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ROGERS JOSEPH O'DONNELL

March 28, 2013

**Via Email, Facsimile and U.S. Mail**

Mulissa Smith  
Office Engineer  
Department of Transportation  
1727 30th Street  
Sacramento, CA 95816  
Mulissa.Smith@dot.ca.gov  
916-227-6282

Re: Reply to Windsor's Response to Synergy's Protest of Intended Award Caltrans Project ID 0600020672; Contract No. 06-0N7904

Dear Ms. Smith,

On March 22, 2012, Windsor Fuel Co. ("Windsor") submitted to the California Department of Transportation ("Caltrans") a response to the March 19, 2013 bid protest of our client, Synergy Project Management, Inc. ("Synergy"). Because there are several key assertions in Windsor Fuel's response that are incorrect or misleading, we submit this reply regarding those assertions.

**I. REPLY TO WINDSOR'S ARGUMENTS**

**A. Windsor Does Not Meet the Requirement that It Be Properly Licensed *at the Time of Award***

Windsor argues that, under Public Contract Code section 10164, it did not have to have a proper license *at the time it submitted its bid* because this is a federally-funded project. This is irrelevant, because Synergy is protesting the intended award to Windsor, not the validity of Windsor's bid. As argued in Synergy's written statement in support of its protest, pursuant to Public Contract Code section 20103.5, a contractor must be properly licensed by the time the contract is awarded on a federally-funded job. This comports with the statute cited in Windsor's reply, section 10164,<sup>1</sup> which also requires proper licensing on

<sup>1</sup> While section 20103 5 is specific to local agencies and section 10164 is specific to state agencies, both require proper licensing under state law prior to the award of a contract on a federally-funded job.

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federally-funded jobs prior to award of the contract. "The contract shall not be awarded unless the state agency has verified that the contractor has a valid license in the appropriate classification for the work performed." Pub. Contract Code §10164.

Here, as explained in Synergy's written statement of protest letter (at pp. 2-3) and below, Windsor does not currently have valid licenses in the appropriate classifications to perform the project. Thus, "the contract shall not be awarded" to Windsor.

**B. Traffic Control Work Does Not Qualify as a Type of Work That Windsor May Perform Under Its "Class A" General Engineering License**

Contractors licensed in one classification are prohibited from contracting in another classification without the proper license. 16 CCR §830(b); Bus. & Prof. Code §7117.6. Only specialty contractors are permitted to work outside of their particular license classification for work that is "incidental and supplemental" to their specialty. Bus. & Prof. §7059; 16 CCR §§831, 834(c). A "Class A" general engineering contractor, on the other hand, is limited to the types of work described in Business & Professions Code section 7056. 16 CCR §834.

Traffic control work is not within the areas described in section 7056. The scope of work for a general engineering contractor is limited to:

[F]ixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, powerplants and other utility plants and installations, mines and metallurgical plants, land leveling and earthmoving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above-mentioned fixed works.

Bus. & Prof Code §7056.

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The California Attorney General has confirmed that a general engineering contractor is limited to the type of fixed works described in section 7056 and may not perform other work just because it may be "incidental" to fixed works requiring specialized engineering knowledge and skill. Attorney General Opinion, 2002 Cal. AG LEXIS 33, \*2, 85 Ops. Cal. Atty. Gen. 171, 172 (Cal. AG 2002).

Windsor's reply letter does not cite any contrary authority. In one case cited by Windsor, *Ron Yates Construction Co., Inc. v. Superior Court*, 186 Cal. App. 3d 337 (1986), the court held that a Class A general engineering contractor could construct a residential foundation because it constituted a "fixed work requiring specialized engineering knowledge and skill" under section 7056, even though it was not specifically included in the list of illustrative work. The other case cited in Windsor's reply letter, *Pacific Caisson & Shoring, Inc. v. Bernards Bros. Inc.*, 198 Cal. App. 4th 681 (2011), relies upon this reasoning from *Yates* to hold that a general engineering contractor is entitled to perform excavation and support work for the construction of a medical center. Hence, the cases Windsor cites only stand for the proposition that the "list of fixed works in section 7056 is not exhaustive." *Pacific Caisson & Shoring, Inc., supra*, at 689 (emphasis added).

The traffic control work at issue here is not a "fixed work" that requires specialized engineering skill. It is in no way similar to the examples of fixed work listed in section 7056. California Code of Regulations, Title 16, Division 8, Article 3, describes traffic control work as follows:

A construction zone traffic control contractor prepares or removes lane closures, flagging, or traffic diversions, utilizing *portable* devices, such as cones, delineators, barricades, sign stands, flashing beacons, flashing arrow trailers, and changeable message signs, on roadways, including, but not limited to, public streets, highways, or any public conveyance.

