



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 a horizontal line.

Marc Armstrong
Estimator / Project Manager

CC: Mike Fain, Karl Meyers

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
SUBCONTRACTOR LIST
DES-OE-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) 227-8282 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 PAVEMENT (P) MOBILIZATION (P), TRAFFIC CONTROL (P) REMOVE THERMO STRIPE + MARKING AND RELATED THERMO STRIPE + MARKINGS AND RELATED
	33	100%	
	3	21%	
	8	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 20	96% 47%	PRE-PARKING INERTIAL PROFILE (P) PRE-PAVING GRANULAR (P)
FORCE TRAFFIC CONTROL, INC EXETER, CA EXETER, CA	2 3 4	100% 79% 100%	TRAFFIC CONTROL (P) RELATED CONSTRUCTION AREA SIGNS POLES
FMG GRINDING CO. SAN JOSE CA	14 15	58% 61%	GRINDING + RELATED

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STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
CALTRANS BIDDER - DBE - COMMITMENT
 DES-05-0102.10C (NEW 08/2012)

This information may be submitted with your bid proposal. If it is not, and you are the apparent low bidder or the second or third low bidder, it must be submitted and received as specified in section 2 of the specifications. Failure to submit the required DBE information will be grounds for finding the bid nonresponsive.

CONTRACT NO: 04-3R4004

BID AMOUNT: \$ \$2,932,448.00

BID OPENING DATE: 2/11/14

BIDDER'S NAME: CHESTER BROSS CONSTRUCTION

DBE CDAL FROM CONTRACT %: 12%

DBE PRIME CONTRACTOR CERTIFICATION: N/A

BID ITEM NO.	ITEM OF WORK AND DESCRIPTION OF SERVICES TO BE SUBCONTRACTED OR MATERIALS TO BE PROVIDED ²	FOR CALTRANS USE ONLY	NAME OF DBE ¹ <small>(Must be certified on the date bids are opened - include Caltrans certification #, DBE address and phone number) (Indicate 2nd and lower tier subcontractors)</small>	DOLLAR AMOUNT DBE ³
2	CONST AREA SIGNS		FORCE TRAFFIC CONTROL, INC.	\$2,340.00
3	TRAFFIC CONTROL (P)		PO BOX 1107	\$79,000.00
4	PCMS		EXETER CA 93221 PH-559-786-9856 CERT.#22335	\$5,816.00
23	SUPPLY & DELIVER LIQUID ASPHALT (P)		BLACK DIAMOND ASPHALT INC. 118 MAIN ST. VACAVILLE CA 95668 PH-707-448-9402 CERT.# 22999	\$244,399.98
Total Claimed Participation				\$ 399,457.98

IMPORTANT: Identify all DBE firms being claimed for credit, regardless of tier. Names of the First Tier DBE Subcontractors and their respective item(s) of work claimed must be consistent, where applicable, with the names and items of work in the "Subcontractor List" submitted with your bid. Copies of the DBE question are required.

- DBE prime contractors must enter their certification number and indicate all work to be performed by DBEs including work performed by its own forces.
- If 100% of item is to be performed or furnished by DBE, describe exact portion of item to be performed or furnished.
- See section 2.1.12 of the specifications to determine the credit allowed for DBE firms.

13.6 %

[Signature]
 Signature of Bidder

2/11/14
 Date

209.920.3595
 (Area Code) Tel. No.

STEPHANE SIMMONDS DIR. MGR.
 Person to Contact (Please Type or Print)

Submit to:

MSC 43
 OFFICE ENGINEER
 DEPARTMENT OF TRANSPORTATION
 1727 30TH STREET
 SACRAMENTO, CA 95816-7005

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Contractor's License #984141-A



"REVISED"

To: Caltrans **From:** Marc Armstrong

Attention: Office Engineer

Fax: 916-227-6282 **Pages:** 6

Phone: 916-324-8985 **Date:** 2/25/2014

Re: Contract No. 04-3E4004 Chester Bross **REVISED TO INCLUDE SUPPORTED DOCUMENTS**
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