DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
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P. O. BOX 168041
SACRAMENTO, CA 95816-8041
PHONE (916) 227-6280
FAX (916) 227-6282
TTY 711

Flex your power!
Be energy efficient!

May 17, 2013

Facsimile: (602) 437-1821

Kurt L. Clink, President
Truesdell Corporation of California, Inc.
1310 W. 23rd Street
Tempe, AZ 95282

04-2E7104
04-SCI-82,85,87,101,152,234-VAR
B.O. 01/30/2013

Dear Mr. Clink:

The Department of Transportation (Caltrans) received the attached summary of protest from Gibbs and Giden on behalf of Truesdell Corporation of California, Inc. (Truesdell) for rescinding Contract No. 04-2E7104 awarded to Truesdell on March 28, 2013.

On February 21, 2013, Caltrans received a protest from American Civil Constructors (ACC) protesting the bid submitted by Truesdell on January 30, 2013. ACC alleged that the bid documents contained omissions and that the Certified Small Business Listing for the Non-Small Business Preference (Small Business) and Certified Disabled Veteran Business Enterprise (DVBE) Summary form contained irregularities.

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 Truesdell. During that review Caltrans found that Truesdell, on its Small Business summary, listed Highway Safety to perform bid item 3, Traffic Control, for $91,000.00, and on the DVBE summary stated item 3, Traffic Control System, as the description of work for Titan without further explanation as required for a partial item. As you are aware, a subcontractor that is performing work in excess of one-half of 1% of the total amount of the bid or $10,000.00 is required to be listed on the Subcontractor List.

Your attention is directed to the Certified DVBE Summary form which states that, "The names of first tier DVBE subcontractors and their items of work listed must be consistent with the names and items of work in the Subcontractor List (Public Contract Code §4100 et. seq.) submitted with the bid". Truesdell failed to list Highway Safety or Titan on the Subcontractor List.

Based on the above finding, Caltrans determined that Truesdell's bid was therefore nonresponsive and that pursuant to California Civil Code section 1689, this contract was awarded to Truesdell by mistake. Caltrans therefore upholds its decision to rescind the award of the contract as stated in our letter of April 8, 2013. Caltrans will proceed to award this contract to the lowest responsive and responsible bidder.

Your attention is directed to Section 3-1.04 of the 2010 Standard Specifications. Caltrans is not obligated to offer an extension of the award period for a nonresponsive bid. Should you wish to extend your bid while resolving a nonresponsive finding, you must send your request to the Office Engineer no later than 4:00 pm, two business days prior to the expiration of your bid.

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

Attachments

GIBBS GIDEN ATTORNEYS AT LAW
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REPLY TO LOS ANGELES OFFICE

AUTHOR'S E-MAIL: BGADBOIS@GGLTS.COM

FILE NO.: 1020.001

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ALFRED FADEL ▲

RETIRED PARTNER
KENNETH C. GIBBS
(Full-Time Neutral)

April 10, 2013

VIA FACSIMILE, E-MAIL AND FEDEX

John C. McMillan
Deputy Division Chief
STATE OF CALIFORNIA
DEPARTMENT OF
TRANSPORTATION
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, CA 95816-8041

Fax: (916) 227-6282
john.mcmillan@dot.ca.gov

Re: *Contract No. 04-2E7104*
Protest of Truesdell Corp. of Notice of Rescission and Caltrans' Finding that Truesdell Corp.'s Bid was Nonresponsive
Protest of Truesdell Corp. of Notice of Award to American Civil Constructors

Dear Mr. McMillan:

1. Summary of Protest and Request for Relief

Our office represents Truesdell Corporation of California, Inc. ("Truesdell"), the low bidder on the California Department of Transportation ("Caltrans") contract 04-2E7104 for Methacrylate Bridge Deck Replacement ("Project"), who was awarded the contract for the Project on March 28, 2013 ("Contract"). On behalf of Truesdell, we submit this written response to Caltrans' "Notice of Award Rescission" letter dated April 8, 2013. Truesdell protests: (1) Caltrans' attempt to unilaterally rescind the Contract awarded to Truesdell on March 28, 2013 on the grounds that Caltrans has not established any valid legal basis for rescission; (2) rejection of Truesdell's bid as nonresponsive on the grounds that such "finding" is moot in light of the prior award of the Contract; moreover, the subsequent "finding" that Truesdell's bid was nonresponsive is not supported by facts and thus, does not provide any ground for rescission; and (3) the proposed notice of award to American Civil Constructors, the second ranked bidder on

the grounds that the proposed rescission of award to Truesdell is improper with no valid legal basis and therefore the award of the Contract to Truesdell should remain in place. Based on the factual and legal analysis below, we respectfully request that Caltrans withdraw the Notice of Award Rescission and allow Truesdell to continue its performance of the Contract without delay.

