

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
1727 30th STREET
P. O. BOX 168041
SACRAMENTO, CA 95816-8041
PHONE (916) 227-6299
FAX (916) 227-6282
TTY 711



*Flex your power!
Be energy efficient!*

March 25, 2014

Facsimile: (925) 427-1216

Marc Armstrong, Estimator
Windsor Fuel Co.
1150 Willow Pass Road
Pittsburg, CA 94565

04-3E4004
04-Nap-128-19.1/34.3
B.O. 2/11/14

Dear Mr. Armstrong:

The Department of Transportation (Caltrans) received the attached letter dated February 25, 2014, from Windsor Fuel Co. (WFC) protesting the bid submitted by by Chester Bross Construction Company (Chester Bross) for contract 04-3E4004. The protest alleges that Chester Bross listed both Linear Options, Inc. and Force Traffic Control, Inc. to perform work described as Traffic Control and therefore, must self perform the work. In addition, the protest further alleges that Chester Bross listed Force Traffic Control on its Disadvantaged Business Enterprise (DBE) Commitment form, but since Chester Bross must self perform the work, does not meet the DBE goal for this contract. WFC requests that Caltrans uphold WFC's protest and award the contract to WFC.

Caltrans reviewed the bid documents, as well as the protest and determined that Chester Bross listed Linear Options, Inc. to perform 21 percent of traffic control and Force Traffic Control, Inc. was listed to perform 79 percent of traffic control for a total of 100 percent. Therefore, Chester Bross is not required to self perform this item, and as such is allowed to claim DBE participation for Force Traffic Control, Inc.

Based on the determination above, Caltrans finds the bid submitted by Chester Bross responsive and will proceed to award this contract to Chester Bross, providing that all requirements have been met.

If you have any questions, please contact Mulissa Smith, Contract Awards Branch Manager, at (916) 227-6228.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. McMILLAN".

JOHN C. McMILLAN
Deputy Division Chief
Office Engineer
Division of Engineering Services

Attachment



General Engineering Contractors – Paving, Chip Seal, Oil Spreading

1150 Willow Pass Road • Pittsburg, CA 94565 • TELEPHONE (925) 427-5266 FAX (925) 427-1216
STATE CONTRACTORS LICENSE # 984141

February 25, 2014

Via U.S. Mail and Facsimile (916) 227-6282

Mr. Earl Seaberg, Deputy Division Chief
MSC 43
Office Engineer Contracts Award Branch Chief
California Department of Transportation
1727 30th Street
Sacramento, California 95816-7005

Re: Construction on State Highway in Napa County Near Napa From Knoxville Road to Solano County Line
Caltrans Contract No. 04-3E4004, 04-Nap-128-19.1/34.3
Protest of Bid Submitted by Chester Bross Construction Company

Dear Mr. Seaberg:

Please consider this letter to be a formal protest of the bid submitted by Chester Bross Construction Company ("CBCC") in connection with Caltrans Contract No. 04-Nap-128-19.1/34.3. For clarity, we are submitting a separate letter that protests the bid submitted by Martin Brothers Construction.

For the reasons stated below, CBCC's bid is nonresponsive. CBCC's bid must be rejected based on the Department's bidding requirements and strictly-enforced policies.

1. **CBCC Listed Two Companies As Subcontractors For Traffic Control and Therefore Is Prohibited From Utilizing Either Company**

In the subcontractor list submitted with its bid, CBCC listed both Linear Options and Force Traffic Control as performing traffic control. CBCC did not clearly identify what portions of traffic control would be performed by each listed entity. Under Public Contract Code Section 4106, "if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself."

Accordingly, CBCC must self perform the traffic control work and is prohibited from utilizing either Linear Options or Force Traffic Control. See Pub. Contract Code § 4106



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2. **Because CBCC Is Prohibited From Utilizing Force Traffic Control As A Subcontractor, CBCC Failed To Meet The DBE Participation Goal of 12%**

On its DBE commitment form, CBCC listed Force Traffic Control as performing \$79,000 in traffic control work. However, because CBCC listed two subcontractors for the traffic control work, Force Traffic Control cannot be utilized as a subcontractor, reducing the amount of work that CBCC committed to DBE firms to \$320,458, or only 10.9%, well short of the 12% minimum DBE commitment required for this contract.

3. **The Department's Prior Decisions On Double Listing Of Subcontractors Requires That It Reject CBCC's Bid As Nonresponsive**

The Department has a longstanding policy that, when a general contractor lists more than one subcontractor for the same work scope, the general contractor may not utilize the subcontractors in question and hence may not count the amount it subcontracted to those companies toward the DBE and other goals set for a contract.

