

FELDMAN & ASSOCIATES, INC.

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April 9, 2015

VIA FACSIMILE

Mr. John C. McMillan
Deputy Division Chief
California Department of Transportation
Division of Engineering Services
1727 30th Street
Sacramento, CA 95819-8041

Re: Liberty Maintenance, Inc./Caltrans - Contract No. 03-3F3404

This firm represents Liberty Maintenance, Inc., with respect to its bid for Caltrans Contract No. 03-3F3404. The purpose of this letter is to respond to the unfounded accusations advanced by FD Thomas, Inc., in its bid protest letters dated April 6 and 7, 2015. FD Thomas has taken a scatter-shot approach to its protest, and its contentions are based on incorrect statements of law, speculation, or bare assertions that find no support in the bid documents.

The purpose of public bidding is to eliminate favoritism, fraud, and corruption, to avoid the misuse of public funds, and to stimulate marketplace competition. (*Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App. 3d 449, 456-457.) Bid protests must be considered practically and in light of the actual facts and circumstances presented, not from a hypothetical standpoint. (*MCM v. City & County of San Francisco* (1998) 66 Cal.App. 4th 359.) Further, the overarching public purpose must guide the awarding agency's considerations, not the "private interest of a disappointed bidder." (*Id.*) As the California Court of Appeal has remarked, "it certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid." (*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377 at 383).

As a result, public agencies are permitted to waive minor bid variances or irregularities if the overall bid substantially conforms to the bid requirements, if the irregularity has not affected the overall amount of the bid, and if the bidder does not enjoy an advantage not available to all bidders [47 Ops.Cal.Atty.Gen. 129, 130 (1966), quoted with approval in *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 889, 905.] In other words, public agencies have

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discretion to waive inconsequential issues in order to avoid the wasteful outcomes that would result from a rule of strict compliance.

For the reasons set forth below, Caltrans should reject FD Thomas' protest and award the contract to the lowest responsible bidder Liberty Maintenance, Inc.

1. Liberty Maintenance possesses the license required by the bid documents, and FD Thomas' allegations regarding Liberty's responsibility are unfounded

The most egregious accusation advanced by FD Thomas is that Liberty Maintenance is not a responsible bidder. The term "responsibility," for purposes of public contract awards, "includes the attribute of trustworthiness, [and] also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work." (*City of Inglewood-Los Angeles Cty. Civic Ctr. Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867. See Also Public Contract Code § 1103.) FD Thomas' accusations confuse responsibility with responsiveness, misrepresent the bid requirements, and are based on pure speculation.

Liberty Maintenance is fully qualified to perform the contract. Caltrans' Notice to Bidders states that the contractor is required to have either a Class A license or a C-33, license. Despite Caltrans' clear indication of the license requirements in the Notice to Bidders, FD Thomas argues that Bid Item 26, Adjust Lift Span Balance, requires "specialized engineering knowledge and skill," and requires a Class A license. FD Thomas' argument finds no support in the bid documents. Specification section 78-2, which addresses adjustment of the lift span balance, contains no indication that a Class A license would be or is required for that portion of the work, and, as previously stated, the call for bids expressly required either a Class A or C-33 license for the project.

Moreover, FD Thomas' argument, if accepted as true, would work to invalidate its own bid. FD Thomas listed subcontractor DCCI (CA License No. 987859) for 54% of Bid Item 26. According to the California State License Board, DCCI (also known as Danny's Construction Company, LLC) possesses C-17, C-23, and C-51 licenses, but does not possess an A license. FD Thomas' own subcontractor would therefore be ineligible to perform any work under Bid Item 26 according to its argument.

Liberty Maintenance possesses the C-33 license required by the bid documents, and is therefore qualified to bid and perform the work. FD Thomas' position is not supported by the project specifications and is inconsonant with its own bid. Caltrans should therefore reject FD Thomas' tortuous reading of the bid documents and unsupported argument.

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2. Liberty Maintenance was not required to list Construction Area Signs on its List of Subcontractors

FD Thomas' protest with respect to Liberty Maintenance subcontractor Construction Area Signs fundamentally misstates California law. Public Contract Code §4104 requires contractors to identify in their bids any subcontractors who will perform work in excess of one-half of one percent of the total bid amount, or "in the case of bids or offers for the construction of street or highways, including bridges," those who will perform work in excess of one-half of one percent of the total bid amount or \$10,000.00, whichever is greater.

Liberty Maintenance's total bid for Contract 03-3F3404 was \$8,870,447.20. As a result, the one-half of one percent threshold for section 4104's listing requirement was \$44,352.24. As set forth in Liberty Maintenance's DBE Commitment form, Construction Area Signs will perform work totaling \$21,880.00, far below the listing threshold. Since Construction Area Signs will perform less than one-half of one percent of the work, Liberty Maintenance was *not* required to include Construction Area Signs in its subcontractor list, and FD Thomas' protest is without merit.

