

DEPARTMENT OF TRANSPORTATION

DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER, MS 43

1727 30th STREET

P. O. BOX 168041

SACRAMENTO, CA 95816-8041

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Be energy efficient!*

October 17, 2013

Facsimile: (760) 200-9014

Regina Castro, Vice President
Desert Concepts Construction
77-770 Country Club Dr., Suite D
Palm Desert, CA 92111

12-0L3804
12-ORA-39-1.1/19.2
B.O. 6/27/13

Dear Ms. Castro:

The Department of Transportation (Caltrans) received the attached letters from AFSAR law Group on behalf of Desert Concepts Construction Inc. (Desert Concepts) on July 23, August 2, and August 8, 2013, protesting the bid documents submitted by Highland Construction Inc. (Highland). The protest alleges that Highland listed Global Transloading on its Disadvantaged Business Enterprise (DBE) Commitment form but did not include Global Transloading on the Subcontractor List. Desert Concepts requests Caltrans find the bid submitted by Highland nonresponsive and award the contract to Desert Concepts.

The Office of Business and Economic Opportunity, Contract Evaluation Unit (CEU) evaluated the DBE Commitment form submitted by Highland and determined that Highland met the 10 percent goal for this project. Furthermore, Global Transloading was listed to perform trucking services and certified truckers are not required to be listed on the Subcontractor List.

As such, the protest submitted by Desert Concepts lacks merit. Caltrans will proceed to award this contract to the lowest responsive and responsible bidder, provided that all requirements have been met.

The Resident Engineer will receive a copy of this letter for contract administration and compliance.

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

Sincerely,


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

Attachments

c: District Resident Engineer

AFSAR

LAW GROUP

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Palm Desert, CA 92211
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July 23, 2013

VIA FACSIMILE & U.S. MAIL ONLY

State of California Department of Transportation/Caltrans
Division of Engineering Services
Office Engineer
1727 30th Street
Sacramento, CA 95816

Re: Bid Protest on Contract Number 12-0L3804

To Whom It May Concern:

This office represents the legal interests of Desert Concepts Construction, Inc. It is my client's understanding that Highland Construction, Inc. (hereinafter "Highland") is third low bidder. This correspondence is provided as a formal bid protest to the bid submitted by Highland.

The bid of Highland fails to follow instructions included on the face of the DBE Commitment form. More specifically, the DBE commitment form requires that "[n]ames of the first Tier DBE Subcontractors and their respective item(s) of work listed above must be consistent, where applicable, with the names and items of work in the "List of Subcontractors" submitted with your bid." Here, Highland submits a DBE Commitment form showing Contract No. 28 (Partial) to be completed by Global Transloading. The Subcontractor List, however, fails to show Global Transloading whatsoever.

The Subcontractor List itself states, "[t]he 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. ... Failure to provide complete information in columns 1 through 4 within the time specified will result in a non-responsive bid." With Global Transloading listed on the DBE Commitment as performing Dollar Amount DBE valued at \$118,065.60 it is unquestionable that Global Transloading was required to be listed on the Subcontractor List and the failure to include them renders Highland's bid non-responsive.

July 23, 2013
Page 2 of 2

As always, we appreciate your time in reviewing the bid referenced herein and this correspondence in protest of same. If we can provide further assistance with regard to this project, please contact this office or Desert Concepts Construction, Inc. at your earliest opportunity.

Very truly yours,

AFSAR LAW GROUP, A.P.C.



Amir H. Afsar

cc: Client
AHA/jbl
L072313.HighlandConst.BidProtest.doc



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Palm Desert, California 92211
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July 23, 2013

Total Number of Pages 3 (Including This Cover Letter)

Please deliver the attached pages to:

Company: State of California Department of Transportation/Caltrans
Office Engineer

Recipient's Fax No.: (916) 227-6282

From: Amir H. Afsar, Esq.

Transmitted From: (760) 345-3220

Re: Bid Protest on Contract Number 12-0L3804

Please see the attached correspondence.

If you have any additional questions, please don't hesitate to contact this office.

Thank you,

Original Sent By U.S. Mail: Yes No

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August 2, 2013

VIA FACSIMILE & U.S. MAIL ONLY

John McMillan
State of California Department of Transportation/Caltrans
Division of Engineering Services
Office Engineer
1727 30th Street
Sacramento, CA 95816

**Re: Response to Highland Construction's Bid Protest Response
Contract Number 12-0L3804**

Dear Mr. McMillan:

As you may recall, this office represents the legal interests of Desert Concepts Construction, Inc. (hereinafter referred to as "Desert Concepts"). This correspondence is written in response to a letter dated July 24, 2013, provided by Highland Construction (hereinafter "Highland") in defense of their improper DBE Commitment form and non-responsive bid.