CBCC would have been aware of this policy when it submitted its bid on No. 04-Nap-128-19.1/34.3 because Teichert Construction had protested CBCC's bid on December 30, 2013, in connection with Contract No. 06-0Q7704. On that contract, as here, CBCC had listed two subcontractors for the same scope of work. Caltrans upheld Teichert's protest of CBCC's bid, ruling:

Since Chester Bross must perform bid item 3, with its own forces, that work cannot now be counted towards the 3 percent Disabled Veterans Business Enterprise (DVBE) participation on this contract. As a result, the total claimed participation has been reduced from \$47,087 or 3.24 percent, to \$8, 441 or .058 percent.

Therefore, Chester Bross did not meet the stated DVBE participation goal for this contract and is no longer eligible for award of this contract.

Caltrans has issued similar rulings in connection with protest on other bids. For example, on January 30, 2012, Caltrans rejected a bid submitted by HCI in connection with Contract No. 07-279804, where HCI had failed to comply with Public Contract Code section 4106.



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Similarly, on May 30, 2013, Caltrans determined that Knife River Construction would not be allowed to subcontract Bid Item no. 1 on Contract no. 03-4M1604 because it had listed to separate subcontractors for that work.

Given that Caltrans in the past has ruled that when a general contractor lists more than one subcontractor for the same work scope, the listed subcontractors cannot be utilized or counted toward contract goals, it cannot depart from that precedent and adopt a different rule for this contract. Treating similarly situated bidders differently constitutes an action by a public agency undertaken without any reason, "based on no more than the will or desire of the decision-maker," and by definition is arbitrary and capricious conduct. See *Clack v. State*, 275 Cal. App. 2d 743, 747 (1969) (action based on will or desire of the public agency, and no more, is arbitrary); *Verdugo Hills Hospital, Inc. v. Department of Health*, 88 Cal. App. 3d 957, 964 (1979) (action done without apparent reason is arbitrary).

Conclusion

The Department owes a duty to enforce its bid requirements in a fair and uniform manner. Accordingly, because CBCC has patently failed to comply with the Department's bid requirements, CBCC's bid is nonresponsive and must be rejected.

We therefore respectfully request that the Department uphold Windsor Fuel Company's protest and award the contract to our company, which submitted the lowest responsive bid for No. 04-Nap-128-19.1/34.3. Thank you for your careful attention to this protest, and please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Marc Armstrong', is written over the typed name.

Marc Armstrong
Estimator / Project Manager

CC: Mike Fain, Karl Meyers

1150 Willow Pass Road
Pittsburg, CA 94565
Phone: (925) 427-5266 Fax: (925) 427-1216
Contractor's License #984141-A

Windsor Fuel Company

WFC

To: Caltrans

From: Marc Armstrong

Attention: Office Engineer

Fax: 916-227-6282

Pages: 4

Phone: 916-324-6985

Date: 2/25/2014

Re: Contract No. 04-3E4004 Chester Bross
Construction Protest

Urgent

For Review

Please Comment

Please Reply

Please Recycle

● **Comments:**

Please see attached our Formal Protest to Contract No. 04-3E4004, 04-Nap-128-19.1/34.3 as required. Please let me know if you need any further information. Please confirm receipt. Hard copy will be sent via Certified mail.

Thanks,

Marc

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
SUBCONTRACTOR LIST
 DES-DE-0102 2 (REV 3/2011)

Bidder Name: Chester Gross Construction Co.

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
LINEAR OPTIONS INC DURHAM CA	1	99%	LEAD PLAN (P) MOBILIZATION (P), TRAFFIC CONTROL (P) REMOVE THERMO STRIPE + MARKING AND RELATED THERMO STRIPE + MARKINGS AND RELATED
	33	10%	
	3	21%	
	9	100%	
	10	100%	
	11	100%	
	12	100%	
	13	100%	
	29	100%	
	30	100%	
	31	100%	
	32	100%	

AUSTIN ENTERPRISE BAKERSFIELD, CA	18	100%	CRACK TREATMENT

APSL CONSTRUCTION HAYWARD CA	19	96%	PRE-PAVING INERTIAL PROFILE (P) PRE-PAVING GRINDING (P)
	20	47%	

FORCE TRAFFIC CONTROL, INC EXETER, CA EXETER, CA	2	100%	TRAFFIC CONTROL (P) + RELATED CONSTRUCTION AREA SIGNS POLS
	3	79%	
	4	100%	

FMA GRINDING CO. SAN JOSE CA	14	58%	GRINDING + RELATED
	15	61%	

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**** Transmit Conf. Report ****

P.1
CALTRANS CONTR AWARDS Fax 916-227-6282

Mar 26 2014 01:22pm

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STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN Jr., Governor

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