california engineering contractors inc.
20 Happy Valley Road, Pleasanton, CA 94566
An Equal Opportunity Employer (925) 461-1500 ♦ FAX (925) 461-0510

September 20, 2013

Via U.S. Mail and Facsimile (916) 227-6282

Mr. John McMillan
MSC 43
Office Engineer Contracts Award Branch Chief
California Department of Transportation
1727 30th Street
Sacramento, CA 95816-7005

RE: Construction on State Highway in San Joaquin and Sacramento Counties Near Terminous at Mokelumne River Bridge, Project ID 1000000354, Contract No. 10-0U6104

Protest of Bid Submitted by American Civil Constructors West Coast, Inc.

Dear Mr. McMillan:

We are writing to respond to a September 17, 2013, letter from American Civil Constructors West Coast, Inc. ("ACC").

ACC filled out its bid using a null sign (Ø) to indicate that it had not received and did not acknowledge any addenda. A null sign is used to state that there are no items or data in a set.[1] ACC's use of a null sign in its bid form constitutes an express representation that ACC had received and acknowledged no addenda.

Because ACC represented it did not receive and acknowledge any addenda, ACC's bid is completely different from the Cal Electro and Truesdale Corporation bids to which ACC refers in its letter. In those two bids, the contractors failed to include any information at all about whether or not they acknowledged particular addenda. Similarly, Newton Construction acknowledged all of the addenda that had been issued and therefore had complied with the bid documents. Thus, none of the other bids to which ACC refers involved an instance where the bidder expressly stated that it would not be bound by any addenda.

[1] "Null" means "zero; a nought, a zero; (*Math.*) something equal to zero." Oxford English Dictionary, Third Edition (December 2003).

ACC cannot change its bid form after the fact to remove its express representation that it had not received or considered any addenda. It is illegal for Caltrans to allow a change in a bid after bids are opened. Greer v. Hitchcock, 271 C.A .2d 334 (1969). What ACC is asking Caltrans to do is no different from changing the prices written in on a bid form after bids have been opened. If Caltrans did try to accept ACC's bid, any contract with ACC would be illegal and void, and ACC would have a legal obligation to disgorge any payments that Caltrans made to it. Id.; Miller v. McKinnon, 20 Cal. 2d 83 (1942).

The representation in ACC's bid that it had not received or considered any addenda is conclusive and legally cannot be contested by ACC. Evid. Code § 622; Plaza Freeway Ltd. v. First Mountain Bank, 81 Cal. App. 4th 616, 629 (2000).

As ACC has noted, Caltrans in its August 23, 2013, letter allowed ACC to submit evidence that "establishes it considered and agreed to be bound by the requirements of Addendum #1 in its bid." (emphasis supplied.)[2]

Significantly, ACC has not submitted any such evidence. ACC has not shown that it agreed "in its bid" to be bound by the requirements of Addendum # 1. Just the opposite is true. ACC's bid expressly states that ACC did not receive and did not agree to be bound by any addenda. Under the terms of Caltrans' August 23, 2013 letter, ACC's bid must be rejected.

Caltrans has determined, in its August 23, 2013 letter, "the addendum [Addendum #1] to be a material amendment to the contract." Caltrans is correct in this determination. Because Addendum #1 modified the labor rates for the project, it is by definition a material amendment that affects pricing for the project.

Even ACC concedes, by the conclusion of its letter, that "Addendum #1 is a material amendment." Caltrans therefore cannot overlook that ACC specifically represented it did not receive and would not be bound by that amendment.

ACC tries to blame Caltrans for ACC's own errors in filling out its bid form. All of the other bidders filled out the form correctly. ACC admits that "we did receive this addendum prior to bid." If ACC's administrator was not aware of that fact, it was because of carelessness on ACC's part. There is no legal requirement that Caltrans make available all addenda online in any particular manner. Caltrans satisfied its obligations when it sent the addendum and ACC received it.

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[2] For example, if ACC could have demonstrated that the bid it had submitted did list Addendum #1, and Caltrans was mistaken in asserting that the bid form did not refer to Addendum #1, then Caltrans could have awarded the contract to ACC. However, ACC did not provide such proof.

We therefore respectfully request that the Department uphold California Engineering Contractors, Inc.'s protest and award Contract No. 10-0U6104 to our company, which submitted the lowest responsive bid.

Very truly yours,

for Wahid Tadros

President

CALIFORNIA ENGINEERING CONTRACTORS, INC.

cc: American Civil Constructors West Coast, Inc.

Facsimile Cover

Date: September 20, 2013	From:
Company: Caltrans	20 Happy Valley Road Pleasanton, CA 94566
Attention: John McMillan	Tel. No: (925) 461-1500
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Tel. No:	No. of pages including cover: 4

Reference:
Protest of Caltrans Bid 10-0U6104

Please find California Engineering Contractors, Inc. response to a September 17, 2013, letter from American Civil Constructors West Coast, Inc.

Thank you