



General Engineering Contractors – Paving, Chip Seal, Oil Spreading

1150 Willow Pass Road • Pittsburg, CA 94565 • TELEPHONE (925) 427-5266 FAX (925) 427-1216

STATE CONTRACTORS LICENSE # 984141

February 25, 2014

Via U.S. Mail and Facsimile (916) 227-6282

Mr. Earl Seaberg, Deputy Division Chief  
MSC 43  
Office Engineer Contracts Award Branch Chief  
California Department of Transportation  
1727 30<sup>th</sup> Street  
Sacramento, California 95816-7005

Re: Construction on State Highway in Napa County Near Napa From Knoxville Road to Solano  
County Line  
Caltrans Contract No. 04-3E4004, 04-Nap-128-19.1/34.3  
Protest of Bid Submitted by Chester Bross Construction Company

Dear Mr. Seaberg:

Please consider this letter to be a formal protest of the bid submitted by Chester Bross Construction Company ("CBCC") in connection with Caltrans Contract No. 04-Nap-128-19.1/34.3. For clarity, we are submitting a separate letter that protests the bid submitted by Martin Brothers Construction.

For the reasons stated below, CBCC's bid is nonresponsive. CBCC's bid must be rejected based on the Department's bidding requirements and strictly-enforced policies.

1. **CBCC Listed Two Companies As Subcontractors For Traffic Control and Therefore Is Prohibited From Utilizing Either Company**

In the subcontractor list submitted with its bid, CBCC listed both Linear Options and Force Traffic Control as performing traffic control. CBCC did not clearly identify what portions of traffic control would be performed by each listed entity. Under Public Contract Code Section 4106, "if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself."

Accordingly, CBCC must self perform the traffic control work and is prohibited from utilizing either Linear Options or Force Traffic Control. See Pub. Contract Code § 4106



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2. **Because CBCC Is Prohibited From Utilizing Force Traffic Control As A Subcontractor, CBCC Failed To Meet The DBE Participation Goal of 12%**

On its DBE commitment form, CBCC listed Force Traffic Control as performing \$79,000 in traffic control work. However, because CBCC listed two subcontractors for the traffic control work, Force Traffic Control cannot be utilized as a subcontractor, reducing the amount of work that CBCC committed to DBE firms to \$320,458, or only 10.9%, well short of the 12% minimum DBE commitment required for this contract.

3. **The Department's Prior Decisions On Double Listing Of Subcontractors Requires That It Reject CBCC's Bid As Nonresponsive**

The Department has a longstanding policy that, when a general contractor lists more than one subcontractor for the same work scope, the general contractor may not utilize the subcontractors in question and hence may not count the amount it subcontracted to those companies toward the DBE and other goals set for a contract.

CBCC would have been aware of this policy when it submitted its bid on No. 04-Nap-128-19.1/34.3 because Teichert Construction had protested CBCC's bid on December 30, 2013, in connection with Contract No. 06-0Q7704. On that contract, as here, CBCC had listed two subcontractors for the same scope of work. Caltrans upheld Teichert's protest of CBCC's bid, ruling:

Since Chester Bross must perform bid item 3, with its own forces, that work cannot now be counted towards the 3 percent Disabled Veterans Business Enterprise (DVBE) participation on this contract. As a result, the total claimed participation has been reduced from \$47,087 or 3.24 percent, to \$8, 441 or .058 percent.

Therefore, Chester Bross did not meet the stated DVBE participation goal for this contract and is no longer eligible for award of this contract.

Caltrans has issued similar rulings in connection with protest on other bids. For example, on January 30, 2012, Caltrans rejected a bid submitted by HCI in connection with Contract No. 07-279804, where HCI had failed to comply with Public Contract Code section 4106.



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Similarly, on May 30, 2013, Caltrans determined that Knife River Construction would not be allowed to subcontract Bid Item no. 1 on Contract no. 03-4M1604 because it had listed to separate subcontractors for that work.

Given that Caltrans in the past has ruled that when a general contractor lists more than one subcontractor for the same work scope, the listed subcontractors cannot be utilized or counted toward contract goals, it cannot depart from that precedent and adopt a different rule for this contract. Treating similarly situated bidders differently constitutes an action by a public agency undertaken without any reason, "based on no more than the will or desire of the decision-maker," and by definition is arbitrary and capricious conduct. See *Clack v. State*, 275 Cal. App. 2d 743, 747 (1969) (action based on will or desire of the public agency, and no more, is arbitrary); *Verdugo Hills Hospital, Inc. v. Department of Health*, 88 Cal. App. 3d 957, 964 (1979) (action done without apparent reason is arbitrary).

#### Conclusion

The Department owes a duty to enforce its bid requirements in a fair and uniform manner. Accordingly, because CBCC has patently failed to comply with the Department's bid requirements, CBCC's bid is nonresponsive and must be rejected.

We therefore respectfully request that the Department uphold Windsor Fuel Company's protest and award the contract to our company, which submitted the lowest responsive bid for No. 04-Nap-128-19.1/34.3. Thank you for your careful attention to this protest, and please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Marc Armstrong', is written over a horizontal line.

Marc Armstrong  
Estimator / Project Manager

CC: Mike Fain, Karl Meyers

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**Windsor Fuel Company**

# WFC

**To:** Caltrans

**From:** Marc Armstrong

**Attention:** Office Engineer

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**Fax:** 916-227-6282

**Pages:** 4

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**Phone:** 916-324-6985

**Date:** 2/25/2014

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**Re:** Contract No. 04-3E4004 Chester Bross  
Construction Protest

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**Urgent**

**For Review**

**Please Comment**

**Please Reply**

**Please Recycle**

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● **Comments:**

Please see attached our Formal Protest to Contract No. 04-3E4004, 04-Nap-128-19.1/34.3 as required. Please let me know if you need any further information. Please confirm receipt. Hard copy will be sent via Certified mail.

Thanks,

Marc