

*Build the Best. Be the Best.*



August 15, 2014

Flatiron West Inc.  
1770 La Costa Meadows Drive  
San Marcos, CA 92078  
760 916 9100 MAIN  
760 916 9101 FAX  
www.flatironcorp.com

Via Facsimile and Certified Mail

John C. McMillan  
Department of Transportation  
Division of Engineering Services  
Office Engineer  
1727 30th Street  
Sacramento, CA 95816-8041

**Re: Construction on State Highway in San Bernardino County on Route 138 Near Phelan from 0.6 Mile West of Phelan Road to the Junction of Route 15 and on Route 2 from 0.1 Mile North of Wild Horse Canyon Road to Route 138, Contract 08-3401U4  
Response to Protest of Skanska USA Civil West**

Dear Mr. McMillan:

Flatiron/Hardy & Harper A Joint Venture ("Flatiron/Hardy") is the low bidder on the above-referenced project. This responds to the protest of our bid by Skanska USA Civil West ("Skanska") dated August 13, 2014.

On bid day, Flatiron/Hardy listed Pavement Recycling Systems ("PRS") on the Subcontractor List form with the description of work "Cold Plane AC and Related (Partial)". As required by the Bid Documents, Flatiron/Hardy listed PRS's bid items and percentages in its post-bid Subcontractor List.

In its protest, Skanska contends Caltrans must award it the project because Bid Items 49 and 99 fall outside Flatiron/Hardy's bid-day description for PRS' scope—"Cold Plane AC and Related." The alleged deviation, according to Skanska, violates: (1) the Subletting and Subcontracting Fair Practices Act (the Listing Law); and (2) Caltrans listing requirements.

Skanska falsely characterizes the three scopes as vastly different, such that Bid Items 49 and 99 cannot be considered cold planing of AC. In fact, they are the same operation by the same equipment—the only difference is the intensity of pressure:

Bid Item	Basic Operation	Intensity
49 – Remove AC	Grinding AC using a cold planer.	Grinding deeply to remove the AC.
61 – Cold Plane AC	Grinding AC using a cold planer.	Grinding shallowly to level the AC.
99 – Rumble Strip in AC	Grinding AC using a cold planer.	Grinding intermittently to cut rumble strip in AC.

The same operators perform all three items with a cold planer. As all three Bid Items involve cold planing of AC, they fall within the first three words of Flatiron's bid-day description: "Cold Plane AC." For this reason alone, Skanska's protest is without merit.



## *Build the Best. Be the Best.*

Flatiron/Hardy included the phrase "and related" on its bid-day description of work for PRS. This is consistent with the Listing Law and the Bid Documents. The Listing Law requires bidders disclose the "portion of the work that will be done" by the subcontractor. (PCC 4104(b)) The Bid Documents require only a "Description of Subcontracted Work." In practice, Caltrans (and all California public entities with which we are familiar) have required a general statement of the subcontracted scope (e.g., electrical, reinforcing steel, excavation, etc.). Bidders add—and owners accept—the phrase "and related" to indicate related/ancillary work to be performed by the subcontractor.<sup>1</sup>

Bid Items 49, 61 and 99 are "related" to cold planing AC because these items are performed with the use of an AC cold planer. It is the same equipment and same basic construction operation—the only difference is the intensity. Skanska contends Bid Items 49 and 99 are not "related" to cold planing AC based on four arguments: (1) "is a separate [bid] item[s] of work;" (2) they have "separate specifications;" (3) they are permanent work rather than temporary work; and (4) they are "not performed in conjunction with" Bid Item 61. This four-element test is fabricated by Skanska to misrepresent the listing. Summarily, Bid Items 49 and 99 are "cold plane AC" because they are the application of a cold planer to AC.

