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April 15, 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 further bid protest letter submitted by FD Thomas on April 13, 2015, and to correct the numerous incorrect statements contained therein.

First, FD Thomas states that "Liberty concedes that its bid is not responsive," due to the inadvertent omission of Tri-Valley Striping from Liberty's subcontractor list. This statement is both factually and legally incorrect. As discussed in my previous letter, Liberty conceded that it mistakenly omitted Tri-Valley, which it intended to use as a subcontractor on the project, not that its bid was non-responsive. Further, the legal consequence of Tri-Valley's omission is that Liberty Maintenance cannot use Tri-Valley as a subcontractor, not that its bid is invalid or non-responsive (See Public Contract Code §4106.) FD Thomas' argument in this regard is wholly without merit, and based on a fundamental misunderstanding of applicable California law.

Second, FD Thomas argues that Liberty Maintenance could have withdrawn its bid due to the omission of Tri-Valley because Liberty made a mistake in its bid that made the bid materially different. FD Thomas' argument is incorrect because it assumes that *every* mistake that may be made during the bid process is a material mistake, when, in fact, Tri-Valley's identity is not a material element of Liberty Maintenance's bid.

Under Public Contract Code § 5103, a bidder may only be relieved if its mistake made the bid *materially* different than intended. A particular bid requirement or term is considered material if it affects price, quantity, quality, or delivery, or if the bid package identifies the term mandatory (See Stimson v. Hanley (1907) 151 Cal. 379). Here, Tri-Valley's identity

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does not add or subtract to the material terms of Liberty Maintenance's bid. Liberty Maintenance must honor its bid price notwithstanding its omission of Tri-Valley, and the quantity, quality, and delivery of the work are still governed by the plans and specifications. As previously discussed, the only legal consequence of the omission is that Tri-Valley may not participate in the way Liberty Maintenance had originally intended.

Third, FD Thomas' argument with respect to the "Total Value of all Subcontracts" is overstated. While Liberty Maintenance input the total value of DBE subcontracts on the DBE Participation form instead of the total value of all contracts, its error was inconsequential and should be waived as such. The total value of the subcontracts is clearly ascertainable from the bid form itself (as demonstrated by the relative ease with which FD Thomas was able to determine their value), and, in the post-bid DBE submission context, Liberty's misunderstanding did not affect a material term, as the values of all subcontracts and all DBE subcontracts are already known.

Fourth, while FD Thomas claims that Summit West's use of the word "teaming" in its quote "removes all doubt that a non-DBE firm will be performing at least a portion of the work," FD Thomas' own argument admits that its protest is based on nothing more than speculation and assumption. A qualified DBE subcontractor knows that it must self-perform the work for which a general contractor seeks participation credit. In this situation, it is inherently more reasonable to infer that Summit West will "team" with Sycamore Environmental by hiring, on a temporary basis, qualified staff to work for Summit West on this project. FD Thomas speculates that a subcontract relationship is implied by a single word, and purports to place the burden on Liberty Maintenance to disprove its assumptions. Speculation and assumptions are improper grounds for a bid protest, and FD Thomas' arguments with respect to Summit West are without merit.

Finally, FD Thomas' misplaced responsibility argument proceeds from a mischaracterization of Liberty Maintenance's response and a selective reading of Business and Professions Code § 7059 (b), which in its entirety provides as follows:

In public works contracts, as defined in Section 1101 of the Public Contract Code, *the awarding authority shall determine the license classification necessary to bid and perform the project.* In no case shall the awarding authority award a prime contract to a specialty contractor whose classification constitutes less than a majority of the project. When a specialty contractor is authorized to bid a project, all work to be performed outside of his or her license specialty, except work authorized by subdivision (a), shall be performed by a licensed subcontractor in compliance with the Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the Public Contract Code).

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While FD Thomas has argued that Bid Item 26 necessarily requires an A license, it has offered no evidence to support its position, and the decision is ultimately Caltrans' to make. The work described in Bid Item 26 and Special Provision 78-2.01 is essentially coordinating communication with Caltrans' engineers, weighing Caltrans provided counterweight blocks, and moving counterweight blocks at Cantrans' direction. Liberty Maintenance has successfully performed the same and similar lift-span balancing work for other owners on numerous projects. Further, if Caltrans ultimately determines that an A license is required for a portion of Bid Item 26, Liberty Maintenance bid that work at \$40,000, which is less than one half of one percent of its overall bid. In that circumstance a subcontractor could be used to complete the portion of work requiring an A license without violating the Fair Subletting and Subcontracting Act. Further, FD Thomas has offered no explanation of how it intends to subcontract a portion of Bid Item 26 to a subcontractor that does not possess an A license, thereby undermining its own argument.

In closing, FD Thomas' latest letter simply recites its previous protest grounds and goes to great lengths to selectively cite and twist legal precedent and authorities. Liberty Maintenance encourages you to reject FD Thomas' ploy, and looks forward to working with Caltrans on this project.

Sincerely,



Kevin Hannifan
for FELDMAN & ASSOCIATES, INC.

cc: Mark Feldman
Client

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Mr. John McMillan
Liberty Maintenance

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Response to Further Protest Letter re: Caltrans Contract No. 03-3F3404 submitted by FD Thomas

MESSAGE:

ORIGINAL WILL BE SENT VIA:

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