

**SMITH, CURRIE & HANCOCK LLP**

ATTORNEYS AT LAW

A LIMITED LIABILITY PARTNERSHIP THAT INCLUDES PROFESSIONAL CORPORATIONS

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244 California Street  
Suite 500  
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ecbrown@smithcurrie.com

November 12, 2013

Mr. John McMillan  
Deputy Division Chief  
Division of Engineering  
Office Engineer, MD 43  
1727 30th Street  
P.O. Box 168041  
Sacramento, CA 95816-8041  
Phone: (916) 227-6299  
Facsimile: (916) 227-6282

**Via:** Facsimile, E-mail, Overnight Delivery

**Re:** Contract No. 12-0F96E4 - Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing

**Subject:** Shimmick Construction Company, Inc.'s November 8, 2013 Bid Protest

Dear Mr. McMillan:

On behalf of Flatiron West, Inc., ("Flatiron"), I am writing in response to Shimmick Construction Company, Inc.'s ("Shimmick") November 8, 2013 bid protest letter.

The state bidding law supports awarding the Camino De Estrella Project Contract No 12-0F96E4 (the "Project") to the lowest responsive, responsible bidder. Under that law, Flatiron agreed to self-perform all work in excess of ½ of 1 percent of the total bid that was not identified day of bid on the Subcontractor List form OES-OE-0102.2 (REV 3/2001). See Pub. Cont. Code § 4106. The California Department of Transportation's (the "Department") past decisions support awarding the Contract to Flatiron as the Project's lowest responsive, responsible bidder.

In support of its bid protest, Shimmick copies six of the Department's previous decisions, none of which support Shimmick's position. Five involve removal of listed subcontractors or removal of descriptions of work from those listed day of bid. One of the examples is for the third ranked bidder that was never in contention to be awarded the contract in any case.

Mr. John McMillan  
November 12, 2013  
Page 2

On the other hand, we enclose two Department decisions that specifically state that a General Contractor agrees to self-perform all work in excess of  $\frac{1}{2}$  of 1 percent of the total bid where there is no subcontractor listed on bid day and that later additions of information are of no legal or practical effect. These decisions were correct because the Subletting and Subcontracting Fair Practices Act (the "Act") prohibits contractors from substituting a subcontractor for the work it had already agreed to self-perform. *See, e.g., R. M. Sherman Co. v. W. R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563. Under these earlier Department decisions, Flatiron, as low bidder, should be awarded the Contract.

Specifically, the Department's decisions regarding Contract Nos. 04-0G3104 and 03-1-F6004 follow the statutory rule that any additions to the subcontractor list are to be rejected and the low bidder was required to self-perform the work. *See id.*, and Pub. Cont. Code § 4106. As discussed in Flatiron's November 6, 2013 letter to you, that is exactly what should occur here as well. Furthermore, the Department's response to Contract 04-0G3104 was as follows:

The statement on the 'Subcontractor List' form that reads, 'Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening.' Refers to the percentage of subcontracted work previously submitted only.

The Department specifically mentions columns 2 and 3 as being the only portion needed for the previously submitted subcontracted work, which is how they accepted the bid but enforced the Public Contract Code.

The Department's Subcontractor List form OES-OE-0102.2 (REV 3/2001) has instructions and 4 columns to be filled out by the contractor; 1 and 4 at bid time, and 2 and 3 either with the bid or within 24 hours of the bid opening:

Instructions: The bidder must identify each subcontractor performing work in an amount in excess of  $\frac{1}{2}$  of 1 percent of the total bid or \$10,000, whichever is greater (Pub. Cont. Code § 4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

- Column 1: Business Name and Location (Public Contract Code 4104(a)(1))
- Column 2: Bid Item Nos. (Public Contract Code 4104(2)(A))
- Column 3: Percentage of Bid Item Subcontracted (Public Contract Code 4104(2)(A))
- Column 4: Description of Subcontracted Work (Public Contract Code 4104(b))

Mr. John McMillan  
November 12, 2013  
Page 3

Flatiron properly listed subcontractors on the day of the bid (column 1) with their corresponding work descriptions (column 4). Flatiron completed columns 2 and 3 for their previously listed subcontractors' within 24 hours, thus completing columns 1 through 4 within the time specified.

