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State of California, Department of Transportation
Division of Engineering Services
Office Engineer
1727 30th Street, MS-43
P.O. Box 168041
Sacramento, CA 95816

Attention: John C. McMillan
Deputy Division Chief

Re: Caltrans Contract No. 04-2J0704

Dear Mr. McMillan:

This letter responds to the letter from Bay Cities Paving & Grading, Inc. ("Bay Cities") dated January 19, 2016.

In the original bid protest filed by DeSilva Gates Construction, LP ("DGC") on December 17, 2015, DGC protested Bay Cities' bid because Bay Cities had failed to properly identify the portions of Bid Items 102, 106 and 108 to be performed by its listed subcontractor, FBD Vanguard Construction ("Vanguard"). In its letter dated December 22, 2015, Bay Cities, in attempting to explain away its failure to properly identify the portions of these bid items to be performed by Vanguard, stated: "Bay Cities will furnish the materials needed to construct Items 102, 106 and 108 and Vanguard will install these materials."

In the response letter DGC filed on December 24, 2015, DGC pointed out that this statement was demonstrably false, because, among other things, the statement was contradicted by Bay Cities' own bid.

Now, in its letter dated January 19, 2016, Bay Cities claims that nothing in its bid contradicts the statement in its letter dated December 22, 2015, that "Bay Cities will furnish the materials needed to construct Items 102, 106 and 108 and Vanguard will install these materials." Yet, as detailed in DGC's response letter filed on December 24, 2015, Bay Cities' statement is contradicted by Bay Cities' bid. Specifically, if Bay Cities intended to supply all of the concrete, fabricated rebar, forming materials and other materials for Items 102, 106 and 108 to Vanguard, then, in its bid, Bay Cities grossly misstated the percentages of work to be performed by Vanguard for each of these bid items.

In its letter dated January 19, 2016, Bay Cities makes no attempt whatsoever to justify the percentages set forth in its bid for Items 102, 106 and 108. Indeed, Bay Cities does not even dispute the fact that all of these percentages were grossly erroneous if Bay Cities were in fact supplying all of the materials to Vanguard for these bid items.

Instead, Bay Cities claims that it does not matter if the percentages included in its bid for these bid items are grossly erroneous. This is of course not the case.

Bay Cities does not dispute the fact that it was required to state, in its bid, the percentages of work to be subcontracted to Vanguard for Items 102, 106, and 108. Nor could it. Caltrans Revised Standard Specification section 2-1.10 provides that, for listed subcontractors, a bidder "must show the "Percentage of the subcontracted work for each bid item." Obviously, a bidder, such as Bay Cities, cannot circumvent this requirement by putting fallacious percentages in its bid.

Yet, Bay Cities does not dispute the fact that the percentages it put in its bid for Items 102, 106 and 108 are grossly erroneous, if its claim that Vanguard will not be providing any materials were to be believed.

Moreover, as discussed in DGC's letter filed on December 24, 2015, in *Valley Crest Landscape v. City Council of the City of Davis*, 41 Cal.App.4th 1432 (1996), the Court held that when a bidder makes a mistake in stating, in its subcontractor listing, the percentage of work to be done by a subcontractor, a public entity has no choice except to reject the bid.

Bay Cities attempts to distinguish the *Valley Crest* decision because in that case the mistaken percentages indicated that the bidder would not meet the requirement that it perform 50% of the work. Yet, a subsequent decision made no such distinction.

In *MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal.App.4th 359 (1998), the Court held that the City of San Francisco was required to reject a contractor's bid because the bidder had failed to comply with a bid solicitation requirement that it state on its List of Subcontractors, the dollar amounts of work to be performed by several subcontractors, even though there was no statutory requirement that such amounts be provided. The Court reasoned in part as follows:

The City and Myers do not contend the failure to list the dollar amount of work to be performed by each subcontractor could have affected the amount of the bid. Rather, they contend that MCM received an advantage or benefit not allowed other bidders in that it was given the opportunity to withdraw its bid. Several cases have concluded that "[w]aiver of an irregularity in a bid should be allowed if it would not give the bidder an unfair advantage by allowing the bidder to withdraw its bid without forfeiting its bid bond. [Citation.]" (Valley Crest, supra, at p. 1442, 49 Cal.Rptr.2d 184, citing *Menefee v. County of Fresno*, supra, 163 Cal.App.3d 1175, 1178-1181, 210 Cal.Rptr. 99.)

