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December 11, 2015

John C. McMillian, Deputy Division Chief
Department of Transportation
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, California 95816
Facsimile: (916) 227-6282

Re: Caltrans Contract No.: 04-3G3054, 04-SF, SM-80,84,92-VAR
Contractor: Bleyco, Inc.
Bid Opening Date: 10/21/2015

Dear Mr. McMillian,

Our office represents Bleyco, Inc. ("Bleyco") on the matters related to the bid submitted by to Caltrans for the bridge lighting projects on routes 80, 84 and 92 in San Francisco County and San Mateo County. (Contract No.:04-3G3054, 04-SF, SM-80,84,92-VAR) (hereinafter "Project").

Bleyco submitted a bid for the Project in an amount of \$2,089,100. Bleyco was by far the lowest bidder on Project. The next lowest bidder on the Project was Mike Brown Electric Co. with a bid amount of \$3,938,452.62.

Bleyco listed subcontractor SEM, Inc. ("SEM") in its bid submission for the Project. SEM is providing coordination and management services on various bid items. Bleyco erroneously listed SEM as a subcontractor under Bid Item #3 Traffic Control. SEM's true scope of work on the Project is for coordination and supervision services.

On November 30, 2015, Caltrans sent a letter to Bleyco advising that subcontractor SEM, did not qualify as a traffic control subcontractor. (Caltrans Ltr. 11/30/15). On this basis, Caltrans disallowed the DVBE credits associated with SEM's subcontract work, and determined that Bleyco was no longer eligible for the contract award. (Caltrans Ltr. 11/30/15).

Bleyco's erroneous listing of SEM under the wrong bid item is an inconsequential deviation from the bid requirements. Bleyco's error does not change the bid amount and the error does not confer any competitive advantage.

SEM holds an electrical license (Lic. No. 9858669) and SEM is qualified to perform coordination and supervision services on this bridge lighting Project. There is no reason to disqualify

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this Disadvantaged Veteran Business from the Project.

“The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders.” *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 906.

The bid error by Bleyco does not qualify as a material error. The erroneous identification of SEM as a traffic control subcontractor does not destroy competitive advantage or confer any benefit not enjoyed by other bidders. (*Id.*) As such, SEM should be allowed to perform its intended scope of work, and Bleyco should be allowed to properly retain its DVBE credits for the Project.

Inconsequential Bidding Errors Can Be Waived

Caltrans possesses the requisite authority to make of a finding of inconsequential error with regards to Bleyco’s bid. The rule that requires “strict compliance with bidding requirements does not preclude the contracting entity from waving inconsequential deviations.” *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, (2014) 223 Cal. App. 4th 1181, 1188.

However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential.

Bay Cities Paving & Grading, Inc. v. City of San Leandro, (2014) 223 Cal. App. 4th 1181, 1118. (emphasis added).

The erroneous listing of SEM as a subcontractor for traffic control instead of for supervision and coordination functions is inconsequential and does not change the amount of the bid, or confer any benefit or advantage.

The error likely occurred as the result of a combination of factors. This was Bleyco’s first time using the electronic bidding system to submit its bid. The error may have been caught in advance of bid submission, however, the unfamiliarity with the electronic submission process was a contributing factor in not catching the mistake.

Another issue is that Bleyco’s subcontractor SEM will be performing supervision and coordination activities across the board on numerous bid items. The cost associated with the work to be performed by SEM was already included within the various bid item amounts. This may have contributed to the accidental mis-classification as SEM for traffic control, as SEM will be performing coordination for the traffic control scope for work. However, SEM will also be performing coordination and supervision for many other bid items as well.

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During the rush to submit the bid, a mistake was made by Bleyco. The unfamiliarity with the electronic bid submission, and the structuring of SEM's scope of work across several different bid items, added to the confusion.

What is not confusing, is the fact that 1) Bleyco spoke with SEM prior to the bid submission, 2) Bleyco obtained a proposal from subcontractor SEM for the Project, 3) SEM is properly licensed for its intended scope of work, 4) Bleyco listed SEM as a DVBE subcontractor in its bid submission, and 5) the amount of work subcontracted to SEM satisfies the 3% DVBE requirements.

As such, Bleyco's bid is responsive. The bid error is inconsequential and the error should be properly waived by Caltrans.

SEM Confirmed Its Scope of Work For the Project

SEM has confirmed its scope of work and proposal amounts for the Project with the California Department of Transportation through a series of email exchanges with Shawn Murphy at SEM. (See email chain between John Myers/Mulissa Smith (DOT) and Shawn Murphy (SEM) dated November 4, 2015-December 7, 2015). SEM provided a copy of its proposal for the Project as part of this exchange.

