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Jill Sewell, Office Chief
DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
Office Engineer, MS-43
P.O. Box 168041
Sacramento, CA 95816-8041

**Re: Contract No. 05-4482U4
05-SB-101-2.2/3.3
Project ID 0500000543
Bid Opened: 04/27/2016**

Dear Ms. Sewell:

This letter is in response to the May 23, 2016, letter from Security Paving Company, Inc. ("Security"), which was in response to the protest letter of Rasmussen/Myers and Sons ("Rasmussen") on Caltrans' Contract No. 05-4482U4 (the "Contract").

A. Security Completely Ignores the Fact That it Admittedly is Trying to Circumvent the Listing Law.

As outlined in Rasmussen's original protest letter, post-award Security admitted to attempting to circumvent the Listing Law; namely, Security attempted to add Bid Items to High Light Electric's scope of work. Specifically, Security claims that it intended to list High Light for Bid Item 286 "Operations Systems," but it admittedly did not list that item in its bid, nor did it list Bid Item 286 in the DBE Commitment form for High Light. Security, however, submitted a letter to Caltrans seeking to add Item 286 to High Light Electric's scope of work, claiming it intended to list them originally. As outlined in Rasmussen's original protest letter and what Security completely ignored in its response is the fact that High Light's bid (which is included in the DBE submittal by Security) does not even include a proposal to do the work listed in Bid Item 286. Thus, it appears post-bid opening Security approached High Light in an effort to get them to provide Security with a price, knowing that Security was the apparent low bid. This was pointed out by Rasmussen and Security's letter completely ignores its apparent violation of the Listing Law.

The record is clear that Security Paving was, and may still be, attempting to subcontract bid items for which it failed to list a subcontractor, yet nowhere in its response to Rasmussen's protest does Security address its circumvention of the Listing Law, nor does it explain that it can perform Bid Item Number 286 with its own forces. In fact, Security has never represented to

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Caltrans that it could perform Bid Item Number 286 with its own forces, thus leaving only one option for Security—subcontract that item without Caltrans approval.

B. Security Admits Its Bid is Unbalanced as It Admits It has Marked Up Bid Item 127 by Over 250 Percent.

In its attempt to argue that its DBE forms and its subcontractor listing forms are consistent, Security claims that Tipco is going to perform 100% of Bid Item 127. Security, however, fails to explain (in its response to Rasmussen's protest) why, if Tipco is performing 100% of Bid Item 127, Security bid \$142,000 for Bid Item 127 -- \$102,000 more than it is paying Tipco. Accepting Security's claim that Tipco is performing 100% of Bid Item 127, then Security has marked up this bid item by 255%, which is an unbalanced bid.

A mathematically unbalanced bid is defined in 24 CFR §635.102 as "a bid containing a lump sum or unit bid items which do not reflect reasonable actual costs plus a *reasonable* proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs." To determine whether a bid is mathematically unbalanced, it should be evaluated for reasonable conformance with the engineer's estimate through an examination of the underlying basis for the bid. It should also be compared to the bids of other bidders.

Security's own letter admits its bid is mathematically unbalanced. Tipco, who per Security is performing 100% of Bid Item 127, bid \$40,000. Thus, Security's cost for Bid Item 127 is \$40,000; however, its bid to Caltrans for that same item is \$142,000—a 255% mark up on its costs. Clearly 255% is not a reasonable share of profit and overhead costs. Thus, either Security's bid is unbalanced, or Tipco is not performing 100% of the work. Either way, Security's bid must be rejected.

Furthermore, Bid Item 127 is not the only bid item in Security's bid that is unbalanced. For example, Bid Item 5 "Traffic Control" was a lump sum item bid by Security in the amount of \$900,000. However, all other bidders bid that item between \$353,300 on the low side and \$565,000 on the high side. Thus, even comparing Security's bid to the next highest bid for Bid Item 5, Security's bid is \$335,000 more than the next highest bid. And, \$547,000 more than the lowest bid on Bid Item 5. Bid Item 5 clearly meets the definition of a mathematically unbalanced bid. And there are more items that are unbalanced. On Bid Item 29 "Street Sweeping," Security bid the lump sum of \$525,000. Other bidders bid between \$76,000 and \$230,000, again putting Security's bid \$295,000 higher than the next highest bid and \$449,000 higher than the lowest bid.

Security also unbalanced its bid on unit price items as well. On Bid Item 79 "Structural Backfill," Security bid \$78.00 a cubic yard. The other bidders bid between \$23.00 and \$48.00 a cubic yard, with two at \$40.00. On Bid Item 91.2 "Plastic Pipe," Security bid \$30.00 a lineal foot; other bidders bid between \$5.00 and \$12.00 a lineal foot. On Bid Item 92.3 "Plastic Pipe," Security bid \$43.00 a lineal foot, other bidders bid between \$13.00 and \$14.50 a lineal foot. The same is true for items 93-96—Security bid almost twice as much or more per lineal foot than all other bidders. Additionally, the same is true for Bid Item 99 "Imported Top Soil." Security bid \$75.00 a cubic yard and all other bidders bid between \$45.00 and \$22.00 a cubic yard.

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The above are only a few items that stood out when quickly reviewing Security's bid. One thing is clear—Security's bid is unbalanced. Moreover, Security's unbalanced bid should be rejected to protect the State's interest. It appears that Security increased the upfront lump sum items and increased the unit prices on items it believed would overrun the estimated quantities which will result in Caltrans paying more at the beginning of the project and more for the project than if Caltrans were to accept a properly balanced bid. Given these issues with Security's bid, it appears to be materially unbalanced and thus it must be rejected to protect the State's interest.¹

Conclusion

Security's bid is non-responsive because it has attempted to violate the listing law by subcontracting work post-bid opening. Furthermore, Security has admitted its bid is mathematically unbalanced and, based on a review its bid, is materially unbalanced and thus it must be rejected. Rasmussen/Myers and Sons is the lowest responsive, responsible bidder and should be awarded the Contract.

Very truly yours,

DOWNEY BRAND LLP

*Dictated by the Writer;
Mailed in His Absence
To Avoid Delay*

Matthew J. Weber

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¹ At a minimum, and based upon John C. McMillan's June 10, 2002, memo Caltrans must examine the bid for unbalancing and include its results in the Contract Award Recommendation. Moreover, once Caltrans confirms what it outlined above, that Security's bid is materially unbalanced, the "bid shall be rejected to protect the State's interest."