



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

March 24, 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 Kern County in and Near Wasco From 0.7 Mile East of
Corcoran Road to Magnolia Avenue
Caltrans Contract No. 06-0P7504, 06-Ker-46-37.5/49.0
Protest of Bid Submitted by Northwest Paving Company

Dear Mr. Seaberg:

Please consider this letter to be a formal protest of the bid submitted by Northwest Paving Company ("NPC") in connection with Caltrans Contract No. 06-Ker-46-37.5/49.0.

For the reasons stated below, NPC's bid is nonresponsive. NPC's bid must be rejected based on the Department's bidding requirements and strictly-enforced policies.

1. **NPC Listed Two Companies As Subcontractors For Traffic Control and Therefore Is Prohibited From Utilizing Either Company**

In the subcontractor list submitted with its bid, WPC listed both Cal Stripe Inc. and Sambrano Traffic Control as performing traffic control. NPC 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, NPC must self perform the traffic control work and is prohibited from utilizing either Cal Stripe Inc. or Sambrano Traffic Control. See Pub. Contract Code § 4106



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2. **Because NPC Is Prohibited From Utilizing Sambrano Traffic Control As A Subcontractor, NPC Failed To Meet The DVBE Participation Goal of 5%**

On its DVBE commitment form, NPC listed Sambrano Traffic Control as performing \$28,540.00 in traffic control work. However, because NPC listed two subcontractors for the traffic control work, Sambrano Traffic Control cannot be utilized as a subcontractor, reducing the amount of work that NPC committed to DVBE firms to \$36,700.00, or only 3.1%, well short of the 5% mandatory DVBE Goal commitment required for this contract.

3. **The Department's Prior Decisions On Double Listing Of Subcontractors Requires That It Reject NPC'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 DVBE and other goals set for a contract.

NPC should have been aware of this policy when it submitted its bid on No. 06-Ker-46-37.5/49.0. because Teichert Construction had protested a similar protest against Chester Bross Construction Company'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 NPC has patently failed to comply with the Department's bid requirements, NPC's bid is nonresponsive and must be rejected.

Additionally due to the Department recognizing this non responsive bid by NPC and Awarding the Contract to Windsor Fuel Company on March 18, 2014, we feel the Rescission of Award to Windsor Fuel Company is incorrect.

We therefore respectfully request that the Department uphold Windsor Fuel Company's protest and Re-Award of the contract to our company, which submitted the lowest responsive bid for No. 06-Ker-46-37.5/49.0.

Thank you for your careful attention to this protest, and please feel free to contact me if you have any questions.

Sincerely,


Marc Armstrong
Estimator / Project Manager

CC: Mike Fain, Karl Meyers

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER

1727 30th Street, MS-43

SACRAMENTO, CA 95816-8041

PHONE (916) 227-6299

FAX (916) 227-6282

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Flex your power!
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06-0P7504

06-Ker-46-37.5/49.0

NO FED AID

WINDSOR FUEL COMPANY
 1150 WILLOW PASS ROAD
 PITTSBURG CA

94533

B.O. 2/26/14

Dear Contractor:

Your bid proposal for the above noted contract in the amount of \$1,118,975.50 was found to be acceptable and the contract has been awarded to you as indicated below by the Director of Transportation.

The description of the work and location are as follows:

Apply polymer modified asphalt chip seal IN KERN COUNTY IN AND NEAR WASCO FROM 0.7 MILE EAST OF CORCORAN ROAD TO MAGNOLIA AVENUE

A(n) 5 percent DVBE goal was set for this project. Your firm was certified to achieve 8.3 percent DVBE participation.

If you have received this document by facsimile transmittal, the original document will be arriving in the mail along with forms and instructions to execute this contract. Please follow the instructions carefully. If you have questions relative to the execution of the contract, you may call our Contract Awards Section at (916) 227-6299.

A copy of the Engineer's Estimate (bid item) page(s), and Listing of Subcontractor page(s) from your proposal are attached, for your records.