2. **Background Facts**

On Wednesday, January 30, 2013 prior to 2:00 p.m., Truesdell submitted a bid in the total amount of $1,373,373 for the above referenced contract and listed 4 subcontractors, a copy of which attached hereto as **Exhibit** A. On Friday, February 1, 2013, Truesdell submitted the Certified DVBE Summary and the Certified Small Business listing to Caltrans, a copy of which is attached hereto as **Exhibit B**.

Thereafter, Mark Long, Truesdell's Vice President of Construction checked the Caltrans' website each business day to determine the date of award of the contract for the Project. On or about February 20, 2013, Mr. Long viewed Caltrans' website and learned that the apparent low bidder's bid had been rejected and that Truesdell was listed as the lowest ranked bidder. With no communication from Caltrans to the contrary, Truesdell, adjusted its resources for the Contract so that it would have the capacity to mobilize and commence work upon confirmation of award of the Contract.

At approximately 6:30 a.m. on Friday, March 29, 2013, Mr. Long viewed the Caltrans Office of the Engineer website at http://www.dot.ca.gov/hq/esc/oe/planholders/awarded.php?q=04-2e7104&b=&a=&c=&d=&search=Search and viewed a record of Award of Contract Number 04-2E7104 to Truesdell in the form attached hereto as **Exhibit C**, which, as of the date of this letter, April 10, 2013, is still posted on Caltrans' website. Truesdell received an express delivery of the Contract tender from Caltrans prior to 10:00 a.m. on Friday March 29, 2013, which included the Contract date stamp of March 28, 2013.

In reliance on the confirmation of award of the contract, Nancy Mackowiak, Truesdell's Contract Manager, immediately procured payment and performance bonds, and Mr. Clink's signature on the Contract and submitted the package to Caltrans via Federal Express on Friday March 29, 2013, as evidenced by Truesdell's cover letter and Federal Express tracking slip and confirming e-mails attached hereto collectively as **Exhibit D**.

Although Caltrans issued a letter to Truesdell dated March 28, 2013, which purported to reject Truesdell's bid as non-responsive, Caltrans did not fax the letter to Truesdell until mid-day on Friday March 29, 2013. Truesdell did not receive the Caltrans' letter in the mail until Monday, April 1, 2013 (See the attached **Exhibit E**).

Caltrans received Truesdell's executed Contract and bonds at 10:09 a.m. on Tuesday, April 2, 2012, following the Monday Cesar Chavez holiday (see **Exhibit D**). On Wednesday, April 3, 2013 at 12:48 p.m., Nim Patel with Caltrans left Ms. Mackowiak a voice mail message,

which stated that Truesdell was awarded Contract 04-2E7104 and if she had any questions to call him at (408) 254-5705.

On Friday, April 5, 2013 at 4:30 p.m. Ms. Mackowiak received a voice mail where Mulissa Smith left a message stating that Caltrans intended to rescind the Contract award and to please return the contract books.

On Monday April 8, 2013 Truesdell received a fax letter from Caltrans, which purported to rescind the Contract, a copy of which is attached hereto as **Exhibit F**.

3. Legal Analysis

A. Caltrans Cannot Reject a Bid After the Bid is Accepted.

In accordance with *Transdyn/Cresci JV v. City and County of San Francisco* (1999) 72 Cal.App.4th 746, once Truesdell was informed that it received award of the Contract on March 28, 2013, the award was complete and no further action was needed to create a binding contract. Thus, Caltrans' March 29, 2013 attempt to reject Truesdell's bid was too late, because Caltrans had already awarded the Contract the previous day on March 28, 2013. Caltrans cannot reject a bid that it has already accepted.

B. Truesdell's Bid is Responsive; There is No Valid Factual Basis for Rejecting Truesdell's Bid or Rescinding the Contract

Assuming, for the sake of argument, that Caltrans had not already awarded the Contract to Truesdell, there is no valid basis for rejecting Truesdell's bid because Truesdell's bid fully complies with the requirements of the Subletting and Subcontracting Fair Practices Act (Public Contract Code Section 4100 et seq., hereinafter the "Act"). The four firm names appearing only on Truesdell's small business and DVBE summary forms (**Global Environmental, Titan, Highway Safety and Kwik Bond Polymers**) are, in fact, consistent with Truesdell's subcontractor list because none of the firms noted in Caltrans' March 28, 2014 letter, received April 1, 2013, are "subcontractors "under the Act, who were required to be listed in Truesdell's bid.