For example, Prime Contractors list subcontractors for Reinforcing Steel and Related (Partial). In addition to the Bid Items entitled Reinforcing Steel, there is Reinforcing Steel work within various items such as approach slabs, minor concrete, concrete barrier, etc. This listing of various items that have a Reinforcing Steel component under the description Reinforcing Steel and Related (Partial) is routinely accepted by Caltrans. Likewise, cold planing, as an operation, is clearly a common component of Bid Items 49, 61, and 99.

In addition, Skanska mischaracterizes three past Caltrans bid rejections to support its claim.

- Contract No. 08-0C1214: On this bid, the bid-day description was "roadway ex/base-clear grub (partial)" (no mention of related work). The bidder added Duff to the subcontractor's scope post-bid. Duff consists of chipping, stockpiling, and reapplying vegetation to disturbed soil areas.

The past bid is inapplicable to this case. The Bidder modified its post-bid Subcontractor List by adding the scope of Duff. This is additional scope due to the Bidder specifically listing the description of work as Roadway Ex/Base-Clear Grub (Partial). The item Duff is not included in this specific description. The scope of Duff referenced in this example is clearly a different scope of work from Roadway Ex/Base-Clear Grub (Partial) that is often performed by a different subcontractor. Further, the word "Duff" cannot be used as a description of an operation that is common to Roadway Ex/Base-Clear Grub (Partial). For Contract 08-3401U4, the Bid Items at issue use the same equipment (cold planes) performing the same task (cold planing)—just at different levels of intensity.

- Contract No. 02-2E5104: On this bid, the bid-day description was "striping and mobilization" (no mention of related work). Caltrans rejected the bid because the bidder added the "pavement marker" bid item to the subcontractor's scope in its post-bid listing.

<sup>1</sup> This standard fulfills the purpose of the listing requirement: prevention of bid shopping. If a successful bidder tries to bid shop, the subcontractor may enforce its statutory right to perform the work by proving: (1) it was listed in the bid for a general area of work; and (2) its proposal to the bidder is consistent with the general area of work listed in the bid. Using these documents, the bid and subcontractor's proposal, the subcontractor can prevent the bidder from taking away any portion of its work.



*Build the Best. **Be the Best.***

As an initial matter, it is ironic that Skanska included this rejection in its bid protest. In its bid for this job, Skanska listed Cal-Stripe for "Striping and Related." In its post-bid list, Skanska included "Bid Item 41: Remove Pavement Marker" in Cal-Stripe's scope. If anything, this past bid is precedence for rejection of Skanska's bid (i.e., pavement marker work does not fall within the definition of striping).

In any case, this past bid rejection does not apply to Flatiron/Hardy's bid. A pavement marker is clearly not a stripe and is not installed by a striping machine. Conversely, the three scopes Flatiron/Hardy allocated to PRS consist of grinding AC with the same equipment, cold planer.

- Contract No. 04-3A23U4: On this bid, the bid-day description was "Bridge Structures," while the post-bid list added retaining walls and sound walls. There is no reasonable argument for the notion that retaining walls and sound walls have any similarity to building bridge structures.

Skanska also enclosed examples of bidders using separate subcontractors for rumble strips. The distribution of work by other bidders on other projects has no bearing on the validity of Flatiron/Hardy's listing obligations.

In summary, the three Bid Items at issue consist of grinding AC using a cold planer and is subcontracted to a company that performs this specific scope of work. Flatiron/Hardy retained a single subcontractor, PRS, to perform this work using its cold planers and described the work in its bid as "cold plane AC and related." Flatiron/Hardy did not add or change the scope post-bid.

Skanska's protest has no merit and should be rejected, therefore, Flatiron/Hardy respectfully requests that the contract be awarded to Flatiron/Hardy.

If you have any questions regarding this matter please feel free to contact the undersigned at 714-482-5259 or [cpeich@flatironcorp.com](mailto:cpeich@flatironcorp.com).

Thank you.

A handwritten signature in black ink, appearing to read "C. Peich".

Christian M. Peich

Attorney-in-fact

Flatiron/Hardy & Harper A Joint Venture