In Valley Crest, the court found the bidder had an unfair advantage where it could have withdrawn its bid under Public Contract Code section 5103. "Misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error. It makes the bid materially different and is a mistake in filling out the bid. As such, under Public Contract Code section 5103, North Bay [the low bidder] could have sought relief by giving the City notice of the mistake within five days of opening the bid. That North Bay did not seek such relief is of no moment. The key point is that such relief was available. Thus, North Bay had a benefit not available to the other bidders; it could have backed out. Its mistake, therefore, could not be corrected by waiving an 'irregularity.' *Id.* at p. 1442, 49 Cal.Rptr.2d 184.)

* * *

Valley Crest held that misstating the correct percentage of work to be done by a subcontractor was "in the nature of a typographical or arithmetical error. It makes the bid materially different and is a mistake in filling out the bid." As such, the contractor could have sought relief under section 5103. Consequently, the contractor's ability to withdraw its bid without forfeiting its bond constituted an unfair advantage and the city could not waive the irregularity. (Valley Crest, supra, 41 Cal.App.4th 1432, 1442, 49 Cal.Rptr.2d 184.)

We believe the failure to state dollar amounts of work to be performed by seven of nine subcontractors is, like the misstatement of the correct percentage of work to be done by subcontractors in Valley Crest, "in the nature of a typographical or arithmetical error." As such, MCM could have sought relief under the statute and had an advantage not available to other bidders. The City was without power to waive the deviation. [*Id.* at 375-377.]

In the contract involved in the MCM Construction, Inc. v. City and County of San Francisco case there was no requirement that the contractor perform any specified percentage of the work. Nor was there any contention that the failure to comply with the subcontractor listing requirements could have affected the amount of the bid. Nevertheless, the Court held that the public entity had no choice except to reject a bid that failed to properly provide the information that must be included on the subcontractor listing form.

It is undisputed that if Bay Cities' claim that Vanguard is not furnishing any concrete or other materials were accepted at face value, then Bay Cities grossly mistated the percentages of work to be performed by Vanguard for Items 102, 106 and 108 on the Subcontractor List that it submitted with its bid. Accordingly, Caltrans is legally required to reject Bay Cities' bid.

Moreover, the percentages of subcontractor participation for Items 102, 106 and 108 set forth in Bay Cities' bid contradict Bay Cities' claim, in its letter dated December 22, 2015, that Vanguard would not be supplying any materials for Items 102, 106 and 108. Accordingly, it appears that when it submitted its bid Bay Cities planned on having Vanguard supply at least some of the materials for these bid items, but then, in an attempt to justify an improper subcontractor listing, claimed in its letter dated December 22, 2015, that Vanguard would not be supplying any of these materials.

There should therefore be a very real concern that if Bay Cities were awarded the Contract, it would have Vanguard supply some of the concrete, fabricated rebar, forming materials and/or other materials for the the work involved in Items 102, 106 and 108. Indeed, significantly, nowhere in Bay Cities' letter dated January 19, 2015, does Bay Cities state that Vanguard will not be supplying any of the concrete, fabricated rebar, forming materials or other materials in connection with Items 102, 106 or 108, if Bay Cities is awarded the above-referenced contract.¹

¹ Thus for example, although Bay Cities dismisses the possibility that Vanguard will provide concrete in connection with Items 102, 106 and 108 as "speculation, nowhere in its January 19th letter does Bay Cities state that Vanguard will not be providing any concrete in connection with those items.

Caltrans should reject Bay Cities' bid for the reasons set forth in this letter and DGC's prior bid protest letters.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. M. Smith', with a long horizontal flourish extending to the right.

Randall M. Smith
Attorney for DeSilva Gates Construction, LP