3. Summit West Environmental was properly listed on Liberty Maintenance's DBE Commitment Form

Summit West Environmental, Inc., was properly listed as a subcontractor in Liberty Maintenance's bid and included in its DBE Commitment form. Summit West agreed to and will perform Contractor Supplied Biologist (Bid Item 18) and Species Protection (Bid Item 19) work for the sum of \$79,000.00. In its protest, FD Thomas looks beyond the face of Liberty Maintenance's bid and speculates that Summit West will not perform the work for which it has submitted a bid, and concludes based on that speculation that Liberty Maintenance should not be able to claim any DBE participation credit for Summit West's work.

Summit West's confirming email, which was included in Liberty Maintenance's DBE package, indicates that it will solicit "help" from Sycamore Environmental, however nowhere is it indicated that any portion of Summit West's scope will be subcontracted to or performed by Sycamore Environmental or any other entity. FD Thomas' extrapolation is not supported by the DBE documentation Liberty Maintenance submitted, and its conclusions are improper and without foundation.

As discussed above, Caltrans' consideration of FD Thomas' bid protest should be guided by the actual facts and circumstances that appear from the face of the bid, not the hypothetical scenarios spun by an unsuccessful bidder. FD Thomas' argument with respect to Summit West is a transparent attempt to cast doubt, however remote, on any portion of Liberty Maintenance's bid and secure the bid for itself. FD Thomas' argument is improper, not based on the actual facts or documents presented, and should be summarily rejected.

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4. Liberty Maintenance's omission of Tri-Valley Construction from its subcontractor list does not invalidate its bid

After reviewing its bid documents, Liberty Maintenance acknowledges that Tri-Valley Construction should have been included in its subcontractor list. Liberty Maintenance's omission, however, was the result of an inadvertent mistake during the final minutes before the submission deadline. On the morning of March 17, the day of the bid, Liberty Maintenance received a quote by fax from Tri-Valley at 8:29 a.m. That bid, a copy of which is enclosed, was for a total of \$20,148.20, less than the one-half of one percent listing threshold of \$44,352.24 discussed above. Liberty Maintenance omitted Tri-Valley from the subcontractor list based on the 8:29 a.m. bid.

On the afternoon of March 17, at 2:48 p.m. (Eastern Time, 11:48 a.m. PST), Tri-Valley submitted a revised proposal by email, which increased its overall bid to \$54,274.20. A copy of the 2:48 p.m. bid is attached, and was also submitted in connection with Liberty Maintenance's DBE Commitment paperwork. Liberty Maintenance updated its bid amount for each work item Tri-Valley would perform, which is apparent from the line item prices it submitted, but did not account for the fact that the increase pushed Tri-Valley over the one-half of one percent listing threshold. Liberty Maintenance's inadvertent omission of Tri-Valley from its subcontractor list resulted from the rush of information it received just prior to submitting the bid. Contrary to FD Thomas' assertion, Liberty Maintenance did not enjoy any additional time or enjoy any advantage over other bidders. It experienced the same constraints and limitations every public works contractor faces when preparing and submitting a bid.

Because Tri-Valley's last-minute bid revision was fully incorporated, and the only oversight was as to the subcontractor list, Liberty Maintenance's bid contained no typographical or arithmetical errors. Consequently, Liberty Maintenance could **not** have sought to withdraw its bid under Public Contract Code §5103 without forfeiting its bid bond. No advantage, either prospective or actual, was gained.

FD Thomas points to the correct authority in its bid protest, but, as in its other arguments, arrives at the wrong conclusion. As FD Thomas wrote, "[u]nder California law, a minor irregularity can be waived only 'if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders'" (citing *Konica Business Machines*, 206 Cal.App.3d 449 at 454.) Here, Liberty Maintenance's error with respect to Tri-Valley did not affect in any way the amount of its bid, and it gained no competitive advantage or benefit thereby. Consequently, Liberty Maintenance's bid is not per se non-responsive, and Caltrans should choose to waive the irregularity as a non-material oversight.

FD Thomas also argues but cites no authority for the proposition that a bid must be rejected if a contractor fails to list a subcontractor it intends to use. Under applicable law, the

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failure to designate a subcontractor simply means that the contractor agrees to self-perform the work (See Public Contract Code §4106.) Liberty Maintenance is fully qualified and prepared to perform the work it intended to subcontract to Tri-Valley, and will perform the work after bid award.

It is an unfortunate consequence of Liberty Maintenance's last-minute oversight that Tri-Valley, a DBE contractor, will be excluded from participation in the project. FD Thomas argues that Liberty Maintenance's bid must be rejected because the exclusion of Tri-Valley will result in a DBE participation rate of slightly less than 4%, however Liberty Maintenance submitted both DBE participation commitments and good faith efforts documentation. Liberty Maintenance respectfully submits that its original commitment level of over 4%, and the technicality that will result in a revised commitment level of roughly 3.75% support a determination that good faith efforts were employed and are sufficient to support the award of the contract. In addition, Liberty Maintenance is committed, to the extent possible, to increase the purchase of materials and supplies from the DBE suppliers it listed in order to maximize DBE participation.

