



April 06, 2015

**VIA FACSIMILE (916) 227-6282 AND U.S. MAIL**

John C. McMillan  
Deputy Division Chief  
Department of Transportation  
Division of Engineering Services  
Office Engineer, MS 43  
1727 30th Street  
P.O. Box 168041  
Sacramento, CA 95816-8041

Re: F.D. Thomas, Inc. Bid Protest of Liberty Maintenance, Inc.  
Contract No. 03-3F3404  
Construction On State Highway In Sacramento Near Isleton At Three Mile Slough Bridge  
In District 03 On Route 160  
03-Sac-160-L7.0  
Project ID 0312000219  
Federal-Aid Project ACBHNH-P160 (024) E

Dear Mr. McMillan:

The apparent low bidder on the project is Liberty Maintenance, Inc. DBA Ohio Liberty Maintenance, Inc. (Liberty). F.D. Thomas, Inc. (F.D. Thomas) is the apparent second-low bidder. F.D. Thomas hereby protests the award of the contract to Liberty on the grounds that Liberty's bid is non-responsive and Liberty is not a responsible bidder for the following reasons:

- Liberty's bid violates California's Subcontractor Listing Laws.
- Liberty's bid does not comply with CalTrans' Disadvantaged Business Enterprise (DBE) requirements.
- Liberty's bid requires Liberty to self-perform work for which it is not qualified under California Contractor License Laws (Liberty is a "C-33"- Specialty Painting Contractor intending to perform Adjustment and Lift Span Balancing, which should be done by an "A" Licensed General Engineering Contractor).

**Liberty's Bid Violates California's Subcontractor Listing Laws**

Public Contract Code §4104, which is part of the Subletting and Subcontracting Fair Practices Act, provides that each bidder on a public work shall "list" the name and place of business of each subcontractor that will perform work in excess of one-half of one percent of the contractor's total bid, or \$10,000, whichever is greater. This requirement is reiterated in section 2-1.33C of Caltrans' Standard Specifications 2010, CalTrans' Notice to Bidders Special Provision 2-1.10 and Caltrans' Subcontractor List Form DES-OE-0102.2B (rev 5/2014). Liberty's bid violates these laws, specifications and bid requirements.



Specifically, Liberty recorded *Tri-Valley Striping*, (CA, Contractor license # 850528, which is not included in Liberty submission) only on the DBE commitment form submittal for \$54,289.80 as performing bid items 7,8,16,20,21,27,28,29,30 and partial item 32. By doing so Liberty has shown intent to use this contractor without properly listing the subcontractor according to Public Contract Code §4104. Simply put, Liberty's CalTrans Form DES-OE-0102.2B (rev 5/2014) is incorrect and not complete.

Similarly, Liberty recorded *Construction Area Signs*, (CA, Contractor license # 442645, which is not included in Liberty submission) only on the DBE commitment form submittal for \$21,880.00 as performing bid items 4, 6, and partial item 5. By doing so Liberty has shown intent to use this subcontractor without properly listing the subcontractor according to Public Contract Code §4104. Thus, again Liberty's CalTrans Form DES-OE-0102.2B (rev 5/2014) is incorrect and not complete.

Liberty's failure to correctly list all of its subcontractors is not a minor irregularity that can or should be waived. Under 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 ..." *Konica Business Machines U.S.A., Inc. v. Regents of University of California*, 206 Cal.App.3d 449, 454 (1966). Public Contract Code §5103 allows a contractor to withdraw its bid if it made an error "in filling out the bid," which includes typographical or arithmetical errors. *MCM Constr., Inc. v. City & County of San Francisco*, 66 Cal.App.4th 359 (1998). By failing to properly list these two subcontractors, Liberty could seek to withdraw its bid without forfeiting its bond pursuant to Public Contract Code §5103 – a clear and unfair advantage that requires the bid to be deemed non-responsive. See *Valley Crest Landscape v. City of Davis*, 41 Cal.App.4th 1432, 1442 (1996).

