

January 2, 2015

Via Fax and U.S. Mail, Certified

Mr. John C. McMillan
Deputy Division Chief
Department of Transportation
Division of Engineering Services
Office Engineer
P.O. Box 168041, MS-43
Sacramento, CA 95816-8041

RE: Contract No. 06-432604; Souza Construction, Inc.

Dear Mr. McMillan:

My office is in receipt of your December 9, 2014, letter to our client, Souza Construction, Inc. ("Souza"), wherein you have notified Souza that Caltrans has deemed Souza's bid for the above-referenced contract nonresponsive. It appears that Caltrans has based that finding on a determination that Souza expanded the scope of work for certain subcontractors between the time Souza submitted its original bid package containing preliminary information on the Subcontractors List and Souza's submission of the 24-hour Subcontractors List the following day.

We believe that Caltrans has made this determination in error and would like to direct your attention to the governing statutes and how the operative facts should be viewed in light of the controlling legal authority.

The controlling statute is Public Contract Code § 4104 (operative July 1, 2014). Section 4104 obligates Caltrans to request certain information from bidders, and it provides detail on *what* information is to be received and *when* it is to be received. Section 4104(a)(1) provides in relevant part that bidders must provide "[t]he name, the location of the place of business, and the California contractor license number of each subcontractor who will perform work or labor or render service to the prime contractor" (Emphasis added).

Section 4104(a)(3)(A) provides that "*any information requested by [Caltrans] . . . concerning any subcontractor who the prime contractor is required to list . . . other than the subcontractor's name, location of business, and California contractor license number, may be submitted by the prime contractor up to 24 hours after the deadline established by [Caltrans]" (Emphasis added). Section 4104(a)(3)(B) makes the use of the 24-hour extension of time referenced in § 4104(a)(3)(A) optional by the agency.*

Thus, § 4104 provides Caltrans with the option of allowing bidders to submit additional information regarding subcontractors required to be listed up to 24 hours after the initial bid submission, so long as in the initial bid submission, the bidder lists: 1) the subcontractors'

names; 2) the subcontractors' location of business; and 3) the subcontractors' California contractor's license number. By the plain language of the statute, no other information concerning any subcontractor was required to be submitted by any bidder on the project in question with their initial bid submission.

In the instant situation, it should be undisputed that Caltrans elected to utilize the extra 24-hour period for soliciting additional subcontractor information from bidding prime contractors. It is an elementary corollary that once Caltrans elected to utilize that optional additional 24-hour period provided in § 4104(a)(3)(A), it was then incumbent upon Caltrans to follow and apply that procedure to each bidder.

The Subcontractor List utilized by Caltrans requests the following types of information on subcontractors required to be listed: 1) Business Name; 2) Location City; 3) California Contractor License Number; 4) Description of Portion of Work; 5) Bid Item Numbers; and 6) Percentage of Bid Item Subcontracted. Of the 6 categories of information requested by Caltrans, only items 1-3 (subcontractor business name, location, and license number) are required to be given with the initial bid submission according to the plain language of § 4104(a)(1) and (a)(3)(A). Items 4-6 (description of portion of work, bid item numbers, and the percentages of bid items subcontracted) are categories of information that § 4104(a)(3)(A) affirmatively allows the bidder to submit 24 hours after the bid submission deadline (assuming the agency in question has elected to use the optional additional 24-hour period, as Caltrans did here).

Section 4104(a)(3)(A) does not provide Caltrans with discretion to pick and choose what types of information it requests up front with the initial bid submission versus that which it requires 24 hours after—the plain language of the statute states that the agency will get precisely three items of information with the initial bid submission (subcontractor name, location and license number) and all additional information desired or requested by the agency may be provided by the bidding contractor up to 24 hours later (“*any information requested by the . . . department . . . concerning any subcontractor who the prime contractor is required to list . . . other than the subcontractor's name, location of business, and California contractor license number, may be submitted by the prime contractor up to 24 hours after the deadline established by the . . . department . . . for receipt of bids . . .*”). § 4104(a)(3)(A) (emphasis added).

