



February 7, 2012

Mr. John McMillan
Deputy Division Chief
State of California Department of Transportation
Division of Engineering Services, Office Engineer, MS-43
1727 30th Street
Sacramento, CA 95816-8041

Via Fax & Overnight Carrier
Fax: 916.227.6282

RE: Caltrans Contract Number 09-347804, 09-Mno-167-0.0/10.0 ("Project")

SUBJECT: Improper Nonresponsive Determination

Dear Mr. McMillan:

Granite Construction Company ("Granite") is in receipt of the California Department of Transportation's ("Caltrans" or "Department") letter of January 31, 2012, indicating that the bid submitted by Granite for the above referenced Project has been deemed nonresponsive. Granite strongly disagrees with this determination and submits, for the reasons stated herein, that such determination is erroneous and must be rectified. The determination that Granite's proposal is nonresponsive is predicated on the determination by Caltrans that Dependable Petroleum Products, Inc. ("Dependable"), a certified DVBE, is not performing a commercially useful function citing Military & Veterans Code §999(b)(5)(B)(i)(ii)¹. Specifically, the letter states "[Dependable] is an extra participant in the purchase of paving asphalt for this project because *it does not take possession of the product*". This conclusion is absolutely incorrect. Dependable does, in fact, take possession of the product and will be performing a commercially useful function for the Project, *as it has done on other Caltrans projects in which it has performed the exact same functions*. Granite's bid is fully responsive and Granite respectfully requests that Caltrans reconsider its determination and award the Contract to Granite in its capacity as the lowest responsible

¹ §999(b)(5)(B)(i)(ii) provides as follows: 999. (b) As used in this article, the following definitions apply: (5)(B) "Disabled veteran business enterprise contractor, subcontractor, or supplier" means any person or entity that has been certified by the administering agency pursuant to this article and that performs a "commercially useful function," as defined below, in providing services or goods that contribute to the fulfillment of the contract requirements: (i) A person or an entity is deemed to perform a "commercially useful function" if a person or entity does all of the following: (I)(aa) Is responsible for the execution of a distinct element of the work of the contract. (ab) Carries out the obligation by actually performing, managing, or supervising the work involved. (ac) Performs work that is normal for its business services and functions. (II) Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices. (ii) A contractor, subcontractor, or supplier will not be considered to perform a "commercially useful function" if the contractor's, subcontractor's, or supplier's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of a disabled veteran business enterprise participation.

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and responsive bidder. Alternatively, Granite requests a hearing or other proceeding in which it is given the opportunity to present its case.

A. Granite's Bid Was Responsive: Dependable Is Performing a Commercially Useful Function

Granite timely submitted its bid and accompanying Certified DVBE Summary for Caltrans Contract No. 09-347804. Caltrans subsequently notified Granite that its bid was nonresponsive because its certified DVBE supplier, Dependable, is purportedly not performing a commercially useful function for the Project. Under California law, an entity qualifies as a DVBE and a bidder may obtain DVBE participation credit based on that entity, when the entity has been certified and is performing a "commercially useful function ... in providing services or goods that contribute to the fulfillment of the contract requirements." (See footnote 1)

1. Dependable Is a Certified DVBE

Dependable is a California corporation. The president of Dependable, Peter Mosher, is a disabled veteran. Dependable, is a California certified DVBE (Supplier #61779) as evidenced by Dependable's DVBE Certification (copy attached), issued by the State of California (<http://www.bidsync.com/DPXBisCASB>). Dependable is certified to provide "Asphalts" (UNSPSC product code 301216). By being classified as an asphalt supplier, Dependable regularly distributes asphalt petroleum products, such as asphalt oil, to contractors, such as Granite.

