temporary K-Rail" or "Traffic Control." "Remove Base and Surfacing" and "Cold Plane Asphalt Concrete Pavement" are not "Roadwork." MCM conveniently lists certain aspects of grading work such as Earthwork, Base, and A/C Pave; but fails to list "Class 4 Subbase, Lime and Lime Stabilized Soil." MCM's use of the vague term "Roadwork" allows it to pick and choose what items of grading and paving work to include in a subcontractor's scope of work after the bid. It allows MCM to bid shop and negotiate with its subcontractors after the bid and before the 24 hour listing is to be submitted. MCM could elect to self perform this work or subcontract it out. Either way it allows MCM to bid peddle and to bid shop.

In conclusion, RGW is the lowest responsive and responsible bidder on Cal Trans Contract No. 04-0A7104. The five issues that MCM complains about with RGW's bid are minor, immaterial, or non-existent and things that Cal Trans can and routinely does waive. In any event, it now turns out that MCM, after burying Cal Trans with over 70 pages of specious bid protest materials, is not itself even a responsive bidder. At this point, this process needs to stop. RGW requests that Cal Trans award this contract to RGW.

If you have any further questions or require any further information, please contact me at (925) 606-2400, ext. 2402, or by e-mail at [bill@rgwconstruction.com](mailto:bill@rgwconstruction.com).

Sincerely,



William S. Stewart  
President

Enclosed: Attachment I

# Attachment I

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION

## SUBCONTRACTOR LIST

DES-OE-0102.2 (REV 3/2011)

Bidder Name: MCM CONSTRUCTION, INC.

The bidder must identify each subcontractor performing 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.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location

Column 2: Bid Item Nos.

Column 3: Percentage of Bid Item Subcontracted

Column 4: Description of Subcontracted Work

Bay Cities Paving &  
Grading -  
Concord CA

ROAD WORK EARTHWORK,  
BASE, A/D PAVE, LIGHT  
WEIGHT FILL, DRAINAGE  
MSE WALLS, SWPPP  
TRAFFIC CONTROL (P),  
RET. WALL EXCAVATION  
BACKFILL, RAIL,  
CROSS CULVERT, DRAINAGE  
REMOVAL, BOX CULVERT EX/  
BACKFILL

CRISP -  
Fremont CA

STAMPING,

Greco  
Dubuque CA

SEWER STRUCTURES

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Attachment I

STATE OF CALIFORNIA - DEPARTMENT OF WATER RESOURCES  
**SUBCONTRACTOR LIST**  
 DATE OF BIDDING: 04/21/2014

Project Name: MCM Construction, Inc.

The bidder must identify all subcontractors performing work in any amount in excess of 1% of contract price from bid or \$10,000 whichever is greater from Contract Documents and req. Complete columns 1 thru 4 and submit with the bid or fax to (916) 227-8282 within 24 hours after the bid opening. Failure to provide complete information will result in the bid being rejected and the bidder being ineligible to bid.

Contract Item Name and Location	Contract Item No.	Contract Description of Work	Percentage of Work Subcontracted	Subcontractor Name
			50%	
			75%	
	21-23		60%	
	41		100%	
	47		100%	
	48		100%	
	51-54		100%	
	52-61		100%	
	60		100%	
	71		100%	
	90-97		100%	
	98		100%	
	99-107		100%	
Bay Area Parks - Grading Contract, CA	126		50%	Boardsmith Landworks, Inc. 7110 Hwy 101, Suite 100, San Jose, CA 95128
	60		100%	Boardsmith Landworks, Inc. 7110 Hwy 101, Suite 100, San Jose, CA 95128
	72-74		100%	Boardsmith Landworks, Inc. 7110 Hwy 101, Suite 100, San Jose, CA 95128
	102-110		100%	
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	32-44		100%	
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**RGW CONSTRUCTION, INC.**

**FAX TRANSMITTAL**

DATE: 4-21-14

TIME: 4pm

NAME: John McMillan

COMPANY: Cal Trans

FAX NUMBER: 916/227-6282

FROM: Bill Stewart

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Thank you  
Diane Lima  
Certified Payroll Clerk

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