(Emphasis added).

None of these services contribute to a fixed work of construction, and none of them require engineering knowledge. On the contrary, they require knowledge of traffic laws and traffic flow and of the operation of portable traffic devices.

Thus, contrary to Windsor's argument, its general engineering license, and skills in the engineering of fixed works such as paving and earthmoving required for that license, do not allow it to perform traffic control work. A C-31 license is required to perform traffic control work, and Windsor does not have a C-31 license.

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**C. Windsor's Qualifying Partner Is Illegally Qualifying Four Separate Construction Businesses, Thus Invalidating Windsor's "Class A" License**

Contrary to Windsor's argument, a sole proprietorship, such as Michael Telfer's construction company, is included within the three-firm limit for a qualifying individual under Business & Professions Code section 7068.1. This statute defines "Firm" to include "a partnership, a limited partnership, a corporation, a limited liability company, or any other combination or organization described in Section 7068." Bus. & Prof. Code §7068.1(d) (emphasis added). Section 7068 describes the following construction organizations that a licensed applicant may qualify: (1) an *individual*; (2) a partnership or limited partnership; (3) a corporation; and (4) a limited liability company. Bus. & Prof. Code §7068(b)(1)-(4) (emphasis added). Accordingly, Mr. Telfer had already exceeded the three-firm limit when he illegally qualified Windsor's license.

There is no merit to Windsor's argument that Mr. Telfer's qualification of his sole proprietorship was a necessary function of obtaining his license. In fact, Mr. Telfer qualified Continental Western Transportation Co. Inc. in 1988, five years before he qualified his sole proprietorship in 1992. See Exhibit A attached hereto ("Exh."), Contractor's License Detail (Personnel List) for Telfer's sole proprietorship; Exh. B, Contractor's License Detail (Personnel List) for Continental. This is also supported by the fact that Synergy's qualifying individual, Javad Mirsaidi, does not use his Class A license to qualify a sole proprietorship. Exh. C, Personnel License List for Mirsaidi.

Additionally, the evidence belies Windsor's argument that it has not exceeded the three-firm limit because Windsor is a fictitious business name for Telfer Oil Company. If Windsor and Telfer are in fact different names for the same entity, then one would expect that they have the same business phone number and insurance carriers. This is not the case. Windsor's business phone number is 707-838-9751, and its workers' compensation carrier is National Union Fire Insurance Company. See Exh. D, Contractor's License Detail for Windsor. Telfer Oil's phone number is 925-228-1515, and its workers' compensation carrier is Liberty Mutual Fire Insurance Company. See Exh. E, Contractor's License Detail for Telfer Oil.

Even if Windsor and Telfer Oil may technically be the same legal entity, the owners are operating them as separate construction businesses with different employees, as evidenced by the different workers' compensation carriers (not to mention the separate

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contractor's licenses).<sup>2</sup> Thus, Windsor and Telfer Oil qualify as different firms for the three-firm limit in section 7068.1, which was intended to ensure that the qualifying individual does not qualify more construction businesses than he or she is capable of overseeing. See Bus. & Prof. Code §7068.1 (qualifying individual is "responsible for exercising that direct supervision and control of ... construction operations").

#### D. Windsor's License Has Been Automatically Invalidated

Windsor's license was in fact automatically invalidated when it used an improper qualifying individual. A valid license is not issued to a partnership if the qualifying partner "does not meet the qualifications." Bus. & Prof. Code §7071. Here, as explained in Synergy's protest letter (at pp. 3-4), Mr. Telfer did not meet the qualifications of sections 7068 and 7068.1 when he attempted to qualify Windsor, because he was already qualifying three firms at that time. Additionally, a contractor only has 90 days to replace the responsible managing employee, or the license is automatically suspended at the end of the 90 days. Bus. & Prof. Code §7068.2(a). Here, Mr. Telfer was used to improperly qualify Windsor on March 30, 2000, far longer than 90 days ago. See Exh. D.

