



**Santa Margarita
Construction Corp.**

February 8, 2013

John McMillan, Deputy Division Chief
 Mulissa Smith, Contract Branch Chief
 Division of Engineering Services
 Office Engineer, MS 43
 1727 30th Street
 P.O. Box 168041
 Sacramento, CA 95816-8041

Re: Contract No. 04-2E7504
 Protest of Bid

Mr. McMillan:

Santa Margarita Construction Corp. (SMCC) hereby protests the bid received the the California Department of Transportation (Department) on January 29, 2013 of Newton Construction & Management, Inc (Newton).

Newton's Certified DVBE Summary Materially Amends Newton's Subcontractor List

The apparent low bidder, Newton, submitted with its bid proposal a Certified DVBE Summary and Subcontractor List [Exhibit A, B].

Per Newton's Subcontractor List, Newton utilized Western Structures of Riverside, California to perform 6-percent of bid items 12 – Prepare Concrete Bridge Deck Surface and 13 – Treat Bridge Deck, defined solely by Newton as “Deck Surfacing” via its Description.

Per Newton's Subcontractor List, Newton is subcontracting exactly \$3,609.42 to Western Structures. This is established within Newton's Subcontractor List and is not subject to change without applicable penalty per Public Contract Code § 4100 et seq.

Contrary to Newton's Subcontractor List is Newton's Certified DVBE Summary. Newton's Certified DVBE Summary states Western Structures is performing \$57,000.00 in “Deck Surfacing” for bid items 12 – Prepare Concrete Bridge Deck Surface and 13 – Treat Bridge Deck in which Newton is claiming Western Structure's DVBE participation.

Newton's utilization of \$57,000.00 in “Deck Surfacing” services by Western Structures for DVBE participation is in direct conflict with Newton's Subcontractor List in which Newton states Western Structures will be performing \$3,609.42 in “Deck Surfacing” services within the bid items corresponding between Newton's Certified DVBE Summary and Subcontractor List.

Please note the determination of the Department regarding the following contracts and corresponding bidders: 06-0C1304, American Paving; 06-0C1304, Emmett's Excavation; 12-0K5304, Highland Construction; 07-4T3504, JTS Construction; 07-4T3504, Re Com Development; 12-0C5704, SEMA Construction; 12-0C5704, Powell Constructors; et cetera.

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It has been upheld that the Department's consideration in regard to Column 3: Percentage of Bid Item Subcontracted within the Subcontractor List found in each bid packet is consistent. These percentages to be subcontracted are not to be increased or decreased after commencement with the work.

Once a contract is awarded, the contractor must submit for approval to the Resident Engineer a Subcontracting Request. The Subcontracting Request must correspond with the contractor's Subcontractor List. Newton's Subcontractor List states Western Structures will be performing 6-percent of bid items 12 – Prepare Concrete Bridge Deck Surface and 13 – Treat Bridge Deck, or \$3,609.42 of "Deck Resurfacing".

However, Newton claims Western Structures is performing \$57,000.00 of the same "Deck Resurfacing" work within the same bid items.

Due the Resident Engineer's inability to allow Newton to subcontract approximately 95-percent of bid items 12 – Prepare Concrete Bridge Deck Surface and 13 – Treat Bridge Deck to Western Structures as they are listed as performing 6-percent of this work, it will be impossible for Newton's bid to provide adequate DVBE participation on this project without the Department unlikely providing Newton such material advantage as waiving this enormous variance as a minor irregularity.

Recapitulating, Newton cannot and will not utilize \$57,000.00, or 6-percent of Newton's bid price, in DVBE services because the Department cannot accept revised subcontracting percentages post-award which differ by \$53,390.58, or 5.7-percent of Newton's bid price. This directly violates Public Contract Code § 4100 et seq., and a violation would have to occur in order for Newton to achieve adequate DVBE participation and meet the project's goal.

Consideration given to the \$53,390.58 variable in proposed DVBE participation, approximately 5.7-percent of Newton's total bid and 95-percent of Newton's claimed DVBE participation, the difference is substantial on these smaller projects. Regarding the Department's strong stance toward award of contracts to entirely responsive bidders and the consistency in deeming irregular bids non-responsive, the Department should take into account the notable intent of prime contractors to fulfill DVBE and subcontractor commitments. Should prime contractors begin to routinely list DVBE's for participation in various bid items, and simply insert a "blanket" number within the Certified DVBE Summary without truly ensuring adequate DVBE participation, the goals would become nonenforceable. It is unknown which sum of participation Newton will allow for DVBE performance, and the material advantage is held by the fact there is no provision regarding annulment of participation documentation provided by bidding contractors should the documentation differ throughout the bid book. For this reason the Certified DVBE Summary states:

"Names of first tier DVBE subcontractors and their items of work listed must be consistent with the names and items of work in the Subcontractor List submitted with the bid."

Clearly the items of work listed by Newton to be performed by its DVBE subcontractor are not consistent with the items of work in the Subcontractor List submitted with its bid. The Subcontractor List commits Newton to subcontracting 6-percent of bid items 12 and 13, or \$3,609.42, to Western Structures for "Deck Resurfacing", while the Certified DVBE Summary commits Newton to subcontracting 95-percent of bid items 12 and 13, or \$57,000.00, to Western Structures.

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Western Structures' (West Coast Structures, Inc.) CUF Questionable

It should be realized Western Structures provided bids to several bidding prime contractors. Western Structures does not provide material (furnishing of material is paid under a separate bid item) and does not rent equipment, but provides a contracted service which requires a California contractor's license and must be recognized as a subcontractor for its entire portion of work within the Subcontractor List.

It is unknown to prime contractors whether or not Western Structures performs a commercially useful function as the organization has not been evaluated by the Contract Evaluation Unit. There is little information regarding this company bidding prime contractors can rely upon in determining whether or not Western Structures does in fact perform the type of work it is bidding to prime contractors, and if so, which portion of its work does it subcontract. A simple Google search of either "West Coast Structures, Inc." or its dba, "Western Structures" does not return any results of "Deck Surfacing" contracts in commencement, awarded, or otherwise. There is no mention of Western Structures having ever performed a like contract.

It is questionable whether or not Western Structures owns the necessary shotblasting and application equipment to provide such "Deck Surfacing" work they have quoted for bid item 12 – Prepare Concrete Bridge Deck Surface and 13 – Treat Bridge Deck. It is unknown if Western Structures subcontracts bridge deck preparation or utilizes operated rental equipment in which their participation may be disallowed by CEU. Please determine whether Western Structures performs a CUF, or it will be otherwise assumed they do not.

Conclusion

Newton's bid does not provide for adequate DVBE participation to meet the goal, and such being clear, Newton's bid is non-responsive and the contract should be awarded to the lowest, responsive bidder.

Should Newton be determined responsive by the Department, please provide reasoning pertaining to the earlier segment of this protest. This common issue is deserving of explanation, is very much overdue and any response by the Department would be greatly appreciated.

Regards,

A handwritten signature in black ink, appearing to read "John R. Brukiewicz".

John R. Brukiewicz
Vice President

cc: Andrzej Abramowicz
Joseph Eisenberg
Shlomo Edgelberg
Dan ben Canaan
An Horowitz

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