

RANDALL M. SMITH

Attorney at Law
488 BOUNDARY OAK WAY
WALNUT CREEK, CALIFORNIA 94598

Telephone: (925) 639-6162

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:

In its letter to Caltrans dated December 22, 2015, Bay Cities Paving & Grading, Inc. ("Bay Cities") has responded to the bid protest filed by DeSilva Gates Construction, LP ("DGC"). In attempting to explain away its failure to properly identify the portions of Bid Items 102, 106 and 108 to be performed by Vanguard, Bay Cities claims: "Bay Cities will furnish the materials needed to construct Items 102, 106 and 108 and Vanguard will install those materials." This explanation is demonstrably false.

All four bidders listed Vanguard for Bid Items 93, 98-119, 131 and 137. All of the bidders, except Bay Cities, listed Vanguard for 100% of each of these Bid Items. Bay Cities listed Vanguard for 85% of the Bid Item 102 work, 75% of the Bid Item 106 work, and 85% of the Bid Item 108 work. This is despite the fact that Vanguard's bid included furnishing all of the materials for its work, including, but not limited to, the concrete, the fabricated rebar and the form materials. Vanguard advised bidders that its bid was based on Vanguard setting up a portable batch plant in two or three locations at or near the jobsite, and then using its mixer trucks to haul the concrete to the jobsite.

Now, however, Bay Cities claims that Vanguard will not be furnishing any concrete or other materials for any of the Bid Item 102, 106 or 108 work, and that, instead, Bay

Cities will be furnishing all of these materials to Vanguard. This claim is not only contrary to the terms of Vanguard's subcontract bid; the claim is contradicted by Bay Cities' bid, as demonstrated below.

Bay Cities bid \$2,293,494 for Bid Item 102, and stated, on the Subcontractor List in its bid, that Vanguard would be performing 85% of this work. Accordingly, Bay Cities is now claiming that it will be supplying all of the materials for this bid item, and that the value of these materials is \$344,024 (15% times \$2,293,494).

Yet, the total material cost for Bid Item 102 far exceeds \$344,024. The rebar quote of Double G's Supply, Inc. (a copy of which is enclosed), which was included in Bay Cities' DBE Submittal indicates that the cost of rebar, for unfabricated straight bars, is approximately 31 cents per pound. There are approximately 280,000 pounds of rebar required for the Bid Item 2 work. Accordingly, the cost of the unfabricated rebar is approximately \$86,800 (0.31 times 280,000). The lowest quote DGC received for furnishing (manufacturing and hauling) the concrete for the project was in excess of \$200 per cubic yard. Since there are approximately 2600 cubic yards of concrete required for Bid Item 102, the total cost of furnishing the concrete would be more than \$520,000.

If one just adds the cost of furnishing unfabricated rebar and the cost of furnishing the concrete for Bid Item 102 as set forth above, one obtains a total of \$606,800, which is far in excess of the \$344,024 represented in Bay Cities' bid. Moreover, the calculation of \$606,800 is low because: (1) it does not take into account the applicable sales tax on the purchase of the concrete, (2) it includes only the cost of unfabricated rebar, and does not take into account the cost of furnishing fabricated rebar; and (3) it does not take into account the cost of furnishing the forming materials.

The same problem appears when one analyses Bay Cities' bidding of Bid Item 106. Bay Cities bid \$8,924,580 for that bid item, and stated, on the Subcontractor List in its bid, that Vanguard would be performing 75% of this work. Accordingly, Bay Cities is now claiming that it will be supplying all of the materials for Bid Item 106, and that the value of these materials is \$2,231,145 (25% times \$8,924,580).

Yet, the total material cost for Bid Item 106 far exceeds \$2,231,135. Bay Cities' DBE Submittal (Pages 73 and 78 of 287, copies of which are enclosed) that Double G's Supply, Inc. will be supplying unfabricated rebar for the Bid Item 106 work in the amount of \$561,960. Since there are approximately 17,000 cubic yards of concrete required for the Bid Item 106 work, and the cost of manufacturing and hauling the concrete is in excess of \$200 per cubic yard, the total cost of furnishing the concrete for Bid Item 106 would be more than \$3,400,000.