Caltrans now has in its possession the full details of the SEM subcontractor bid proposal for the Project. Based upon this information, Caltrans has the authority to waive the bid error and properly award the Project contract to Bleyco.

When a public agency is in possession of the information that it needs to find the bid responsive, it possesses the latitude to make a determination that the requirements have been satisfied.

"In short, when the City determined which contractor was the lowest responsible bidder it had before it the information it needed to make clear that G&B had, indeed, satisfied the requirement of supplying the requisite bond."

Bay Cities Paving & Grading, Inc. v. City of San Leandro, (2014) 223 Cal. App. 4th 1181, 1191. (emphasis added).

In case at hand, Caltrans has the information it needs to confirm that Bleyco has satisfied the requirements for DVBE participation. Furthermore, an awarding body may waive minor items of non-compliance from the bid specifications when "[t]here is no evidence of favoritism, corruption, fraud, extravagance or uncompetitive bidding practices." *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 909.

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The Facts Support a Finding of Inconsequential Error

The determination of an inconsequential error and subsequent waiver of the bid error by a public entity is highly fact specific. The party attempting to overturn the determination will carry the burden of proving an unfair competitive advantage has been conferred. "The Ghilotti court emphasized the factual and individualized nature of the inquiry as to whether a bid variation results in an unfair competitive advantage in the bidding process, and ultimately concluded that the appellant had failed to carry its burden on appeal of proving that GBCI had an actual unfair competitive advantage." *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, (2014) 223 Cal. App. 4th 1181, 1197.

The facts in this case support the finding of an inconsequential error. The mis identification of SEM as a traffic control subcontractor, when in fact SEM is only providing *coordination and supervision* for traffic control and coordination and supervision for various other bid items across the board, does not confer any advantage to Bleyco. The DVBE credit amounts are not altered, the bid amount is not altered, and no other advantages are obtained by waiving the error.

Bleyco's bid must be found responsive on this issue, as there is no violation of the specifications with regard to the licensing requirements for subcontractor SEM. Therefore, Bleyco's DVBE credits must stay intact and the contract must be awarded to Bleyco as the lowest responsible/responsive bidder.

Public Policy Against Cancellation of Bid Due to Minor Technicalities

The practice of utilizing minor errors and technicalities to disqualify an otherwise responsive bid, is highly disfavored as a matter of public policy.

"It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.

Ghilotti Construction Co. v. City of Richmond (1996) 45 Cal. App.4th 889, 908-909.
(*emphasis added*).

The error by Bleyco is a minor technicality. SEM was never intended to be listed as a traffic control subcontractor. SEM's true scope of work on the Project has been substantiated and there is no issue regarding SEM's license or qualifications as it relates to SEM's proper scope of work for the Project.

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The public policy goals of using a DVBE for this Project are satisfied. Furthermore, the gap between lowest bid and the second lowest bid is extreme. A finding of non-responsiveness of Bleyco's bid would result in adverse consequences to the tax-paying public if a substantially higher award is made for the same scope of work

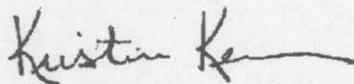
Conclusion

Caltrans holds the necessary authority to waive the bidding irregularity and make a finding of inconsequential deviation from the bid requirements. In the case at hand, Bleyco is the lowest responsive/responsible bidder for the Project.

The laws and policies of the State of California support such a finding, as no competitive advantage has been conferred upon Bleyco.

Therefore, it is requested that Caltrans deem the clerical error in Bleyco's bid inconsequential and award the Project contract to Bleyco.

Yours Truly,



Kristin Kerr

1543-01

cc: client

By Mail and Fax

(cc: Mr. John Myers and Ms. Mulissa Smith via email)

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FAX COVER SHEET

Please deliver the following pages to:

NAME: John C. McMillan, Deputy Division Chief
Department of Transportation, Division Of Engineering Services

FROM: Kristin Kerr

DATE: December 11, 2015

NUMBER OF PAGES ATTACHED: 6 (including cover page)

FAX NO. 1-916-227-6282

re: Caltrans Contract No.: 04-3G3054, 04-SF-80,84,92-VAR
Contractor: Bleyco, Inc.

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ADDITIONAL COMMENTS:

Dear Mr. McMillian

*Attached is the letter dated 12/11/2015 regarding the above referenced Contract Number and Contractor.
The original is being sent mail.*

Thank you.

*Elizabeth Naufahu
Paralegal*