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November 12, 2013

John McMillan  
Deputy Division Chief  
Division of Engineering Services  
Caltrans Office Engineer, MS 43  
1727 30<sup>th</sup> Street  
Sacramento, CA 95816

**Via Fax – 916-227-6282**  
**and Overnight Delivery**

Re: Response to Bid Protests — Contract No. 06-0Q5504 (Federal-Aid Project)

Dear Mr. McMillan:

McInerney & Dillon are legal counsel to Taber Construction, Inc., the apparent low bidder for the above contract. On behalf of Taber, this responds to the separate bid protests by WABO Landscape & Construction, Inc. (second low bidder) and by Clean Cut Landscape (third low bidder) contending that Taber’s bid should be rejected as non-responsive. Specifically, WABO and Clean Cut argue that there is an inconsistency between Taber’s Subcontractor List and its DBE Commitment form that makes its bid ambiguous. We respectfully disagree and, as explained below, submit that there is no inconsistency or ambiguity whatsoever.

Please be aware that your November 7 letter—requesting Taber’s response by the next day, November 8—was not timely received. Indeed, from the face of your letter it appears that your staff faxed it to WABO instead of to Taber. This was only discovered yesterday when a copy of your letter was found on Caltrans’ website.

As a threshold matter, we wish to emphasize an important point: “A bid is responsive if it promises to do what the bidding instructions demand.” *Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1341. Moreover, bid *responsiveness*—as distinct from bidder *responsibility* of a bidder—is determined from the face of the bid without resort to information or investigation outside the bid documents. See, e.g., *Great West Contractors, Inc. v. Irvine School District* (2010) 187 Cal.App.4<sup>th</sup> 1425, 1453-1454; *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4<sup>th</sup> 359, 368 (“MCM”); *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal. App.4<sup>th</sup> 1432, 1438.

John McMillan  
November 12, 2013  
Page 2

As a Federal-Aid project subject to the Federal Highway Administration's DBE regulations (49 C.F.R. Part 26), the Notice to bidders specified a DBE Contract goal of 7 percent. It is also significant that Taber's bid exceeded the Caltrans goal by committing to a combined DBE subcontractor and DBE material supplier participation of 7.1 percent for this contract.<sup>1</sup> The "inconsistency" the two protestors complain about are the different dollar amounts shown in Taber's Subcontractor List and its separate DBE Commitment form. What they overlook, however, is that the two forms serve substantially different purposes. The first, the Subcontractor List, is to comply with the statutory requirements of the Subcontractor Listing Law (Public Contract Code § 4100 et seq.) intended to discourage the "shopping" and/or "peddling" of subcontractor bids. As such, the Subcontractor Listing Law requires only work to be performed by "subcontractors" to be listed. That requirement does not extend to the listing of material suppliers that are not licensed "contractors." (See Public Contract Code § 4113).

On the other hand, the Caltrans DBE Commitment form serves a completely different purpose—to document the extent to which the bidder will meet the DBE participation goal for the contract if its bid is accepted. Significant is the fact that the DBE goal may be achieved by the participation of material suppliers as well as subcontractors. Further, the DBE Commitment form does not require the bidder to identify whether the DBE will be supplying materials to a subcontractor or directly to the bidder itself, merely that will be participating in the project.

Taber's bid listed A-C Electric Company as the subcontractor that will perform 100 percent of the electrical work included in Bid Items 35 and 36. On the other hand, as part of its commitment to foster and promote DBE participation, and prior to its receipt of bids from prospective electrical subcontractor, Taber solicited a proposal from material supplier Catco Services to provide electrical equipment for the project. Given that Taber ultimately subcontracted certain of the electrical work to AC, Taber fostered a relationship between Catco and AC so that the intent of the DBE program could be implemented on this project.

As part of Taber's pre-bid negotiations with AC, that subcontractor agreed to purchase from Catco electrical equipment valued at \$382,000 for AC's performance of the work identified as Bid Items 35 and 36. Taber will not be purchasing those materials for AC to install. In addition, Taber intends to purchase directly from Catco electrical equipment valued at \$200,000 intended for that portion of the work identified in Bid Item 12, work that

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<sup>1</sup> We also note that WABO's bid failed to meet the DBE goal, demonstrating only 3 percent DBE participation.