2. Dependable Is Responsible for the Execution of a Distinct Element of the Work of the Contract; Is Carrying Out its Obligation by Actually Performing, Managing or Supervising the Work; and Is Performing Work that Is Normal For its Business Services

According to the letter from Caltrans, Dependable "is an extra participant in the purchase of paving asphalt for this project because it does not take possession of the product". This is clearly not the case. The column contained in the Certified DVBE Summary Form captioned "Description of Work to Be Subcontracted to DVBE or Materials to Be Supplied by DVBE" (supplied at bid time by Granite in support of its bid) states that Dependable is to "Supply & Deliver Asphalt Oil". Asphalt oil (aka liquid asphalt or paving asphalt) is a necessary *component* used in the manufacture of hot mix asphalt ("HMA"). Indeed, the purchase of this component from Dependable is necessary to Granite's manufacture of HMA for the Project. Dependable is not involved in the manufacture or transportation of HMA. Instead, Dependable is responsible for the distribution and transport of asphalt oil to Granite for Granite's use in the production of HMA for the Project. Dependable is a regular DVBE dealer of asphalt oil (and other asphalt petroleum products) and, as substantiated by the attached Certification of Dependable as a qualified DVBE, supplies and distributes asphalt oil to manufacturers of HMA (such as Granite). As noted below, Caltrans has recognized and accepted Dependable's role in this function on other projects. 49 CFR §26.55(2)(ii)(B) is instructive in this matter. It provides:

"A person may be a regular dealer in such bulk items as *petroleum products*, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both *owns and operates distribution equipment for the products*. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis." (Emphasis Added)

Dependable, in the ordinary course of its business, negotiates, purchases and takes possession of asphalt oil from petroleum refiners and is responsible for payment for asphalt oil it purchases. From the time Dependable takes delivery of asphalt oil at the refinery until such time as it delivers it to its customer, it is in possession of the asphalt oil and has care, custody and control over it. Dependable is solely responsible for ensuring the availability of the asphalt oil in sufficient quantities to meet the needs of its customers such as Granite.

With respect to this Project, Dependable will purchase asphalt oil from a petroleum refiner, take possession of it and will distribute it to Granite. Title to the asphalt oil will pass from the petroleum refiner to Dependable when Dependable receives it at the refinery. From the time that Dependable receives the asphalt oil at the refinery, it has possession of it and bears all risk of loss to the product until such time as it delivers it to Granite. When the asphalt oil is finally delivered to Granite, title to the asphalt oil will pass from Dependable to Granite. Dependable is required to warrant to Granite that Dependable (i) has good title to the asphalt oil at the time of delivery to Granite and (ii) will make timely payment therefore. Furthermore, Dependable is responsible for providing a product that meets appropriate specifications and is free from defects.

Accordingly, Dependable is performing a commercially useful function for this Project: Dependable is (a) responsible for the execution of a distinct element of the work of the contract (the supply and distribution of asphalt oil); (b) carrying out its obligation by actually performing, managing and supervising the procurement, supply and distribution of the asphalt oil (Dependable takes possession of the asphalt oil and distributes it); and (c) performing work that is normal for its business services and functions (as evidenced in the attached Certification and Caltrans' acceptance of Dependable as a dealer in asphalt products on other jobs (see below), Dependable acts as a dealer of asphalt oil in the normal course of its business). This reflects a standard practice in the industry and needs to be recognized as such.

Additionally, the determination made by Caltrans is contrary to the spirit underlying the DVBE program. It is well established that the DVBE program has been initiated and is in place to ensure that a certified DVBE (such as Dependable) is given a greater opportunity to compete for a portion of state funds through either direct award or subcontracting efforts and also to promote self-reliance for California's disabled veterans by offering them the opportunity to gain experience in business. The Department's decision in this matter is contrary to the goals of the DVBE program. While the concept of performing a commercially useful function is intended to ensure that the program is not abused, where a DVBE performs in accordance with standard practices in the industry, no purpose is served by denying its status as a functioning DVBE and frustrating the intent of the DVBE program.