*Ball v. Steadfast-BLK*, 196 Cal. App. 4th 694 (2011), cited in Windsor's reply, does not hold otherwise. In *Ball*, a licensed contractor entered into a contract using a fictitious name. The court held that this is a violation of the requirement that a contractor conduct business under only one name for each license. *Id.* at 702, citing Bus. & Prof. Code §7059.1(b). However, the court determined that this is only a cause for discipline from the licensing agency, as there is no indication in the statute that automatic invalidation of the license is a consequence of violating this mandate. *Id.* at 703. This is quite different from a violation of the three-firm limit in section 7068.1. Section 7068.1 imposes restrictions on qualifying a valid license in the first place, while section 7059.1 only deals with manner in which business is conducted under an existing license. Moreover, as noted above, Windsor's failure to replace its invalid qualifying partner is analogous to the failure to replace a disassociated qualifying partner within 90 days, which expressly results in automatic suspension. Bus. & Prof. Code §7068.2(a).

It is worth noting that *Ball* would actually provide new grounds for automatically invalidating Windsor's license if, as Windsor asserts, Windsor were in fact

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<sup>2</sup> Synergy does not accept Windsor's bald assertion that it is the same legal entity as Telfer Oil, as it has not provided any supporting evidence. Similarly, Synergy does not accept Windsor's unsupported assertion that Mr. Telfer has at least 20% ownership in all four entities; although this hardly matters since this level of ownership is the bare minimum for even one additional firm, and does not permit a qualifying individual to exceed the strict three-firm limit.

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only a fictitious business name for Telfer Oil. The court in *Ball* noted that a fictitious business entity "is not among the categories of 'persons' defined by the [Contractors State Licensing Law] to whom a contractor's license may issue." *Ball, infra*, 196 Cal. App. 4th at 702. Thus, if Windsor's assertions are true, the license it holds in its own name is invalid because it is fictitious business entity to whom a license may not be legally issued.

**II. CONCLUSION**

As Synergy demonstrated in its written statement of protest, Windsor's bid is nonresponsive, and its deviations are material and therefore may not be waived. Windsor's response letter provides no basis for Caltrans to conclude otherwise. Accordingly, Caltrans must cancel the intended award of the contract to Windsor. Synergy has submitted the lowest responsive bid, so the County should award the contract to Synergy.

Best regards,



Tyson Arbuthnot

TA:jj  
Enclosures  
cc: Aaron P. Silberman  
Patricia Walsh (Via U.S. Mail)

# **EXHIBIT A**



DEPARTMENT OF CONSUMER AFFAIRS

# Contractors State License Board

## Contractor's License Detail (Personnel List)

Contractor License #: 653141

Contractor Name: MICHAEL STEPHEN TELFER

*Click on the person's name to see a more detailed page of information on that person*

NAME	TITLE	ASSOCIATION DATE	DISASSOCIATION DATE	CLASS	MORE CLASS
<a href="#">MICHAEL STEPHEN TELFER</a>	SOLE OWNER	08/27/1992		A	<a href="#">More</a>



# **EXHIBIT B**



DEPARTMENT OF CONSUMER AFFAIRS

Contractors State License Board

Contractor's License Detail (Personnel List)

Contractor License #: 532967

Contractor Name: CONTINENTAL WESTERN TRANSPORTATION CO INC

Click on the person's name to see a more detailed page of information on that person

NAME	TITLE	ASSOCIATION DATE	DISASSOCIATION DATE	CLASS	MORE CLASS
<a href="#">RONALD THOMAS COOK</a>	OFFICER	06/16/1988	06/08/1990		
<a href="#">JOHN ALBIN TELFER</a>	OFFICER	08/18/1988		A	
<a href="#">MICHAEL STEPHEN TELFER</a>	RMO/CEO/PRES	08/18/1988		A	
<a href="#">JUDITH MARIE TELFER</a>	OFFICER	12/11/1996			
<a href="#">WILMA LOIS TELFER</a>	OFFICER	06/08/1990			
<a href="#">JAMES LESLIE FLETCHER</a>	OFFICER	06/08/1990	05/23/1994		

# **EXHIBIT C**



DEPARTMENT OF CONSUMER AFFAIRS

# Contractors State License Board

## Personnel License List for MIRSAIDI, JAVAD

*Click on the license number to see the license detailed page of information for the person you selected.*

License #	Business Name	City	Association Date	Disassociation Date	Status
<a href="#">644102</a>	SYNERGY PROJECT MANAGEMENT	SAN FRANCISCO	05/06/1992		ACTIVE

# **EXHIBIT D**



DEPARTMENT OF CONSUMER AFFAIRS

Contractors State License Board

Contractor's License Detail - License # 776848

**DISCLAIMER:** A license status check provides information taken from the CSLB license database. Before relying on this information, you should be aware of the following limitations.