Shimmick directs the Department to the October 9, 2013 letter it issued Herback General Engineering ("Herback") regarding its bid on Contract No. 01-378164. That letter does not support Shimmick's bid protest because Herback was the third-lowest bidder and never responded to the Department's letter. The Department's determination in that case meant that the project was awarded to the low bidder. There was no successful protest and the third bidder was never in contention for the award. We have spoken to Herback and were informed that as a third-place bidder the issue was moot.

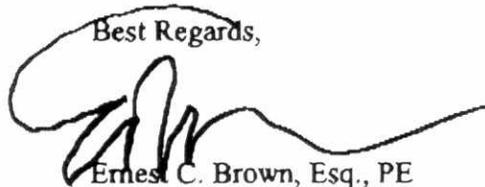
None of the other Department decisions cited by Shimmick support its bid protest either. Each of those decisions involved either post-bid substitution or removal of subcontractors or changing the subcontractor's description of work. The substitution or removal of subcontractors or their scopes of work were direct violations of the Act. *See, e.g., R.J. Land & Associates Const. Co. v. Kiewit-Shea* (1999) 69 Cal.App.4<sup>th</sup> 416, 421.

We note that Shimmick's "Subcontractor List" submitted with the bid did not provide a description of work for RJ Noble (Column 1) in column 4. Instead, Shimmick provided bid item numbers 136-143 in column 4 which should have been placed in column 2. Therefore, by not providing a description of work for RJ Noble in column 4 on day of bid, Shimmick's bid is deemed nonresponsive as stated on the Department's Subcontractor List form OES-OE-0102.2 (REV 3/2001).

It is clear that Public Contract Code Section 4107, state law, and the Department's past practices support awarding the Contract to Flatiron.

Please contact me if you have any questions or need any additional information.

Best Regards,



Ernest C. Brown, Esq., PE  
Partner  
Smith Currie & Hancock LLP

Enclosures

Received

Nov 12 2013 03:45pm

FROM

(TUE) NOV 12 2013 15:29/ST. 15:28/No. 6852052049 P 5

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN Jr., Governor

**DEPARTMENT OF TRANSPORTATION**  
 DIVISION OF ENGINEERING SERVICES  
 OFFICE ENGINEER, MS 43  
 1727 30<sup>th</sup> STREET  
 P. O. BOX 168041  
 SACRAMENTO, CA 95816-8041  
 PHONE (916) 227-6280  
 FAX (916) 227-6282  
 TTY 711



*Flex your power!  
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June 28, 2012

Facsimile: (530) 795-5734

Ed Carbahal, President  
 Vintage Paving Co, Inc.  
 P. O. Box 461  
 Winters, CA 95694

04-0G3104  
 04-Son-121-3.4/6.5  
 B.O. 6/26/12

Dear Mr. Carbahal:

The California Department of Transportation (Caltrans) received the attached revised "Subcontractor List" on June 27, 2012 for Contract No. 04-0G3104 from Vintage Paving Co., Inc. (Vintage). In the revised list, Bid Item 15, Furnish Single Sheet Aluminum Sign and Bid Item 16, Roadside Sign – One Post, were added to Columns 2 and 4 for the subcontractor Chrisp Company. This letter is to inform you that Caltrans cannot accept the revised "Subcontractor List" as it would violate the Subletting and Subcontracting Fair Practices Act of the Public Contract Code. The subcontractor list originally submitted by Vintage with its bid on June 26, 2012 will be used.

The statement on the "Subcontractor List" form that reads, "Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening." Refers to the percentage of subcontracted work previously submitted only. No other revisions to the form are permitted.

Since Item No. 15 and 16 were not listed on the "Subcontractor List" submitted with your bid, Vintage will be required to perform 100% of these items with its own forces, if awarded this contract.

A copy of this letter will be provided to the Resident Engineer for monitoring contract compliance.

If you have any questions, please contact Tammy Thomas, Chief, Office of Contract Awards and Services, at (916) 227-6228.

Sincerely,

*JCM* JOHN C. McMILLAN  
 Deputy Division Chief  
 Office Engineer  
 Division of Engineering Services

Attachments

Received  
06-27-'12 11:26 FROM-VINTAGE PAVING CORP

Jun 27 2012 11:30am

T-777 P0002/0002 F-302

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
SUBCONTRACTOR LIST  
068-018-018.8 (REV 3/2011)

Bidder Name: Vintage Paving Co., Inc.