As the Desert Concepts bid protest previously stated, the Highland bid included a DBE Commitment form showing Global Transloading completing Contract No. 28 (Partial) but failed to include Global Transloading on their Subcontractor List. Highland's July 24 letter explains that they "did not "fail to list" Global Transloading (GT) as a subcontractor because GT is not considered a subcontractor as defined by the Subletting and Subcontracting Fair Practices Act." However, Highland is incorrect and GT is required to be listed. Section 4104 of the Subletting and Subcontracting Fair Practices Act states,

"Any officer, department, board or commission taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement or in the general conditions under which bids will be received for the doing of the work incident to the public work or improvement that any person making a bid or offer to perform the work, shall, in his or her bid or offer, set forth:

(a)(1) The name and the location of the place of business of each subcontractor who will perform work or labor or render

August 2, 2013
Page 2 of 2

service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid or, in the case of bids or offers for the construction of streets or highways, including bridges, in excess of one-half of 1 percent of the prime contractor's total bid or ten thousand dollars (\$10,000), whichever is greater..." (emphasis added)

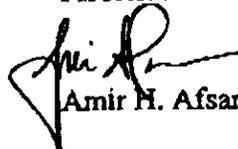
Here, Highland's July 24 letter explains that while GT is not a subcontractor and has no subcontractor's license, they are a "trucking firm" who will "render a service to the prime contractor in or about the construction of the work or improvement" – namely GT will be trucking the hazardous material so it can be disposed of at a licensed hazardous waste facility. Additionally, the costs associated with GT's services are in excess of one-half of 1 percent of the prime contractor's total bid as GT is listed on the DBE Commitment and attributed \$118,065.60 which represents 6.43% of the total bid amount provided by Highland (\$1,836,531.50).

Moreover, this very instruction is on the Subcontractor List itself. In plain language the Subcontractor List explains, "[t]he bidder must identify each subcontractor performing work in an amount in excess of ½ of 1 percent of the total bid or \$10,000, whichever is greater. ... Failure to provide complete information in columns 1 through 4 within the time specified will result in a non-responsive bid." It remains unquestionable that Global Transloading was required to be listed on the Subcontractor List and the failure to include them renders Highland's bid non-responsive.

If we can provide further assistance with regard to this project, please contact this office or Desert Concepts Construction, Inc. at your earliest opportunity.

Very truly yours,

AFSAR LAW GROUP, A.P.C.



Amir H. Afsar

cc: Client
AHA/jbl
L080213.Responsc2Highland.doc



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August 2, 2013

Total Number of Pages 3 (Including This Cover Letter)

Please deliver the attached pages to:

Company: State of California Department of Transportation/Caltrans
Office Engineer

Recipient's Fax No.: (916) 227-6282

From: Amir H. Afsar, Esq.

Transmitted From: (760) 345-3220

Re: Bid Protest on Contract Number 12-0L3804

Please see the attached correspondence.

If you have any additional questions, please don't hesitate to contact this office.

Thank you,

Original Sent By U.S. Mail: Yes No

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August 8, 2013

VIA FACSIMILE & U.S. MAIL ONLY

John McMillan
State of California Department of Transportation/Caltrans
Division of Engineering Services
Office Engineer
1727 30th Street
Sacramento, CA 95816

**Re: Second Response to Highland Construction's Bid Protest Response
Contract Number 12-0L3804**

Dear Mr. McMillan:

As you may recall, this office represents the legal interests of Desert Concepts Construction, Inc. (hereinafter referred to as "Desert Concepts"). This correspondence is written in response to a letter dated August 6, 2013, provided by Highland Construction (hereinafter "Highland") in their ongoing defense of their improper DBE Commitment form, defective Subcontractor list and non-responsive bid.

The claims of Highland Construction and Ms. Stelle are disingenuous. The determination that Highland incorrectly failed to include Global Transloading on their Subcontractor List is not a difficult issue requiring a multitude of statutes and caselaw. As previous correspondences have stated, the failure to include Global Transloading was a violation of Section 4104 of the Subletting and Subcontracting Fair Practices Act and contrary to the instructions on the very face of the Subcontractor List itself.

