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February 18, 2016

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 February 4, 2016.

EVEN THOUGH BAY CITIES' OWN BID CONTRADICTS ITS CLAIM THAT VANGUARD WILL NOT FURNISH ANY MATERIALS FOR ITEMS 102, 106 ANY 108, BAY CITIES STILL HAS NOT PROVIDED ANY EVIDENCE OR SUPPORT FOR ITS CLAIM

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."

As pointed out in the response letters DGC filed on December 24, 2015 and January 25, 2016, this claim is demonstrably false, because, among other things, it is contradicted by Bay Cities' own bid. Specifically, the percentages of subcontractor participation for Items 102, 106 and 108 set forth in Bay Cities' bid contradict Bay Cities' claim that Vanguard would not be supplying any materials for Items 102, 106 and 108.

Although this was pointed out in both the letter DGC filed on December 24, 2015, and the letter DGC filed on January 25, 2016, Bay Cities has not disputed the fact that its own bid contradicts the unsupported claim made in Bay Cities' letter dated December 22, 2015, that "Bay Cities will furnish the materials needed to construct Items 102, 106 and 108 and Vanguard will install those materials."

Moreover, Bay Cities has failed to provide Caltrans any evidence or support whatsoever for its claim that Vanguard will not be supplying any materials in connection with these bid items. Instead, Bay Cities apparently is hoping that Caltrans will simply accept, without any evidence or support, the claim made by Bay Cities in a post-bid letter as to the intent of its bid, even though that claim is contradicted by Bay Cities' own bid. This would of course be entirely improper.

It is also noteworthy that, subsequent to its December 22 letter, Bay Cities has been unwilling—even when directly challenged—to state that Vanguard will not supply any of the concrete, fabricated rebar, forming materials and/or other materials for the work involved in Items 102, 106 and 108.

For example, in the letter DGC filed on December 24, 2015, DGC stated, in part, as follows:

"Indeed, it appears that Bay Cities is attempting to surreptitiously circumvent the Subcontractor Listing requirements by having Vanguard manufacture and/or haul some or all of the concrete required for Bid Items 102, 106 and 108. If Bay City's subcontractor listing is interpreted, in accordance with Bay Cities' letter, as meaning that Bay Cities will be furnishing all of the materials to Vanguard for those items, and that Vanguard will not be furnishing any materials in connection with those items, it would of course be illegal and improper if Vanguard were involved in the manufacture or hauling of any of this concrete. Yet, it appears that, for the work involved in Bid Items 102, 106 and 108, Bay Cities is planning to have Vanguard manufacture concrete at one or more of Vanguard's batch plants, and/or have Vanguard haul the concrete using its mixer trucks. Regardless of whether or not Bay Cities enters into a separate supply,

rental or purchase contract with Vanguard, in addition to a subcontract, it would violate the California Subcontractor Listing law and Caltrans' subcontractor listing requirements if Vanguard were to have any involvement in the furnishing of the concrete.

It also appears that Bay Cities is attempting to surreptitiously circumvent Caltrans Standard Specification section 5-1.13A, which provides that the prime contractor must "perform work equaling at least 30 percent of the value of the original total bid" with its own employees. Bay Cities cannot evade the 30% requirement by the ruse of entering into a separate supply, rental or purchase contract with Vanguard for the manufacture and/or hauling of the concrete, in addition to a subcontract."

Yet, in neither of Bay Cities' subsequent responses did Bay Cities state that Vanguard would not be involved in the furnishing of any concrete for Items 102, 106 or 108.

Likewise, in DGC's letter dated January 25, 2016, DGC stated, in part, as follows:

" 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."

Yet in Bay Cities' reply to this letter (Bay Cities' letter dated February 4, 2016), Bay Cities fails to state that Vanguard will not supply any of the concrete, fabricated rebar, forming materials and/or other materials for the work involved in these bid items, or make any similar statement whatsoever.

Similarly, in DGC's letter dated January 25, 2016, DGC pointed out that "nowhere in its January 19th letter does Bay Cities state that Vanguard will not be providing any concrete in connection with [Items 102, 106 or 108]." In its response to this letter, Bay Cities yet again fails to make any such statement.

Bay Cities' failure to state specifically and unequivocally that, if Bay Cities is awarded the contract, Vanguard will not supply any of the concrete, fabricated rebar, forming materials and/or other materials for any of the work involved in Items 102, 106 or 108, even when challenged to do so, could hardly be more suspicious—especially given the fact that Bay Cities' bid indicates that Vanguard will actually be supplying a significant amount of materials for this work.

Moreover, as noted above, even though Bay Cities' bid indicates that Vanguard will be furnishing a significant amount of materials for Bid Items 102, 106 and 108, Bay Cities has failed to provide any evidence or support for the claim in its post-bid letter that "Bay Cities will furnish the materials needed to construct Items 102, 106 and 108 and Vanguard will install those materials." It clearly appears that Bay Cities made this unsupported statement after bid in an attempt to somehow justify its bid's circumvention of the Subcontractor Listing requirements and the requirement that the prime contractor perform at least 30% of the work. Caltrans should not be fooled.

IF BAY CITIES COULD SUPPORT ITS POST-BID CLAIM THAT VANGUARD WOULD NOT BE SUPPLYING ANY MATERIALS, EVEN THOUGH THIS IS CONTRADICTED BY BAY CITIES' BID, THEN ITS BID WOULD HAVE TO BE REJECTED ANYWAY BECAUSE OF BAY CITIES' GROSS ERRORS IN ITS SUBCONTRACTOR LISTINGS

As discussed above, and in more detail in the letter DGC filed on December 24, 2015, the percentages of Vanguard's participation set forth in Bay Cities' bid dramatically contradict Bay Cities' post-bid claim that Vanguard would not be supplying any materials for Items 102, 106 and 108. Yet Bay Cities has provided no evidence or support for this claim.