The problem in the instant situation is that Caltrans has provided a form which conflicts with the language and dictates of § 4104. Caltrans' Subcontractor List requests the three *required* items with the initial bid—subcontractor name, location and license number—and it *also* requests/requires with the initial bid submission one item of information *not permitted* by § 4104(a)(3)(A); to wit, *the portion of work to be provided by each subcontractor*. Caltrans' Subcontractor List provides that within 24 hours of the bid opening, the bidder must submit the additional information from the Subcontractor List, including bid item numbers and the respective percentages of each bid item number to be performed by the previously listed subcontractors. To avoid conflicting with the plain language of § 4104(a)(3)(A), Caltrans'

Subcontractor List should and must indicate that the portions of work to be performed by each listed subcontractor is information that may be submitted by the bidding contractor up to 24 hours after bid opening (or other deadline set by the agency). *Caltrans cannot require this additional "portion of work" information with the initial bid submission unless it elects to forgo using the additional 24 hour period altogether in accordance with § 4104(a)(3)(B).*

Turning now to the facts of Souza's submissions, it is readily apparent that Souza acted in complete compliance with the requirements of § 4104. With its initial bid submission, Souza included the information *required* to be provided by § 4104(a)(1) and (a)(3)(A); each subcontractors name, place of business, and California contractor license number. Within 24 hours after the deadline established by Caltrans, Souza provided all additional information above and beyond that required by § 4104(a)(3)(A); namely, each listed subcontractors' portion of work, bid item numbers, and the percentage of each bid item number to be performed. This is what the statute requires, and it is the *procedural right that the statute bestows on a bidder* such as Souza. The fact that Souza *also* included with its initial bid submission *some* information regarding the portion of work that the listed subcontractors were to perform is immaterial. The information was not required to be given at that time and the information was not inaccurate, even if it may be argued that it was not complete. Souza was not obligated to provide complete information regarding each listed subcontractors' portion of work at the time of bid submission. Within the relevant 24 hour period, Souza provided complete and accurate information regarding all listed subcontractors.

As such, Caltrans has now put itself in a position where it is purporting to summarily disqualify Souza's bid as nonresponsive where Souza followed the strict letter of the law. Caltrans cannot place the structure and language of its internally produced bidding solicitation documents over the language and structure of the actual law. We know of no authority which supports the proposition that a bidder may be found nonresponsive for gratuitously providing accurate but incomplete information *before the time it is required to be submitted by law* and thereafter providing complete and accurate information at the time *actually required by law*.

It is worth noting that Caltrans seems to be laboring under some confusion about the requirements of § 4104 and the interplay with its bidding forms. In addition to the problem outlined above, Caltrans purported to disqualify as nonresponsive Emmett's Excavating, Inc. for reasons similar to those given with regard to Souza. Interestingly, in its letter to Emmett's (addressed to "Mr. Souza" in the salutation in error, it appears), Caltrans quotes language from the directions on a Subcontractors List that was not apparently used on this bid solicitation, and certainly not submitted by Emmett's as their Subcontractor List. It may be that Caltrans simply needs to do some fine tuning (and perhaps pruning) to the bid solicitation documents it is utilizing and relying upon.

In any event, Caltrans will find itself on extremely tenuous legal grounds if it decides to maintain its previous determination that Souza's bid was nonresponsive where Souza has complied with

Gerald C. Weaver, of Counsel

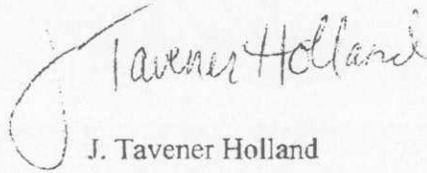
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the plain language of the operative statute and Caltrans has provided a form and instructions that fatally conflict with that statute. We urge Caltrans to reconsider its position on this matter for the reasons set forth herein.

Souza is the lowest responsive, responsible bidder and should be awarded this contract accordingly. It is worth noting that Caltrans would not only benefit by complying with the law, but would also reap the additional benefits of saving the taxpayers' money and actually meeting the stated DBE goal on the contract, which Souza has met and MCM has not. Furthermore, if it makes matters easier, Souza can self-perform any work that is claimed to be "expanded" without affecting its DBE goal or any other requirement or limitation on the use of subcontractors.

For the reasons set forth herein, we urge Caltrans to reconsider its determination that Souza's bid is nonresponsive and immediately proceed to award this contract to Souza. Should anyone have any questions or concerns regarding the contents of this correspondence, please do not hesitate to contact the undersigned.

Very truly yours,



J. Tavener Holland

JTH/jer

cc:
Client
Gerald C. Weaver, Esq.

Suzette C. Weaver of Counsel

LAW OFFICES J. Tavener Holland

LAW OFFICES OF J. TAVENER HOLLAND

Facsimile Transmittal Sheet

TO: John C. McMillan

FROM: J. Tavener Holland

Company: Dept of Transportation

Date: 01/02/15

Fax Number: 916-227-6282

No. of Pages (Including Cover): 5

Phone Number:

Sender's Reference No.:
805-781-0828 (fax)

RE: Contract No. 06-432604

Your Reference No.:
805-781-0788 (phone)

Urgent

For Review

Please Comment

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Notes/Comments:

Please see attached correspondence