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub Cost Code 9.4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or file to (916) 227-8282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Subcontractor Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
Austin Enterprise Bakersfield, CA	11	97.9%	Crack Treatment Rumble Strip
	13	49.1%	
	14	83.6%	
Chrisp Company Woodland, CA			Striping
Statewide Traffic Safety + Signs Fairfield, CA	4	73%	Traffic Control
			Not mentioned however additional error
Chrisp Co. WOODLAND, CA	4	20%	TC - Chrisp only
	6	97.8%	Remove Y. HAZ TTS
	7	93.9%	Remove Thermo TTS
	8	97.8%	Remo. PM
	10	97.9%	LCP
	15	100%	Furn. 55 Alum Sign
	16	98%	Rd. Signs
	17	98%	4" Thermo Stripe
	18	98%	Pavement Markers

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STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**SUBCONTRACTOR LIST**  
DES-0E-0102.2 (REV 3/2011)

Bidder Name: Vintage Paving Co., Inc.

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub Cont Code § 4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-0282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
Austin Enterprise Bakersfield, CA			Crack Treatment Rumble Strip
Chrisp company Woodland, CA			Striping
Statewide Traffic Safety + Signs Fairfield, CA			Traffic Control

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*mark*

Received

Nov 12 2013 03:45pm

FROM

(TUE) NOV 12 2013 15:29/ST. 15:28/No. 6852052049 P 9

STATE OF CALIFORNIA — BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN Jr. Governor

**DEPARTMENT OF TRANSPORTATION**  
 DIVISION OF ENGINEERING SERVICES  
 OFFICE ENGINEER, MS 43  
 1727 30<sup>th</sup> STREET  
 P. O. BOX 168041  
 SACRAMENTO, CA 95816-8041  
 PHONE (916) 227-6280  
 FAX (916) 227-6282  
 TTY 711



*Flex your power!  
 Be energy efficient!*

June 6, 2012

Facsimile: (888) 400-8169

Hilda Fox, President  
 CW Fox Construction, Inc.  
 2701 Secret Lake Trail  
 Cool, CA 95614

03-1F6004  
 03-ED-193-23.4  
 B.O. 5/30/12

Dear Ms. Fox:

The Department of Transportation (Caltrans) received the attached revised "Subcontractor List" on May 31, 2012, for Contract No. 03-1F6004 from CW Fox Construction, Inc. (CWFC). In the revised list, Sierra Traffic Marking was added for Bid Item 20 Lead Compliance Plan. This letter is to inform you that Caltrans cannot accept the revised "Subcontractor List" as it would violate the Subletting and Subcontracting Fair Practices Act of the Public Contract Code. The subcontractor list originally submitted by CWFC with its bid on May 30, 2012 will be used.

The statement on the bottom of the "Subcontractor List" form that reads, "If not submitted with the bid, fax the percent of each bid item subcontracted by no later than 24 hours after bid opening to (916) 227-6282" refers to the percentage of subcontracted work previously submitted only. No other revisions to the form are permitted.

Since Sierra Traffic Marking was omitted for Bid Item 20 on the "Subcontractor List" submitted with your bid, CWFC will be required to perform 100 percent of the Bid Item 20 Lead Compliance Plan with its own forces.

A copy of this letter will be provided to the Resident Engineer for monitoring contract compliance.

If you have any questions, please contact Tammy Thomas, Contract Awards Branch Chief, at (916) 227-6228.

Sincerely,

EARL SEABERG  
 Chief, Office of Contract Awards and Services  
 Office Engineer  
 Division of Engineering Services

Attachments

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**SUBCONTRACTOR LIST**  
 DES-0E-0102.2 (REV 3/2011)

