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November 22, 2013

**VIA FACSIMILE (916) 227-6282 AND FED-EX**

Mr. John McMillan, Deputy Division Chief  
State of California  
Department of Transportation  
Division of Engineering Services  
Office Engineer, MS 43  
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Sacramento, California 95816-8041  
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11-25-13 P12:41 RCVB

RE: Caltrans Contract No. 05-0G0704 (the "**Contract**")  
Bid Opening: 10/15/2013

Dear Mr. McMillan:

On October 15, 2013, Granite Construction Company ("**Granite**") submitted a bid to the California Department of Transportation (the "**Department**") for Contract Number 05-0G0704 (the "**Contract**"). We were informed yesterday, November 21, 2013, that the Department intends to award the Contract to Flatiron West Inc. ("**Flatiron**"). We respectfully object to that proposed course of action. By this letter, Granite would like to bring to the Department's attention that the decision to award to Flatiron appears counter to the Department's historical analysis and application of the specifications and regulations governing good faith efforts to meet the stated DBE goal. The Disadvantaged Business Enterprise ("**DBE**") goal for this Contract was 8%. Flatiron claimed 3.4% DBE participation (\$570,401), significantly short of the 8% goal (\$1,330,350). In contrast Granite exceeded the goal, claiming 9.5% DBE participation (\$1,679,501). Historically, when a bidder (like Flatiron) falls significantly short of the DBE goal while other bidders (like Granite) meet or exceed such goal, the Department has found the bid non-responsive due to the bidder's failure to satisfy its good faith efforts obligations. For the same reasons, Flatiron's bid should be rejected as non-responsive. In the event, the Department nonetheless decides to award the Contract to Flatiron, Granite respectfully requests guidance on this seeming divergence from the Department's past policy and practice with respect to analyzing good faith efforts.

We appreciate that the Department is well-versed in DBE program requirements. We do not wish to overburden the Department, but found it necessary to obtain clarity on the standards against which the Department is and will be analyzing bids (specifically DBE submittals and good faith efforts documentation). We respect the Department's time, efforts and diligence in this matter.

***It Appears That Flatiron Did Not Meet the Contract DBE Goal and Did Not Make Adequate Efforts to Meet this Goal***

Bidders for this Contract are required to "[t]ake necessary and reasonable steps to ensure that DBEs have the opportunity to participate in the Contract." To this end, each bidder was required to meet the 8% Contract DBE goal or demonstrate that it made adequate good faith efforts to meet that goal.

The DBE Contract goal is eight percent (8%). Flatiron only claims 3.4% in DBE participation. If awarded the Contract, Flatiron, will be allowed to avoid the 8% DBE Contract goal and be held to a mere 3.4% DBE commitment.

In contrast, Granite was able to obtain and claim 9.5% DBE participation. The ability of Granite to exceed the 8% goal demonstrates a lack of good faith effort on the part of Flatiron to meet the DBE Contract goal. As you know, the purpose of the good faith efforts requirement is to evaluate whether the bidder made adequate efforts to make the goal but, despite those good faith efforts, was unable to meet the goal. As the U.S. DOT explains in its guidance materials, "This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of Part 26 which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful... The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal." That does not appear to be the situation in this case. In determining whether the low bidder made good faith efforts to meet the DBE goal, the Department may consider DBE commitments of the 2<sup>nd</sup> and 3<sup>rd</sup> bidders. (See Revised Standard Specifications, Section 2-1.12(B)(3)). As explained in Appendix A to Part 26—Guidance Concerning Good Faith Efforts, "In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal." Notably, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. In essence, documented good faith efforts are meant to evidence that the bidder did all it could to reasonably meet the DBE goal, but, despite those efforts, was unable to obtain the needed DBE participation.

Here, the fact that Granite exceeded the DBE goal indicates that Flatiron could have (and should have) met the goal with additional reasonable efforts. There are also additional factors that undermine Flatiron's good faith efforts, including the fact that Flatiron solicited 201 DBE subs/suppliers to Granite's 265. Furthermore, Flatiron received quotes from subcontractors and vendors sufficient to meet the goal but without exception selected subcontractors and vendors on price alone without any apparent regard to meeting the project DBE goal (see Flatiron GFE Attachment C-1). The focus on price alone in selecting subcontractors and vendors certainly does not demonstrate good faith to meet the goal.

Of primary concern to Granite is that, in the past, the Department typically rejected bids like Flatiron's that fell woefully short of the DBE goal where others successfully met the goal. Consistent with the above-referenced regulations, the Department rejected such bids on the grounds that the bidder did not meet the DBE goal or demonstrate that it made adequate good faith efforts to meet that goal. The decision by the Department to accept the GFE effort by Flatiron on this Project, despite the fact another bidder was able to achieve the Contract goal, is contrary to our understanding and observation of the Department's past practice. Flatiron's bid should be deemed non-responsive because they did not achieve the 8% DBE goal and did not make an acceptable good faith effort to meet that goal. If despite this material defect, the Department finds Flatiron's bid to be responsive, Granite respectfully requests guidance as to the seeming change in the Department's interpretation of the good faith efforts requirements.

Your time and consideration of this matter are greatly appreciated. Please do not hesitate to contact me at (805) 331- 8196 if you require additional information.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Bruce McGowan". The signature is fluid and cursive, with a prominent initial "B" and a long, sweeping tail.

Bruce McGowan  
V.P. Central California Region