It is interesting to note that Dependable has previously been recognized by Caltrans as a DVBE supplier and distributor of asphalt oil on other jobs performed by Caltrans including at least two projects performed by Granite: Contract Number: 08-0E1114 and Contract Number: 11-293104. The determination by the Department in this matter has resulted in inconsistent determinations by a state agency that can only be characterized as arbitrary at best. See additional projects listed in footnote ²

²The following is a list of Caltrans' projects which Dependable supplied asphalt oil as a DVBE:
01-0A0204; 01-0A1404; 01-493004; 02-2E6604; 02-2E6704; 3E0004; 02-4C4014; 03-3M9404; 03-4M0504;
03-4M1504; 06-0J3504; 06-0M4504; 06-0M6404; 08-0E1114; 08-0P3604; 08-0P8304; 09-347204; 09-347304;
09-347504; 09-347504; 10-0U8004; 10-0U9004; 10-0U9104; 11-293104; 11-404904.

B. If Caltrans Disallows Dependable, Granite Will Attempt to Meet the DVBE Goal with an Alternate Eligible DVBE Supplier

If Caltrans is unwilling to accept Dependable as Granite's DVBE supplier, despite the foregoing evidence which establishes that Dependable will be providing a commercially useful function for this Project, Granite should be given the opportunity to meet the DVBE goal and fulfill its commitment with another eligible DVBE supplier (See 49 CFR §26.87(i)).

Notwithstanding the preceding paragraph, it is Granite's contention that it has met the DVBE Contract goal and complied with the bid requirements. Thus Granite requests that Caltrans reconsider its finding and make the correct determination that Granite's bid is, in fact, responsive. Granite is fully prepared to perform this job in its customary dependable and high quality manner, using qualified DVBEs. Accordingly, the Project should be awarded to Granite as the lowest responsible and responsive bidder.

Thank you for your consideration. Granite looks forward to your prompt and favorable response in this matter.

Sincerely,

Granite Construction Incorporated for its subsidiary Granite Construction Company



James W. Hall
Senior Corporate Counsel

cc. Darryl Ebel



Department of
General Services
BUILDING GREEN · BUYING GREEN · WORKING GREEN

DEPENDABLE PETROLEUM PRODUCTS INC - #61779

SUPPLIER PROFILE			
Legal Business Name	DEPENDABLE PETROLEUM PRODUCTS INC		
Doing Business As	DEPENDABLE PETROLEUM PRODUCTS INC		
Address	312 ESSEX PLACE VACAVILLE, CA 95687	Phone	(707) 321-5524
		FAX	(707) 451-9665
Email	dppinc@comcast.net		
Business Types	Non-Manufacturer		
Service Areas	Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Fresno, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Madera, Marin, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Bernardino, San Diego, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Ventura, Yolo, Yuba,		
Keywords	ASPHALT PETROLEUM PRODUCTS TRANSPORTATION		
Classifications	301216 - Asphalts		

Active Certifications

TYPE	STATUS	FROM	TO
DVBE	Approved	Apr 14, 2011	Apr 30, 2012
SB (Micro)	Approved	Mar 16, 2010	Apr 30, 2012

Certification History

TYPE	STATUS	FROM	TO
DVBE	Expired	Apr 21, 2010	Apr 30, 2011
DVBE	Expired	Mar 26, 2009	Mar 31, 2010
SB	Expired	Mar 26, 2009	Mar 31, 2010

GRANITE CONSTRUCTION INCORPORATED

FAX COVER SHEET

LEGAL DEPARTMENT
FAX: (831) 768-4139

TIME OF TRANSMISSION: 9:25 a.m.
No. of Pages (including cover sheet): 6

DATE: February 7, 2012

SENT TO: Mr. John McMillan

FIRM: State of California Department of Transportation

FAX: 916.227.6282

FROM: Jim Hall
Senior Corporate Counsel

SUBJECT: Caltrans Contract Number 09-347804

Dear Mr. McMillan:

Granite Construction Company lodges its letter notice objecting to the determination by the California Department of Transportation that Granite's bid has been determined to be nonresponsive with respect to contract No. 09-347804.

Jim Hall
Senior Corporate Counsel
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If there are any problems during transmission, please call (831) 761-7875.

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