Received Jun 18 2013 08:25am

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June 18, 2013

VIA FACSIMILE (916) 227-6282 and GSO

Mr. John McMillan, Deputy Division Chief
State of California
Department of Transportation
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, California 95816-8041
Telephone: (916) 227-6300

RE: Caltrans Contract No. 06-0L3904 (the "**Contract**")
Bid Opening: *5/29/2013*

Dear Mr. McMillan:

On May 29, 2013, Granite Construction Company ("**Granite**") submitted a bid to the California Department of Transportation (the "**Department**") for Contract Number 06-0L3904 (the "**Contract**"). Griffith Company ("**Griffith**") is currently the monetary low bidder and Granite is the apparent second low bidder. By this letter, Granite would like to bring to the Department's attention the following material defects in Griffith's bid: (a) one of the entity's Griffith claims as a Disadvantaged Business Enterprise ("**DBE**"), Our Valley Fence Company, is not a certified DBE; (b) Griffith substantially overstated its DBE commitment; and consequently, (c) Griffith did not meet the seven percent (7%) DBE Contract goal and did not make adequate good faith efforts to meet this goal. As a result, Griffith's apparent low bid is non-responsive.

We appreciate that the Department is well-versed in DBE program requirements. We do not wish to overburden the Department, but found it necessary to notify the Department of this situation in which Our Valley Fence Company is not a certified DBE. We respect the Department's time, efforts and diligence in this matter.

Griffith's Did Not Meet the Contract DBE Goal and Did Not Make Adequate Efforts to Meet this Goal

Bidders for this Contract are required to "[t]ake necessary and reasonable steps to ensure that DBEs have the opportunity to participate in the Contract." (*See* Revised Standard Specifications, §2-1.12A.). To this end, each bidder was required to meet the 7% Contract DBE goal or demonstrate that it made adequate good faith efforts to meet that goal. (*See* Notice to Bidders and Revised Standard Specifications, §2-1.12B). Each bidder is responsible to verify that at the bid opening date the DBE firm is properly certified as a DBE for the scope of work specified on the bidder's commitment form.

The DBE Contract goal is seven percent (7%). Griffith claims to have met the Contract DBE goal, in significant part (almost 40%), through use of Our Valley Fence Company. However, as the Department knows, Our Valley Fence Company is not a certified DBE, and thus, Griffith's DBE commitment was substantially overstated. Without Our Valley Fence's participation, Griffith's actual total claimed DBE participation is $48,982.50 or merely **4.76%**. Griffith's DBE listing error and reliance on its overstated DBE commitment have given it the opportunity to avoid the 7% DBE Contract goal.

The material defect in its DBE commitment form also demonstrates a lack of good faith effort to meet the DBE Contract goal. Griffith's inadequate efforts to meet the DBE Contract goal are highlighted by the ability of Granite to exceed the 7% goal. The purpose of the good faith efforts requirement is to

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evaluate whether the bidder made adequate efforts to make the goal but, despite those good faith efforts, was unable to meet the goal. As the U.S. DOT explains in its guidance materials, "This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of Part 26 which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful... The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal." That does not appear to be the situation in this case. Griffith could have met the goal had it not made a material error by including a non-DBE in its DBE commitment form. Indeed, Granite (and other bidders) met or exceeded the DBE goal for this Contract. In determining whether the low bidder made good faith efforts to meet the DBE goal, the Department may consider DBE commitments of the 2nd and 3rd bidders. (*See* Revised Standard Specifications, Section 2-1.12(B)(3)). As explained in Appendix A to Part 26—Guidance Concerning Good Faith Efforts, "In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal."

In essence, documented good faith efforts are meant to evidence that the bidder did all it could to reasonably meet the DBE goal, but, despite those efforts, was unable to obtain the needed DBE participation. A bidder who makes an error that by all accounts reduces the actual DBE participation on a contract should not be considered to have fulfilled their good faith efforts obligations. Good faith efforts are meant to increase DBE participation.

The Defects in Griffith's Bid Are Material

California Public Contract Code §10180 requires the Department to award its construction contracts to the lowest responsive bidder via competitive bidding. A bid that does not strictly conform to the call for bids cannot be accepted if the variance could have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders. In other words, a public agency can only waive a deviation from bid specifications that is inconsequential and not material. A bid containing a material deviation must be rejected as non-responsive. In this case, Griffith's deviations from the Department's Bid Specifications and governing DBE regulations created an advantage for Griffith not available to other bidders. The defects in its bid enabled Griffith to claim more DBE participation than that to which it was entitled and to potentially reduce its committed DBE participation. Such defects are material, give Griffith a competitive advantage over other bidders, and render Griffith's bid non-responsive.

Your time and consideration of this matter are greatly appreciated. Please do not hesitate to contact me at (661) 387-7745 if you require additional information.

Respectfully Submitted,

John S. Van Lenten
Bakersfield Area Manager