### **Liberty Failed To Comply With CalTrans' DBE Requirements**

The 2010 Standard Specifications and Special Provisions for this project contain multiple DBE-related requirements. First, the "Notice to Bidders" establishes a DBE goal of 4% for this project. Second, the DBE Commitment Form for this project must be properly completed, which includes (1) tallying the total number and value of DBE and non-DBE subcontracts and (2) ensuring "the names of the first tier DBE subcontractors and items of work [are] consistent with the subcontractor list (pub contact code § 4100 et seq.)." Liberty's bid does not meet these DBE requirements for the following reasons:

- Liberty's DBE Commitment Form does not list the "Total Number of all Subcontracts (DBE & Non-DBE)" or the "Total Value of all Subcontracts (DBE & Non-DBE)." Instead, Liberty listed only DBE subcontracts totaling 377,446.56. Liberty omitted all non-DBE subcontracts that are listed on its CalTrans Form DES-OE-0102.2B (rev 5/2014), which brings a serious level of confusion to this determination (see attached documents).
- Although identified on the DBE Commitment Form, Liberty failed to list *Tri-Valley Striping*, license # 850528, on its form subcontractor list (CalTrans Form DES-OE-0102.2B) (rev 5/2014). Under Public Contract Code §4104, because *Tri-Valley* is not listed, it cannot perform work on this project, lowering the amount of DBE participation by \$54,289.80. Please note that Liberty's DBE Commitment Form states that *Tri-Valley* will perform bid Item



Nos. 7,8,16,20,21,27,28, 29,30 and partial item 32. By not listing this subcontractor, Liberty must self-perform these items, pursuant to Public Contract Code §4106.

- Although identified on the DBE Commitment Form, Liberty failed to list Construction Area Signs, license # 442645, on its form subcontractor list (CalTrans Form DES-OE-0102.2B) (rev 5/2014). Under Public Contract Code §4104, because Construction Area Signs is not listed, it cannot perform work on this project, lowering the amount of DBE participation by \$21,880.00. Notably, Liberty's DBE Commitment Form states that Construction Area Signs will perform bid Item Nos. 4, 6, and partial item 5. By not listing this subcontractor, Liberty must self-perform these items, pursuant to Public Contract Code §4106.
- Liberty's DBE Commitment Form inaccurately states that Summit West Environmental, Inc. will perform bid Item Nos. 18 and 19 for the amount of \$79,000. The quote provided by Summit West Environmental reveals a qualification which states that "Summit West will be teaming with Sycamore Environmental Consultants, Inc. to provide field work." Likewise, an the email that Liberty included in the DBE submission package from Chezzie Brungraber representing Summit West, is the statement, "I have also cc'd Sycamore Environmental, Inc. as they will be helping me with this work should it be awarded." (see attached documents)

According to the U.S. Government Publishing Office website link from the Cal Trans Website<sup>(1)</sup>, Title 49, Subtitle A → Part 26, Subpart C, section §26.55 states that "When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals" and "When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE". In other words, work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. In light of Summit West's quotation and email correspondence clarifying that it will not be performing the entire scope of the work, the DBE participation should not be counted toward Liberty's DBE goal as Sycamore Environmental Consultants, Inc. is not listed as a certified DBE business.

In total, Liberty has overstated its DBE Commitment by \$155,169.80 (\$54,289.80 + \$21,880.00 + \$79,000.00). When this overstatement is subtracted from Liberty's DBE commitment, Liberty is left with DBE Commitment percentage of only 2.5%, which is well below the 4% required percentage for this project. Accordingly, this is a major deviation from the State's DBE requirements that renders Liberty's bid non-responsive.

Moreover, even if Liberty's non-compliance with the DBE requirements could be considered a minor irregularity, the irregularity cannot be waived because it gave Liberty an advantage over the other bidders. See *Konica Business Machines U.S.A., Inc.*, 206 Cal.App.3d at 454. For example, Liberty saved precious time in formulating its bid by not identifying all subcontracts and the total value of its subcontracts in the DBE Commitment Form and also by not including all DBE subcontractors in its form subcontractor list (i.e., CalTrans Form DES-OE-0102.2B). Time is obviously an extremely precious commodity for publicly bid projects because contractors have a small window of time to calculate their bids, complete the bid documents and submit everything to the public entity within a set deadline. Here, while contractors like F.D. Thomas were forced to spend time ensuring that the DBE forms form subcontractor lists were properly completed before submitting their bids, Liberty was able to use that time on more substantive matters like re-



evaluating estimates, analyzing last-minute supplier/subcontractor bids, taking more time to assess the Project and recalculating its bid.

**Liberty Is Not A Responsible Bidder Because Liberty Is Not Qualified To Perform Bid Item #26 (Special Provisions 78-2 Adjust Lift Span Balance)**

Public Contract Code §10164 requires bidders to be properly licensed in accordance with the laws of this state at the time the contract is awarded. Indeed, that section further provides:

The contract shall not be awarded unless the state agency has verified that the contractor has a valid license in the appropriate classification for the work performed. Any bidder or contractor not so licensed shall be subject to all legal penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the Contractors State License Board.