If Bay Cities did provide Caltrans with convincing evidence supporting its post-bid claim that the intent of its bid was that Vanguard would not supply any materials for Items 102, 106 and 108, then there would be another significant problem with Bay Cities' bid. As discussed in the letter DGC filed on December 24, 2015, this would mean that, in its bid, Bay Cities had grossly misstated the percentages of work to be performed by Vanguard for Items 102, 106 and 108.

In its letter dated February 4, 2016, Bay Cities attempts to argue that it would not matter if Bay Cities grossly misstated the percentages of Vanguard's participation in its bid. Specifically, Bay Cities argues that it would still be performing at least 30% of the work even if it misstated the percentages of work to be performed by Vanguard. Bay Cities' arguments miss the point because they fail to recognize the significance, in the

cases it discusses, of the right to withdraw a bid pursuant to Public Contract Code section 5103.

In *Valley Crest Landscape, Inc. v. City Council of the City of Davis*, 41 Cal.App.4th 1432 (1996), the Court held that a public entity had no choice except to reject the bid of a bidder that had made a mistake in stating the percentage of work to be done by a subcontractor on the Subcontractor Listing form of its bid. The Court reasoned in part as follows:

{W}e conclude North Bay had an unfair advantage because it could have withdrawn its bid. 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 could have sought relief by giving the City notice of the mistake within five days of the opening of the bid. That North Bay did not seek out such relief is of no moment. The key point is that such relief was available. Thus, North Bay had a benefit not available to other bidders; it could have backed out. Its mistake, therefore, could not be corrected by waiving an "irregularity."

In the decision relied upon by Bay Cities, *Ghilotti Construction Company v. City of Richmond*, 45 Cal.App.4th 897, 911 (1996), The Court distinguished the prior *Valley Crest* decision, stating, in part, as follows:

The most important distinction between this case and *Valley Crest*, however, is that GCC [the Appellant] has never contended GBCI [the bidder whose bid was contested] had a competitive advantage because it could have withdrawn its bid under Public Contract Code section 5103.

Here, on the other hand, DGC has specifically made just such a contention. (See, the letters that DGC submitted to Caltrans on December 24, 2015, and January 25, 2016).

In the subsequent decision of *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.]

The last decision cited by Bay Cities is *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, 223 Cal.App.4th 118 (2014). Unlike the *Valley Crest* decision and the *MCM* decision, this case did not involve subcontractor listing requirements. Instead, it involved the sufficiency of a bid bond.

In *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, the court distinguished the *Valley Crest* decision, stating: "In the present case, by contrast, there is nothing in this record to suggest that G&B could have withdrawn its bid and avoided liability on its bid by invoking Public Contract Code section 5103." The Court further stated: "Appellant concedes that Public Contract Code section 5103 does not apply here."

The *Bay Cities v. City of San Leandro* decision also recognized that Public Contract Code section 5103 had not been involved in the *Ghilotti* decision cited by Bay Cities, stating: "The *Ghilotti* court also acknowledged that a bid defect cannot be waived if it would allow the bidder to withdraw his bid without forfeiting its bid bond, but found that the appellant in that case had not relied on this theory in the trial court."

The *Bay Cities v. City of San Leandro* decision also distinguished the *MCM* decision discussed above, stating, in part, as follows: "The city had found that the defects in MCM's bid offered MCM an actual competitive advantage by allowing it to withdraw its bid without forfeiting its bid bond."

As previously discussed, in a decision which actually discussed this issue, the *MCM* decision, the Court ruled that the public entity was required to reject MCM's bid as nonresponsive because the mistakes MCM made on its Subcontractor Listing form gave MCM the opportunity to withdraw its bid pursuant to Public Contract Code section 5103—even though there was no requirement or issue in that case as to the amount of work which would be performed by the contractor's own forces.

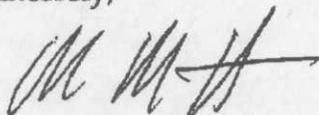
In sharp contrast, in the *Ghilotti* and *Bay Cities* decisions cited by Bay Cities, the courts explicitly stated that no such issue was raised by the appellants in those cases.

Bay Cities also ignores Caltrans Standard Specification section 2-1.10, which provides that, for listed subcontractors such as Vanguard, 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 grossly erroneous percentages in its bid.

Accordingly, if Bay Cities were to provide Caltrans with convincing evidence in support of its post-bid claim that Vanguard would not be supplying any materials for Items 102, 106 and 108, then Caltrans would still have to reject Bay Cities' bid because the subcontractor listings in the bid for Items 102, 106 and 108 would be grossly erroneous. However, Bay Cities still has not even attempted to provide any evidence for its unsupported post-bid claim that Vanguard would not be providing any materials for those bid items—even though the percentages of Vanguard's participation set forth in Bay Cities' bid for those items contradict Bay Cities' claim.

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 stroke extending to the right.

Randall M. Smith
Attorney for DeSilva Gates Construction, LP

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FAX

To 916-227-6282
Company _____
Fax number _____
Date _____
Job number _____

From _____
Phone number _____
Fax number _____
Total pages _____

Message:

A short while ago, I faxed you a letter that was misdated February 16 and had a typo. Please throw out that letter, and accept this letter in its place.

Thank you,
Randell M Smith