Attachment(s)

Sincerely,

JOHN C. McMILLAN
 Deputy Division Chief
 Office Engineer

By: _____

Date: _____

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
OFFICE ENGINEER, MS 43
 1727 30th STREET
 P. O. BOX 168041
 SACRAMENTO, CA 95816-8041
 PHONE (916) 227-6299
 FAX (916) 227-6282
 www.dot.ca.gov/hq/esc/oc



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February 7, 2014

Facsimile: (209) 263-0123

Mike Bross, Vice President
 Chester Bross Construction, Inc.
 39 California Street, PMB 118
 Valley Springs, CA 95252

06-0Q7704
 06-Tul-43-0.0/9.5
 B.O. 12/18/2013

Dear Mr. Bross:

The Department of Transportation (Caltrans) received a bid from Chester Bross Construction, Inc. (Chester Bross) for contract 06-0Q7704 on December 18, 2013. By this letter, Caltrans notifies Chester Bross that it must perform bid item 3, Traffic Control with its own forces.

Public Contract Code Section 4106 states in pertinent part, "... If a prime contractor fails to specify a subcontractor or 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 contractors bid, the prime contractor agrees that he or she is fully qualified to perform that portion of work himself or herself, and that the prime contractor shall perform that portion himself or herself."

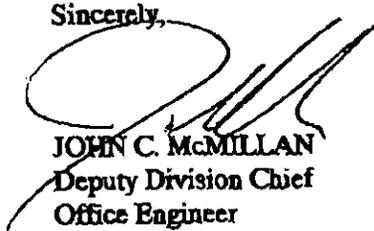
On the Subcontractor List form submitted with its bid, Chester Bross identified the Chrisp Company to perform 95 percent of work bid item 3, Traffic Control and in addition identified and Roll 'N Rock Construction, Inc. (RNR) to perform 8 percent of the work, for a total of 103 percent.

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.

If you have any questions, please contact Mulissa Smith, Contract Awards Branch Chief, at (916) 227-6228.

Sincerely,


 JOHN C. McMILLAN
 Deputy Division Chief
 Office Engineer
 Division of Engineering Services

onecle

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4106. If a prime contractor fails to specify a subcontractor or 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.

If after award of contract, the prime contractor subcontracts, except as provided for in Sections 4107 or 4109, any such portion of the work, the prime contractor shall be subject to the penalties named in Section 4111.

Section: [Previous](#) [4100](#) [4401](#) [4103](#) [4104](#) [4104.5](#) [4105](#) [4106](#) [4107](#) [4107.2](#) [4107.5](#) [4107.7](#) [4108](#) [4109](#) [4110](#) [Next](#)

Speak with a Lawyer in California

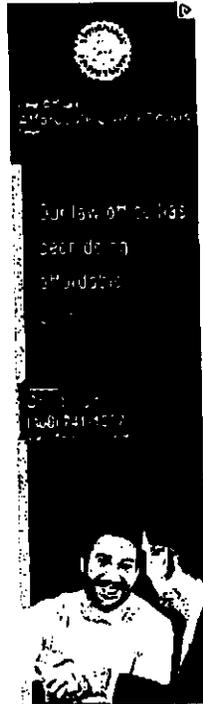
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Last modified: March 17, 2014

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Third Bidder

03-03-14AG9:57 RCVD

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION
CERTIFIED DVBE SUMMARY
 DEB-OE-0102.5 (REV 3/2008)

DISTRICT-COUNTY-ROUTE: 06 - Kern - 46
 CONTRACT NO.: 06-0P7504
 TOTAL BID: 1,168,796.00
 BID OPENING DATE: 2/26/14
 BIDDER'S NAME: Northwest Paving
 DVBE PRIME CONTRACTOR CERTIFICATION: _____

Bid Item Number	Description of Work to Be Subcontracted to DVBE or Materials to Be Supplied by DVBE ¹	For Caltrans Only	DVBE (Name, Telephone No., and Certification No.)	\$ Amount
13	Sweep Screenings		Wells Sweeping (916) 568-0104 Cert # 0000333	31,300.00
3	Traffic Control		Sambromo Traffic Control INC. (916) 687-6472 Cert # 1159740	28,540.00
4	Message Signs			5400.00
Names of first tier DVBE subcontractors and their items of work listed must be consistent with the names and items of work in the Subcontractor List (Pub Cont Code § 4100 et seq.) submitted with the bid. Identify second and lower tier subcontractors on this form.				Total Claimed Participation \$ <u>65,240.00</u> <u>5.6</u> % <u>3.1</u>

- DVBE prime contractors must enter their DVBE reference number or their DBA name as listed with Department of General Services (DVBE prime contractors are credited with 100 percent DVBE participation and need not complete the above table).
- If 100% of an item is not performed or supplied by the DVBEs, describe the exact part, including the planned location of work to be performed, of item to be performed or supplied by DVBE.