If one just adds the cost of furnishing unfabricated rebar and the cost of furnishing the concrete for Bid Item 106 as set forth above, one obtains a total of \$3,961,960, which is far in excess of the \$2,231,145 represented in Bay Cities' bid. Moreover, the calculation of the \$3,961,960 is low because: (1) it does not include the applicable sales tax on the purchase of the concrete, (2) it includes only the cost of unfabricated rebar, and does not take into account the cost of furnishing fabricated rebar, and (3) it does not take into account the cost of furnishing the forming materials.

The same problem appears yet again when one analyses Bay Cities' bidding of Bid Item 108. Bay Cities bid \$3,056,424 for that bid item, and stated, on the Subcontractor List in its bid, that Vanguard would be performing 85% of this work. Accordingly, Bay Cities is now claiming that it will be supplying all of the materials for Bid Item 108, and that the value of these materials is \$458,464 (15% times \$3,961,960).

Yet, the total material cost for Bid Item 108 far exceeds \$458,464. The cost for the furnishing of unfabricated rebar is approximately \$77,500 (250,000 lbs. times \$0.31 per pound). The approximate cost for the furnishing of the concrete is in excess of \$560,000 (2800 cubic yards times \$200 per cubic yard). If one just adds the cost of furnishing unfabricated rebar and the cost of furnishing the concrete for Bid Item 108, one obtains a total of \$637,500. This is far in excess of the \$458,464 represented in Bay Cities' bid. Moreover, the calculation of the \$637,500 is low because: (1) it does not include the applicable sales tax on the purchase of the concrete, (2) it includes only the cost of unfabricated rebar, and does not take into account the cost of furnishing fabricated rebar, (3) it does not take into account the cost of furnishing the forming materials, (4) it does not include the cost of furnishing the required polystyrene materials, and (5) it does not include the cost of providing the granular material which must go in the barrier rail voids.

As the above analyses demonstrate, Bay Cities' attempt to justify its deficient subcontractor listings, by claiming that Bay Cities will be furnishing all of the materials for Bid Items 102, 106 and 108, is contradicted by the percentages of subcontractor participation set forth on the Subcontractor List in its bid.

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.¹ 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.

There is an additional reason why Bay Cities' bid must be rejected as nonresponsive. In *Valley Crest Landscape, Inc. 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 the percentage of work to be done by a subcontractor on the subcontractor listing form in its bid, a public entity has no choice except to reject the bid. The Court reasoned in part as follows:

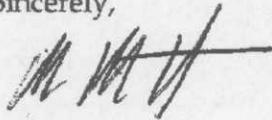
[W]e conclude North Bay had an unfair advantage because it could have withdrawn its bid. Misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error. It makes the bid materially different and is a mistake in filling out the bid. As 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." (Id. at 1442)

¹ If Bay Cities bought the concrete for Bid Items 102 (2600 cy), 106 (17000 cy) and 108 (2800 cy) from Vanguard (22400 cy total), then approximately \$4,480,000 would have to be added to the work being subcontracted out by Bay Cities. On its DBE Commitment Form, Bay Cities claimed a Total Value of all Subcontracts as \$34,691,115 (see Page 1 of Bay Cities' DBE submittal, a copy of which is enclosed). If the concrete were purchased from Vanguard for these three items, this total becomes approximately \$39,171,115 (\$34,691,115 plus \$4,480,000). This would mean that Bay Cities would be subcontracting out 78.5% (\$39,171,115/\$49,896,755.50) of the contract, which renders the bid nonresponsive because it violates Caltrans Standard Specification section 5-1.13A.

As demonstrated above, if Bay Cities' claim that Vanguard is not furnishing any concrete or other materials is accepted at face value, then Bay Cities grossly misstated the percentages of work to be performed by Vanguard for Bid Item Nos. 102, 106 and 108 on the Subcontractor List that it submitted in its bid. Accordingly, Caltrans is legally required to reject Bay Cities' bid.

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

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

12-09-15 P01:53 IN

Low Bidder

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
DBE - COMMITMENT
 DEB-06-0102.10D (REV 12/2014)

CONTRACT NO: 04-2J0704

BID AMOUNT: \$ 49,896,755.⁵⁰

BID OPENING DATE: December 3, 2015

BIDDER'S NAME: Bay Cities Paving & Grading, Inc.