John McMillan  
November 12, 2013  
Page 3

will be performed by Taber itself. All told, there is a commitment for Catco to provide electrical equipment for this project with a total value of \$582,000.

As previously stated, Caltrans' DBE Commitment form does not require that the preparer delineate at which tier the DBE vendors are participating but only that the DBE vendor be identified by name and dollar amount. Catco was correctly identified as it will be providing \$582,000 of electrical equipment for this project. Notwithstanding WABCO's arguments to the contrary, the facts support the conclusion that there is no error or ambiguity apparent on the face of Taber's bid and that it is fully responsive to Caltrans' requirements.

As for WABO's frivolous attempt to cast doubts on whether Catco may be credited as a DBE vendor, the fact remains that Catco is currently certified as a DBE by BART. As such, Taber is entitled to rely on the BART certification as listed per the state's Unified Certification Program. Moreover, BART's certification of Catco includes both "D3690 Misc Electrical Equipment & Supplies" and "F5060 Electrical Goods"—clearly appropriate for the materials identified for this project.

Clean Cut also protests that Catco's letter of commitment is insufficient for DBE participation credit and that a "physical sales quote or invoice" is required. However, we can find nothing in either the federal DBE regulations or the applicable Caltrans Standard Specifications to support that argument. Alternatively, even if such a requirement existed for this solicitation, Taber's provision of Catco's letter of commitment—instead of a sales quote or invoice—is at most a minor, inconsequential irregularity that may be waived. (See *MCM, supra*, 66 Cal.App.4<sup>th</sup> at 371-372). There is simply no basis in fact or logic from which to conclude that submitting only Catco's letter of commitment could have affected Taber's bid price or afforded it an unfair advantage in bidding.

Finally, we note that Clean Cut also argues that there is no consistency between Taber's Subcontractor List and DBE Commitment pertaining to DBE subcontractor KRC Safety. While Taber listed KRC for 100 percent of the Bid Item 3 work, in its DBE Commitment form Taber identifies the DBE amount of KRC's work at \$36,080. Since Taber's lump sum bid for Bid Item 3 is \$50,000, Clean Cut jumps to the conclusion that there is an inconsistency that makes Taber's bid non-responsive. On closer examination, however, it is apparent that Clean Cut is comparing "apples to oranges" by ignoring the prime contractor's markup. Moreover, the fact that Taber's bid item price is higher than KRC's proposal is irreverent; Taber has committed \$36,080.00 as indicated in its DBE commitment form to KRC.

In conclusion, neither the protest by WABO nor that by Clean Cut have any merit. Accordingly, we ask that you deny the protests and proceed to award the contract to Taber as

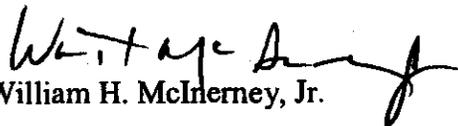
John McMillan  
November 12, 2013  
Page 4

the lowest responsible bidder, as required by law.

Thank you for your attention to this matter. Please feel free to contact me if you have any questions regarding the above.

Very truly yours,

McINERNEY & DILLON, P.C.

  
William H. McInerney, Jr.

cc: WABO Landscape & Construction, Inc.  
(Fax 510-724-2391)

Clean Cut Landscape  
(Fax 559-322-2071)

Bret Taber, Taber Construction, Inc.

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## FACSIMILE TRANSMISSION

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**TO:** CALTRANS  
**ATTN:** John McMillan, Deputy Division Chief  
Division of Engineering Services  
**FAX:** (916) 227-6282  
**RE:** **Contract No. 06-0Q5504**  
Taber Construction's Response to Bid Protests

**FROM:** WILLIAM H. MCINERNEY, JR.  
**DATE:** November 12, 2013  
**PAGES:** 5 (Including cover)

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If you do not receive all pages indicated or there is a problem with the quality of the facsimile transmission that follows, please call (510) 465-7100.

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**MESSAGE:** Please see attached.

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