Submit to:

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

James Heller 2/26/14
 Signature of Bidder Date
(916) 246-4388
 (Area Code) Telephone Number
James Heller
 Contact Person (Type or Print)

STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION
BID BOOK

Contract No.: 06-0P7504
Bidder: VC0000015345 - Northwest Paving

Project ID: 0612000250

SUBCONTRACTOR LIST

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 business name, location, and description of subcontracted work and submit with the bid. Complete bid item numbers and percentage of bid item subcontracted and submit with the bid, or fax to (916)227-6282 within 24 hours after the bid opening. Failure to provide complete information in all areas within the time specified will result in a nonresponsive bid.

List this sub? Yes

1) Business Name: ~~Cal Stripe Inc.~~
City: Colton State: CA
Description of Subcontracted Work:
Striping, Markings, markers, Removal

Bid Item Numbers:

1
Percentages of Bid item Subcontracted:

~~50~~
Bid Item Numbers:

3
Percentages of Bid item Subcontracted:

5
Bid Item Numbers:

7-8
Percentages of Bid item Subcontracted:

100
Bid Item Numbers:

14-19
Percentages of Bid item Subcontracted:

100
Bid Item Numbers:

Percentages of Bid item Subcontracted:

List this sub? Yes

2) Business Name: Sambrano Traffic Control Inc.
City: Wilton State: CA
Description of Subcontracted Work:
Traffic Control, Message Signs

Bid Item Numbers:

3
Percentages of Bid item Subcontracted:

~~15~~
Bid Item Numbers:

4
Percentages of Bid item Subcontracted:

54
Bid Item Numbers:

Total Percentage
20%

TK Item # 3
28,540.00

65,240 Total DVB &
Reduced by \$28,540.00

New DVB 3.1%

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
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March 21, 2014

Facsimile: (925) 427-1216

S/A Mike Fain
 James Heller, ~~Owner~~
 Windsor Fuel Company
 1150 Willow Pass Road
 Pittsburg, CA 94533

06-0P7504
 06-Ker-46-37.5/49.0
 B.O. 2/26/2014

Notice of Award Rescission

Dear Mr. Heller,

Bids were opened on February 26, 2014 for polymer modified asphalt chip seal in Kern County in and near Wasco from 0.7 mile east of Corcoran Road to Magnolia Avenue.

This project was awarded to your company on March 18, 2014. Subsequent to the award, the Department determined that the third bidder, Northwest Paving, is eligible for the Small Business Preference with a comparison amount of \$1,118,796.00, which makes them low bidder on this project. Therefore, the Department has rescinded the award to Windsor Fuel Company.

If you have any questions, please contact Mulissa Smith, Contract Awards Branch Chief, at (916) 227-6228.

Sincerely,

JOHN C. McMILLAN
 Deputy Division Chief
 Office Engineer
 Division of Engineering Services

Attachment

1150 Willow Pass Road
Pittsburg, CA 94565
Phone: (925) 427-6266 Fax: (925) 427-1216
Contractor's License #984141-A

Windsor Fuel Company

WFC

To: Caltrans

From: Marc Armstrong

Attention: Office Engineer

Fax: 916-227-6282

Pages: 10

Phone: 916-324-6985

Date: 3/24/2014

Re: Contract No. 06-0P7504 Northwest

Paving Company Protest

Urgent

For Review

Please Comment

Please Reply

Please Recycle

● **Comments:**

Please see attached our Formal Protest to Contract No. 06-0P7504, 06-Ker-46-37.5/49.0 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