DBE GOAL FROM CONTRACT %: 18

DBE PRIME CONTRACTOR CERTIFICATION: _____

TOTAL NUMBER OF ALL SUBCONTRACTS (DBE & NON-DBE): _____

TOTAL VALUE OF ALL SUBCONTRACTS (DBE & NON-DBE): _____

BID ITEM NO.	ITEM OF WORK AND DESCRIPTION OF SERVICES TO BE SUBCONTRACTED OR MATERIALS TO BE PROVIDED ²	WORK CATEGORY CODES ³	NAME OF DBE (Must be certified on the date bids are opened. Include Caltrans certification no., DBE address, and phone number. Show bid and award for subcontractors)	AMOUNT (\$)
62-6A (Partial)	2nd Tier Rebar Supplier to Independent Structures	G1000 G1001	Double G's Supply 1079 Sunrise Ave #22 Roseville CA 95661 530-902-3058 CT - 41416	237,648.-
106(P)	Rebar Supplier	G1000 G1001	Double G's Supply 1079 Sunrise Ave #22 Roseville, CA 95661 530-902-3058 CT - 41416	337,176.-

Show all DBE firms being claimed for credit, regardless of tier. Attach written confirmation from each DBE shown stating that it will be participating in the contract to perform the specific work shown for the specific amount agreed to.

The names of the 1st tier DBE subcontractors and items of work must be consistent with the Subcontractor List (Pub Cost Code § 4 100 et seq.).

¹Each DBE prime contractor must enter its certification number and show all work to be performed by DBEs, including work performed by its own forces.

²If 100% of an item is not to be performed or finished by the DBE, describe the exact portion of the item to be performed or finished.

³Use Work Category Codes from the California Unified Certification Program database.

Total Claimed Participation

\$ _____

% _____

The bidder acknowledges that it is committed to use the DBEs shown on this form to meet the contract goal (MS CPR 25.53).

Signature of Bidder _____

Date _____ (Area Code) Tel. No. _____

Person to Contact _____ (Please Type or Print)

See Pg 1

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773/287

Contract No. 04-2J0704
1

12-09-15 10:42 IN

Low Bidder

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
DBE - COMMITMENT
 DEB-0E-0192.14D (REV 12/2014)

CONTRACT NO: 04-250704

BID AMOUNT: 49,896,755.⁵⁰

BID OPENING DATE: December 3, 2015

BIDDER'S NAME: Bay Cities Paving & Grading, Inc.

DBE GOAL FROM CONTRACT %: 18

DBE PRIME CONTRACTOR CERTIFICATION: 1A TOTAL NUMBER OF ALL SUBCONTRACTS (DBE & NON-DBE) TOTAL VALUE OF ALL SUBCONTRACTS (DBE & NON-DBE) 34,691,115. ←

BID ITEM NO.	ITEM OF WORK AND DESCRIPTION OF SERVICES TO BE SUBCONTRACTED OR MATERIALS TO BE PROVIDED*	WORK CATEGORY CODES*	NAME OF DBE (Must be certified on the date bid is opened, include California certification no., DBE address, and phone number. Show 2nd and last for subcontractors)	AMOUNT (\$)
5B.59 (Partial)	Place AC Dike	C3940	A.C. Dike Co 2788 Venture Dr Lincoln, CA 95648 916.652.0159 CT - 005219	3,885.
36(P)	Grind & load AC Duly	C1531	ABS L Const 29395 Pacific St Hayward, CA 94544 408.258.7191 CT - 005270	12,600.

Show all DBE items being claimed for credit, regardless of tier. Attach written confirmation from each DBE showing stating that it will be participating in the contract to perform the specific work shown for the specific amount agreed to.

The names of the 1st tier DBE subcontractors and items of work must be consistent with the Subcontractor List (Pub-Cont Code § 4100 et seq.).

*Each DBE prime contractor must enter its certification number and show all work to be performed by DBEs, including work performed by its own forces.

*If 100% of an item is not to be performed or finished by the DBE, describe the exact portion of the item to be performed or finished.

*Use Work Category Codes from the California Unified Certification Program database.

Total Bidder Participation 8.5%

The bidder acknowledges that it is committed to use the DBEs shown on this form to meet the contract goal (49 CFR 26.53)

[Signature]
 Signature of Bidder
12/9/15
 Date
925.687.6666
 (Area Code) Tel. No.
San L Rodriguez Jr
 Person to Contact (Please Type or Print)

Page 1

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