In closing, my client encourages you to reject FD Thomas' speculative and inadequately supported protest. Liberty Maintenance is available to answer any questions you might have, and looks forward to working with Caltrans on the project.

Sincerely,



Kevin Hannifan
for FELDMAN & ASSOCIATES, INC.

cc: Mark Feldman
Client

Phone: (925) 787-1003 Fax: (925) 213-3327

To:

Fax: +1 (330) 765-1947

Page 1 of 1 03/17/2015 9:22 AM



Tri-Valley Striping
 15 Charles Hill Circle
 Orinda, CA 94563
 Phone (925) 787-1003
 WBE/SBE/DBE

Certifications available upon request

Job
CONSTRUCTION ON STATE HIGHWAY IN SACRAMENTO COUNTY NEAR ISLETON AT THREE MILE SLOUGH BRIDGE CONTRACT NO. 03-3F3404

Proposal	
Date	Proposal #
3/16/2015	CE15018

Line Item	Base Bid	Unit Cost	Qty.	Units	Total
16	Remove yellow traffic stripe (Hazardous Waste)				
20	Remove Thermoplastic Traffic Stripe	\$2.50	1,310	LF	\$3,275.00
21	Remove Thermoplastic Pavement Marking	\$1.00	2,200	LF	\$2,200.00
27	4" Thermoplastic line	\$5.00	120	SCFT	\$600.00
28	Pavement Markings	\$1.88	3,900	LF	\$7,316.40
29	4" Thermoplastic Stripe (Broken)	\$12.50	180	SCFT	\$2,250.00
30	Pavement Markers (Retroreflective)	\$2.14	120	LF	\$256.80
32	Mobilization	\$11.20	110	EA	\$1,232.00
		\$3,000.00	1	LS	\$3,000.00

Addendum 1 and 2 noted

Includes: Cal Tracking

Excludes: Permits, Fees, Lead Compliance Plan, Additional Insured Fees, Temporary Pavement Markings, Traffic Control

TOTAL \$20,148.20

From: Landy RATH [mailto:landy@trivalleystriping.com]
Sent: Tuesday, March 17, 2015 2:48 PM
To: ejfrangos@libertymaintenanceinc.com
Subject: revised proposal for Three Mile Slough project

Hi Manny – as we discussed, we are bidding on the temporary pavement striping and marking. We are also adjusting our pricing on the removal. I am attaching our revised proposal for this project. Please call if you have any questions. Have a good week.

Landy Rath
 Tri-Valley Striping | 15 Charles Hill Circle | Orinda, CA 94563
 Phone: 925-787-1003 | FAX: 888-872-4450
 landy@trivalleystriping.com
 CA Lic. 850528

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 Phone (925) 787-1003
 r85858585

estimates available upon request

Job	
CONSTRUCTION ON STATE HIGHWAY IN SACRAMENTO COUNTY NEAR ISLETON AT THREE MILE SLOUGH BRIDGE	
CONTRACT NO. 03-SF9404	

Proposal	
Date	Proposal #
3/18/2015	CE15018

Line Item	Description	Unit Cost	Qty.	Units	Total
7	Temporary Traffic Signs (Signs)				
8	Temporary Pavement Markings (Tape)	\$8.14	2,800	LF	\$21,792.00
16	Remove Yellow Traffic Signs (Hazardous Waste)	\$6.75	334	SF	\$2,228.00
20	Remove Thermoplastic Traffic Signs	\$2.50	1,310	LF	\$3,275.00
21	Remove Thermoplastic Pavement Markings	\$5.91	2,200	LF	\$13,002.00
27	4" Thermoplastic Ice	\$5.05	150	SOFT	\$757.50
28	Pavement Markings	\$1.58	2,500	LF	\$3,950.00
29	2" Thermoplastic Signs (Bridges)	\$12.00	180	SOFT	\$2,160.00
30	Pavement Markings (Retroreflective)	\$2.34	120	LF	\$280.80
32	Mobilization	\$12.20	110	EA	\$1,342.00
		\$3,980.00	1	LS	\$3,980.00

Addendum 1 and 2 noted

Includes: Cost Tracking

Excludes: Permits, Fees, Lead Compliance Plans, Additional Insured Fees, Traffic Control

Proposals based on doing all line items.

TOTAL 564,274.20

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(310) 312-5401

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April 9, 2015

FACSIMILE TRANSMITTAL

Time: 1:27 p.m.

File No: _____

File Name: Liberty Maintenance/Caltrans

Sent To:

Telecopy Number:

Mr. John McMillan
Liberty Maintenance

916-227-6282
330-755-1847

From: Kevin M. Hannifan

Total Pages (Including this Cover Page): 8

DESCRIPTION OF DOCUMENT(S) TRANSMITTED:

Protest Letter re: Caltrans Contract No. 03-3F3404

MESSAGE:

ORIGINAL WILL BE SENT VIA:

MAIL FEDERAL EXPRESS MESSENGER WILL NOT BE SENT

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