



Lic. #743775

August 12, 2013

John McMillan
Department of Transportation
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, CA 95816-8041

Re: Contract Number 12-0L3804
Bid Opening Date: June 27, 2013
Response to Bid Protest 3 by Desert Concepts Construction

Dear Mr. McMillan:

Reference is made to Bid Protest No. 3, submitted by AFSAR Law Group on behalf of Desert Concepts Construction (DCC) dated August 8, 2013 and to HighLand Construction, Inc.'s (HCI) previous responses dated July 24, 2013 and August 6, 2013.

It is unfortunate that DCC has misstated case law and ignored very key facts in the court's decision, much like ignoring the key facts in the Subletting law. In *Leonard v. Hermreck*, the court found that because the plaintiff "subtracted from pit" and "added to and improved" the highway, this brought the work within the provisions of B&P 7026. The court further relied upon the contract between the two parties, in which, the plaintiff agreed to complete the work in a "workmanlike manner ..., in accordance with the general provisions, specifications and drawings of the project, all prepared by the owner ... and agreed that the aforesaid general conditions, special provisions, specifications and drawings now become a part of This Subcontract." in which, Leonard agreed.

The strongest distinction the court made was that, not only did *Leonard* provide trucks and loaders to the project and compacted the materials, but "clearly, by agreeing to comply with the engineering plans and drawings for the construction of the freeway plaintiff became more than just a purveyor of dirt." [*emphasis added*].

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DCC's logic that defines a subcontractor, is that GT is providing "a service" to the project and therefore, under PCC, § 4106, GT must be a subcontractor. If this were the only fact that defined a subcontractor, then a concrete ready mix supplier should also be listed a subcontractor, a steel supplier should be listed as a subcontractor, deliverers of imported borrow should be listed as subcontractors, etc., etc. Theoretically, according to DCC, they are "improving" the highway and "providing a service." We are confident that Caltrans is able to distinguish between trucking and subcontracting. We are just as confident that Caltrans knows that HCI is just as well versed in this distinction.

DCC is passionately protesting the award of this project in retribution for HCI bringing to Caltrans' attention their impropriety and possibly deception of their DBE commitment. In DCC's futilely, they try to further support their absurd protest by citing an unpublished case (BS119024) between HCI & Caltrans regarding Ortiz Asphalt. It is apparent that DCC does not know the true facts of the case or perhaps they just chose to ignore them, much like they did regarding PCC, § 4106, B&P Code § 7026 and the various precedent cases that were previously provided.

In BS119204, the appellate court determined that Ortiz acted as a "subcontractor" because they provided supervision, materials, asphalt rakers, i.e. laborers, to the project, along with their paving equipment, which purportedly, "conformed to the contract's specifications" for the said project. The court cited *Leonard* to support its finding. For DCC to rely on an unpublished case, whereby the facts differ substantially, only demonstrates their desperation.

The bottom line is that GT is providing end dump trucks, on an hourly basis, to the project to haul contaminated dirt from the jobsite. There are no inconsistencies between HCI's Subcontractor Listing and HCI's DBE Commitment. HCI restates our position, which is still supported by case law, that we did not "fail to list" Global Transloading (GT) as a subcontractor because GT is not a subcontractor as defined by the Subletting and Subcontracting Fair Practices Act and/or Business & Professions Code. GT is a "trucking" firm that is Certified DBE, whose classifications are defined as trucking and they do not possess a contractor's license, which demonstrates that they are not a subcontractor nor are they required to be listed as a subcontractor.

DCC's 1st, 2nd and 3rd protests are senseless and without merit. HighLand Construction, Inc.'s bid proposal is not only responsive, but without a doubt, consistent with the Subletting & Subcontracting Fair Practices Act. As such, we hereby request award this contract.

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If you have any further questions, please do not hesitate to contact our office. Thank you.

Respectfully,



Kristi Stelle
VP of Operations

KS:er
VIA: FAX & MAIL

FACSIMILE TRANSMITTAL SHEET

TO: John McMillan

FROM: Kristi Stelle

COMPANY: Department of Transportation

DATE: 8/12/2013

FAX NUMBER: 916-227-6282

TOTAL NO. OF PAGES INCLUDING COVER: 4

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RE: 12-0L3804 - BID PROTEST
RESPONSE #3

YOUR REFERENCE NUMBER:

- URGENT
- FOR REVIEW
- PLEASE COMMENT
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NOTES/COMMENTS:

Please see attached.

Originals to follow via USPS.

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