Bidder Name: CW Fox Construction Inc

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub Cont Code § 4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
SIERRA TRAFFIC MARKING LOOMIS, CA	6 7 8 15 45		TEMP STRIPS TEMP MARKING TEMP STRIPS REMOVE YELLOW STRIPS 4" THREAD AC TACK COAT
DJD ASPHALT, SACRAMENTO	29, 32		AC TACK COAT
MIDSTATE BARBICE INC STOCKTON, CA	26, 43, 44		LOADED KAN WCA FIBER, MISC IN LINE EXTENSION
AL DIKE, LINCOLN, CA	29, 30, 31		AC DIKE, AC DIKE F, PLANS ASPHALT MISC
NITA EXOSION, LOOMIS, CA	23, 24, 25		FIBER ROLL, HYDROSEED, ROLLED NOTTING,
CONSTRUCTION AREA SIGNS NEWCASTLE, CA	4, 5, 41 42		CONSTRUCTION AREA SIGNS, TRAFFIC CONTROL SYSTEM, DELIVER MARKER CUVETS.
KCC VISALIA, CA	9, 13		CHANNELIZERS, TEMP CRAS & CUSHIONS,
SJD CONSTRUCTION DANFORD	14		TEMP TRAFFIC SLOON
TRANSTECH, SACRAMENTO	2,		WPCP
DESTEIN COURT CROTHERS CONSTRUCTION - LINCOLN, CA	10 PARTIAL		TEMP TRAFFIC SIGNAL

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*File*

Received

May 31 2012 09:25am

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**SUBCONTRACTOR LIST**  
 DBS-06-0982A (REV 3/2011)

Bidder Name: CW FOX CONSTRUCTION INC

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub. Cont. Code § 4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-8282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
SIERRA TRAFFIC MARKING LOOMIS CA	6-	83%	TEMP STRIKE (TAPE)
	7-	66%	TEMP PAVEMENT MARKING (TAPE)
	8-	40%	TEMP STRIKE (PAINT)
	15-	87%	REMOVE YELLOW THERMO STRIKE
	20-	41%	LEAD COMPLIABLE PLANT
B & B ASPHALT SACRAMENTO CA	28-	81%	PLACE HOT MIX ASPHALT
	32-	91%	TACK COAT
MID STATE BARRIER INC STOCKTON CA	26-	83%	GUARD RAIL W/LOT FIBER
	43-	91%	IMBER WOOD POST
	44-	87%	IN-LINE TS (A-TENSION)
A.C. DINE CO -	29-	30%	PLACE ONLY AC DINE TYPE C
	30-	45%	PLACE ONLY AC DINE TYPE F
	31-	59%	PLACE ONLY ASPHALT MIX AREA
NITA ERECTION CONTROL LOOMIS CA	23-	80%	FIBER ROLLS
	24-	81%	HYDROSEED
	25-	85%	ROLLED NETTING
CONSTRUCTION AREA SIGNS NEWCASTLE CA	4 Partial	27%	CONSTRUCTION AREA SIGNS
	5-	89%	TRAFFIC CONTROL SYSTEM
	41-	74%	DELIMITORS CL 2
	42-	91%	MARKER - CULVERT

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Received

May 31 2012 09:25am

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**SUBCONTRACTOR LIST**  
 DES-06-09222 (REV 3/2011)

Bidder Name: CW FOX CONSTRUCTION INC

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub Cost Code § 4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
KRC SAFETY - VISALIA CA	9 - 13 -	75 % 77 %	CHANGELIZERS TEMP. EXHAUST CURTAIN MACHINES
SJD CONSTRUCTION - OAKDALE CA	14 -	50 %	TEMP TRAFFIC SCREEN
TRANSTEL CONSULT - SACRAMENTO CA	2 -	91 %	WPCP
BENTACQUANT BRES - CONSTRUCTION - LIVERMORE CA	10 PARTIAL	71 %	TEMP. SIGNAL SYSTEM

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Contract No. 03-1R6004

**SMITH, CURRIE & HANCOCK LLP**

244 California Street, Suite 500  
San Francisco, CA 94111  
800- 800-832-6946 (Phone)  
415-276-1754 (Facsimile)

**FACSIMILE TRANSMITTAL**

TO: Mr. John McMillan

ADDRESS: Division of Engineering, Office Engineer, MD 43, 1727 30<sup>th</sup> Street, P.O. Box 168041

FACSIMILE: 916-227-6282 TELEPHONE: \_\_\_\_\_

FROM: Ernest Brown, Esq., P.E.

TOTAL NUMBER OF PAGES 13, INCLUDING THIS COVER SHEET

DATE: November 12, 2013

**COMMENTS:**

**Re:** Contract No. 12-0F96E4 - Construction on State Highway in Orange County from 0.4 mile north of Camino De Estrella Overcrossing to 0.2 mile south of San Juan Creek Road Undercrossing

Please see the attached November 12, 2013 letter responding to Shimmick Construction Company, Inc.'s November 8, 2013 Bid Protest Letter

Thank you,  
Jay R. Houghton, Esq.  
(415-249-0869)

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