CSLB complaint disclosure is restricted by law (B&P 7124.6) If this entity is subject to public complaint disclosure, a link for complaint disclosure will appear below. Click on the link or button to obtain complaint and/or legal action information.

Per B&P 7071.17, only construction related civil judgments reported to the CSLB are disclosed.

Arbitrations are not listed unless the contractor fails to comply with the terms of the arbitration.

Due to workload, there may be relevant information that has not yet been entered onto the Board's license database.

License Number	776848	Extract Date	2/10/2013
Business Information	<b>WINDSOR FUEL CO</b> Business Phone Number: (707) 838-9751 P O BOX 709 MARTINEZ, CA 94553		
Entity	Partnership		
Issue Date	03/30/2000		
Expire Date	03/31/2014		

**License Status** ACTIVE  
 This license is current and active. All information below should be reviewed.

Classifications	CLASS	DESCRIPTION
	A	GENERAL ENGINEERING CONTRACTOR
	051	WATERPROOFING & WEATHERPROOFING

**Bonding**  
**CONTRACTOR'S BOND**  
 This license filed a Contractor's Bond with **CONTINENTAL CASUALTY COMPANY.**  
 Bond Number: 929119783  
 Bond Amount: 512,600  
 Effective Date: 01/01/2007  
[Contractor's Bond History](#)

**Workers' Compensation**  
**WORKERS' COMPENSATION**  
 This license has workers compensation insurance with **NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA**  
 Policy Number: 048250231  
 Effective Date: 02/01/2013  
 Expire Date: 02/01/2014  
[Workers' Compensation History](#)

Personnel listed on this license (current or disassociated) are listed on other licenses.

<a href="#">Personnel List</a>	<a href="#">Other Licenses</a>
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# **EXHIBIT E**



DEPARTMENT OF CONSUMER AFFAIRS

Contractors State License Board

Contractor's License Detail - License # 776749

**DISCLAIMER:** A license status check provides information taken from the CSLB license database. Before relying on this information, you should be aware of the following limitations.

CSLB complaint disclosure is restricted by law (B&P 7124.6) if this entity is subject to public complaint disclosure, a link for complaint disclosure will appear below. Click on the link or button to obtain complaint and/or legal action information.

Per B&P 7071.17, only construction related civil judgments reported to the CSLB are disclosed.

Arbitrations are not listed unless the contractor fails to comply with the terms of the arbitration.

Due to workload, there may be relevant information that has not yet been entered onto the Board's license database.

License Number	776749	Extract Date	2/10/2013
TELFER OIL COMPANY			
Business Information	Business Phone Number: (825) 228-1515		
	PO BOX 709 MARTINEZ, CA 94553		
Entity	Partnership		
Issue Date	03/29/2000		
Expire Date	03/31/2014		
License Status	ACTIVE		
	This license is current and active. All information below should be reviewed.		
Additional Information	The license may be suspended on 03/06/2013 if a current workers' compensation insurance policy is not filed with the CSLB.		
Classifications	CLASS	DESCRIPTION	
	A	<u>GENERAL ENGINEERING CONTRACTOR</u>	
	D51	<u>WATERPROOFING &amp; WEATHERPROOFING</u>	
Bonding	CONTRACTOR'S BOND		
	This license filed a Contractor's Bond with:		
	<u>AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA</u>		
	Bond Number: 929119782		
	Bond Amount: \$12,500		
	Effective Date: 01/01/2007		
	<u>Contractor's Bond History</u>		
Workers' Compensation	WORKERS' COMPENSATION		
	This license has workers compensation insurance with:		
	<u>LIBERTY MUTUAL FIRE INSURANCE COMPANY</u>		
	Policy Number: WC2861036901112		
	Effective Date: 02/01/2012		
	Expire Date: 02/01/2013		
	<u>Workers' Compensation History</u>		

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## Facsimile Transmittal Sheet

March 28, 2013

<b>To:</b>	Mulissa Smith Office Engineer Department of Transportation	<b>Phone:</b>	
		<b>Fax:</b>	916-227-6282
<b>From:</b>	Joya Yeung, Assistant to Tyson Arbuthnot		
<b>Re:</b>	Reply to Windsor's Response to Synergy's Protest of Intended Award Caltrans Project ID 0600020672; Contract No. 06-0N7904		
<b>Message:</b>	Please see attached correspondence and enclosures.		

Please call Joya Yeung at 415.956.2828 if you did not receive a total of 17 pages.

Original **WILL** follow.

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