Liberty has included in this bid self-performance of work which it is not qualified to perform under California's Contractor License Laws. Liberty is classified as a "C-33" Specialty Painting Contractor. Self-Performing Bid Item # 26, (Adjust Lift Span Balance) is work that is outside the qualification of a C-33 Painting Contractor and is definitely not incidental to painting nor commonly performed by a painter. Such work requires specialized engineering knowledge and skill and, therefore, requires a Class "A" license. See Cal. Bus. & Prof. Code §7056.

According to a contractor license search, Liberty is classified with a Painting and Decorating C-33 Specialty License (see attached documents). This qualifies Liberty to perform the following work according to the California Contractors State License Board website:<sup>1</sup>

A painting and decorating contractor prepares by scraping, sandblasting or other means and applies any of the following: paints, papers, textures, fabrics, pigments, oils, turpentines, japans, driers, thinners, varnishes, shellacs, stains, fillers, waxes, adhesives, water and any other vehicles, mediums and materials which adhere by evaporation and may be mixed, used and applied to the surfaces of structures and the appurtenances thereto for purposes of decorating, protecting, fireproofing and waterproofing.

Liberty has listed no qualified subcontractor to perform this work, and the specialty license which they hold is not adequate. It would appear that Liberty is preparing to either self-perform work for which they are not licensed or, alternatively, hire a qualified subcontractor who has not been properly listed per the Cal Trans Form DES-OE-0102.2B (rev 5/2014). Accordingly, Liberty is not a responsible bidder and its bid should be rejected accordingly. See *MCM Constr., Inc. v. City and County of San Francisco*, 66 Cal.App.4<sup>th</sup> 359, 368 (1998) (bidder is not responsible if it cannot perform the contract as promised.)

<sup>1</sup> See [http://cslb.ca.gov/About\\_Us/Library/Licensing\\_Classifications/C-33\\_-\\_Painting\\_And\\_Decorating.aspx](http://cslb.ca.gov/About_Us/Library/Licensing_Classifications/C-33_-_Painting_And_Decorating.aspx).



## Conclusion

Since Liberty's bid is clearly non-responsive – on multiple, independent grounds – and Liberty is not a responsible bidder, F.D. Thomas respectfully requests that Caltrans reject Liberty's bid, and award the contract to F.D. Thomas as the lowest responsible, responsive bidder.

If you have any questions, please contact me as I would be happy to respond or clarify further.

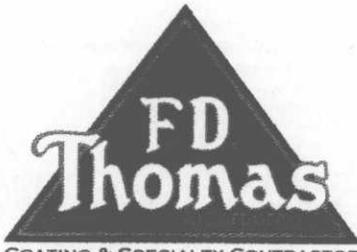
Respectfully,

Grover Lee  
F.D. Thomas VP/Division Manager

P: 541.864.1602  
C: 541.840.6276  
F: 541.664.1105  
E: grover@fdthomas.com

## References:

1. [http://www.ecfr.gov/cgi-bin/text-idx?type=simple;c=ecfr;cc=ecfr;sid=ef39173e4148465ac024cbe5909b418d;idno=49;region=DIV1;q1=26.61;rgn=div5;view=text;node=49%3A1.0.1.1.20#se49.1.26\\_155](http://www.ecfr.gov/cgi-bin/text-idx?type=simple;c=ecfr;cc=ecfr;sid=ef39173e4148465ac024cbe5909b418d;idno=49;region=DIV1;q1=26.61;rgn=div5;view=text;node=49%3A1.0.1.1.20#se49.1.26_155)
2. <http://www.cslb.ca.gov/Resources/GuidesAndPublications/DescriptionOfClassifications.pdf>



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217 Bateman Drive Central Point, OR 97502  
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**Fax**

**To:** Caltrans Office of the Engineer    **From:** Grover Lee

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**Fax:** 916-227-6282    **Pages:** 6 including cover sheet

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**Phone:**    **Date:** 4/6/2015

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**Re:** Contract # 03-3F3404    **CC:**

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**Email:**    **Attn:** John C. McMillan

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**Urgent**     **For Review**     **Please Comment**     **Please Reply**

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Please see attached bid protest.

Please call me if you have any questions

Grover Lee  
F.D. Thomas, Inc.  
(541) 664-3010 Office