The dollar value threshold for Truesdell's listing of subcontractors in the bid for the above-referenced Contract was $6,866.87. Public Contract Code Section 4104 requires listing of subcontractors. Public Contract Code Section 4113 defines "subcontractor" as a contractor, as defined in Business & Professions Code Section 7000 et seq. Business & Professions Code Section 7026 defines "contractor" as "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of

scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise.

Global Environmental was listed on Truesdell's post-bid forms to provide a "public safety plan" and "public noise monitoring", which services clearly do not fall within the statutory definition of "subcontractor" and are not required to be listed at the time of bid under the Act.

Titan and **Highway Safety** were both listed on Truesdell's post-bids form to provide a "traffic control system". Although it might appear that such a system falls under the statutory definition of "subcontractor", in applying section 7026, courts have distinguished between contractors and furnishers of equipment. (*Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 165.) Appellate courts have upheld findings that a company that furnished equipment for use under the supervision and control of a contractor was not acting in the capacity of a subcontractor. (*Andrew v. Conner* (1951) 101 Cal.App.2d 621, 623 [evidence sufficient to support trial court's finding that company was not subcontractor based on conflicting evidence]; see also *Rodini v. Harbor Engineers* (1961) 191 Cal.App.2d 560, 562-563 [affirming trial court's factual finding that plaintiff did not act as subcontractor where it rented tractors and hired out drivers]; *Dahl-Beck Electric Co v. Rogge* (1969) 275 Cal.App.2d 893, 901 [declining to overturn jury finding that defendant was not subcontractor where there was no evidence defendant provided any supervision].) In this case, Truesdell is basically "renting" Titan and Highway Safety personnel, which personnel will be under the direct supervision and control of Truesdell. Truesdell will direct Titan and Highway personnel on when, where and how to set up and implement the traffic control system for the Project. Under the controlling California case law, Titan and Highway Safety do not qualify as a subcontractors under the Act and were not required to be listed in Truesdell's bid.

Kwik Bond Polymers was listed on a Truesdell's post-bid form to "Furnish Bridge Deck Materials". It is clear from this description, that Kwik Bond is a material supplier and was not required to be listed as a "subcontractor" in Truesdell's bid.

Caltrans must establish valid legal grounds exist for under California Civil Code Section 1689(b) before it attempts to rescind the Contract. Based on the facts and law discussed above, Caltrans has failed to establish that any "mistake" was made that would invalidate the award of the Contract to Truesdell on March 28, 2013. To the contrary, Truesdell's low monetary bid is fully responsive to Caltrans' invitation to bid and fully complies with the Act, so there is no basis for rescission of the Contract.

Moreover, Caltrans cannot attempt to award the contract for the Project to American Civil Constructors because if Caltrans awards the contract at all, it must award the contract to the

lowest responsive and responsible bidder. See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transpiration Authority* (2000) 23 Cal.4th 305. Caltrans is estopped to award the contract to any entity other than Truesdell and would be responsible to Truesdell for all costs incurred in bid preparation, bid protest and the costs Truesdell has incurred to date in commencing performance of the work of the Project.

We trust that after you review the facts and law, you will conclude that the award of the Contract to Truesdell on March 28, 2013 was proper and that Caltrans will withdraw it April 8, 2013 letter so that Truesdell can continue its performance of the Contract without delay to the Project.

Very truly yours,

Barbara R. Gadbois
of GIBBS GIDEN LOCHER TURNER
SENET & WITTBRODT LLP

BRG:whb
Enclosures
cc: Kurt L. Clink, President, Truesdell Corporation of California, Inc.

Enclosures
Exhibits A - F

** Transmit Conf.Report **

P.1 May 17 2013 04:58pm
CALTRANS CONTR AWARDS Fax 916-227-6282

Fax/Phone Number	Mode	Start	Time	Page	Result	Note
916024371821	Normal	17:04:56pm	1'39"	7	# O K	

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY EDMUND G. BROWN Jr., Governor

DEPARTMENT OF TRANSPORTATION
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Tempe, AZ 95282

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