In their August 6, 2013 letter, Highland attempts to paint Global Transloading as a simple equipment renter providing trucking services that will do absolutely nothing other than haul material. Highland goes to great lengths to explain that Highland will perform all work itself and that Global Transloading is merely providing end dump trucks. This issue and a quite similar claim was addressed in Leonard v. Hermreck (1959) 168 Cal.App.2d 142. In *Leonard*, the prime contractor on a highway project contracted with Leonard to haul 220,000 tons of dirt from a pit to the roadbed of the highway. When the prime contractor refused to pay Leonard for the hauling, Leonard filed suit. The court, however, granted the prime contractors' motion for nonsuit on the grounds Leonard was an unlicensed contractor. The court explained that Leonard came within the definition of a contractor because he "did

August 8, 2013
Page 2 of 2

subtract from the pit" and he "added to and improved" the highway. These facts showed Leonard was more than just a material supplier but was in-fact providing services for which a construction license was needed.

The facts of *Leonard* fall directly in line with the issue at hand. Highland is the prime contractor hiring Global Transloading to haul material. While Highland would like to characterize this work as "renting trucks" they are not in-fact renting trucks. They are hiring another business to conduct hauling activities of hazardous materials from the highway project. A role that undisputedly is akin to Leonard's subtracting from the pit and a clear improvement to the highway construction project.

The case selected to highlight the incongruence of Highland's argument is one that should be quite familiar to them. In fact, it was the *Leonard* case the Court of Appeals cited at length in Highland's September 2010 litigation against the State of California Department of Transportation.¹ In that action, Highland was awarded a contract to pave turnouts. In their bid, Highland failed to name a subcontractor utilized, Ortiz Paving Corporation, and a monetary penalty was assessed. Highland appealed the penalty and Ms. Stelle claimed the paving work was done by Highland and that Highland had only rented equipment with operators from Ortiz Paving Corporation – an argument virtually identical to the one made here. The court, however, determined that the work performed by Leonard reached a level which would require a license. Here, it is unquestioned that Global Transloading will be providing trucks with drivers (i.e. operated equipment) and that said trucks will be providing a service to the project by removing hazardous materials. As a result and similar to *Leonard*, Global Transloading will "render a service to the prime contractor in or about the construction of the work or improvement" and should have been listed on the Subcontractor List rendering their bid non-responsive.

If you have any questions or wish to discuss this correspondence in further detail, please contact this office or Desert Concepts Construction, Inc. at your earliest convenience.

Very truly yours,

AFSAR LAW GROUP, A.P.C.



Amir N. Afsar

cc: Client
AHA/jbl
L080713.2ndResponse2Highland.doc

¹ Highland Construction, Inc. v. State of California Department of Transportation Second Appellate District, Division One, Case No. B221916 (Los Angeles County Superior Court Case No. BS119024).



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August 8, 2013

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Please deliver the attached pages to:

Company: State of California Department of Transportation/Caltrans
Office Engineer
Recipient's Fax No.: (916) 227-6282

From: Afsar Law Group, A.P.C.
Transmitted From: (760) 345-3220

Re: **Contract Number 12-0L3804**
Second Response to Highland Construction's Bid Protest Response

Please see the attached correspondence.

If you have any additional questions, please don't hesitate to contact this office.

Thank you

Original Sent By U.S. Mail: Yes No

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**** Transmit Conf. Report ****

P.1
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Oct 18 2013 10:38am

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STATE OF CALIFORNIA—CALIFORNIA STATE TRANSPORTATION AGENCY

EDMUND G. BROWN Jr., Governor

DEPARTMENT OF TRANSPORTATION

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October 17, 2013

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Regina Castro, Vice President
Desert Concepts Construction
77-770 Country Club Dr., Suite D
Palm Desert, CA 92111

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12-ORA-39-1.1/19.2
B.O. 6/27/13

Dear Ms. Castro:

The Department of Transportation (Caltrans) received the attached letters from AFSAR law Group on behalf of Desert Concepts Construction Inc. (Desert Concepts) on July 23, August 2, and August 8, 2013, protesting the bid documents submitted by Highland Construction Inc. (Highland). The protest alleges that Highland listed Global Transloading on its Disadvantaged Business Enterprise (DBE) Commitment form but did not include Global Transloading on the Subcontractor List. Desert Concepts requests Caltrans find the bid submitted by Highland nonresponsive and award the contract to Desert Concepts.

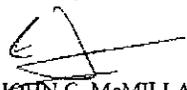
The Office of Business and Economic Opportunity, Contract Evaluation Unit (CEU) evaluated the DBE Commitment form submitted by Highland and determined that Highland met the 10 percent goal for this project. Furthermore, Global Transloading was listed to perform trucking services and certified truckers are not required to be listed on the Subcontractor List.

As such, the protest submitted by Desert Concepts lacks merit. Caltrans will proceed to award this contract to the lowest responsive and responsible bidder, provided that all requirements have been met.

The Resident Engineer will receive a copy of this letter for contract administration and compliance.

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

Sincerely,


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

Attachments

c: District Resident Engineer