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March 22, 2013

Via Facsimile to (916)227-6282 and (916)375-4611;
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Attn: Mulissa Smith
Office Engineer
Department of Transportation
1727 30th Street
Sacramento, CA 95816

Procurement Division
Department of General Services
707 3rd Street, 2nd Floor
West Sacramento, CA 95606

Re: Caltrans Project No. 06-0N7904
Federal Aid Project No. ACSTP-X019(024)E
Windsor Fuel Co.'s Response to Synergy's Bid Protest

Dear Ms. Smith and Department:

This letter constitutes Windsor Fuel Co.'s ("Windsor") response to Synergy Project Management, Inc.'s ("Synergy") protest of Caltrans' intent to award Caltrans Contract No. 06-0N7904 (the "Project") to Windsor.

Contrary to Synergy's contentions, Windsor's Class A license allows Windsor to perform traffic control work because the street and road work comprising the Project requires specialized engineering knowledge and skill. The remaining basis for Synergy's protest also has no merit because California law provides that on a project that receives federal funds, such as the Project at issue, the contractor's licensure at bid time is not a basis for determining whether a bid is responsive. Additionally, Caltrans' Standard Specifications require only that the contractor shall be licensed when the project is awarded to him or her.

Even if Caltrans were legally permitted to consider Windsor's licensure in order to determine responsiveness, under California law Windsor's pocket license issued by the Contractors' State License Board ("CSLB"), attached hereto, is conclusive evidence that Windsor has a valid and active Class A license. Consistent with California law, the CSLB has allowed Michael Telfer to act as the qualifying person for Telfer Oil Company's ("Telfer") license because Mr. Telfer owns more than twenty percent of Telfer. Mr. Telfer also is a manager of Telfer. As the person qualifying for the license of Telfer and one other firm, Mr. Telfer has not exceeded the limitation imposed by Business and Professions Code section 7068.1(b), which allows an individual to be the license qualifier for three firms. Windsor is a fictitious name for Telfer and not a

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separate legal entity. Windsor is not a sole proprietorship, nor an organization or combination of organizations enumerated of mentioned in Sections 7068 and 7068.1 of the Business and Professions Code. Accordingly, the Project must be awarded to Windsor as the lowest responsive and responsible bidder.

Synergy's Licensing Arguments Are Incorrect

1. Business & Professions Code Section 7056 Allows Windsor To Perform Traffic Control Work Under Its Class A License Because The Project Work Requires Specialized Engineering Skill And Knowledge.

Windsor is fully licensed to perform traffic control work. Caltrans' Notice to Bidders requires only that bidders hold a Class A or C-12 license. (Notice to Bidders, p. 2.) Windsor holds a Class A general engineering contractor's license. A photocopy of its license pocket card, issued by the Contractor's State License Board (CSLB) is attached hereto.

A Class A license requires only that Windsor's principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill. Bus. & Prof. Code § 7056. Windsor's principal contracting business satisfies this requirement. The Project work involves the rehabilitation of street and road work, work that Section 7056 identifies as an example of work that involves specialized engineering knowledge and skill. "On its face [Section 7056] does not restrict the divisions or subjects of fixed work requiring the specialized skill of the Class A license." Ron Yates Constr. Co. v. Sup. Ct, 186 C.A. 3d 337, 346 (1986) (rejecting the argument that sections 830 and 834 of the California Code of Regulations, title 16, or Business and Professions Code section 7059 restrict the scope work a general engineering contractor may perform); Pac. Caisson & Shoring Inc. v. Bernards Bros., Inc., 198 C.A.4th 681, 689 (2011). In addition, the traffic control work itself requires specialized engineering skill and knowledge. Under California law, Windsor is required to hold only a Class A license to perform the traffic control work.

Nor did Caltrans' bid documents require that a specialty license be held by a Class A general engineering contractor who intends to perform traffic control work. Additionally, we note that the traffic control work itself requires engineering knowledge and skill. Synergy's contentions have no legal or factual basis.

2. Windsor's Compliance With California's Licensing Laws Is Not A Basis For Invalidating Windsor's Bid Because The Project Will Receive Federal Funds.

This Project will receive federal aid. Public Contract Code section 10164 provides: "In all state projects where federal funds are involved, no bid submitted shall be invalidated by the failure of the bidder to be licensed in accordance with the laws of this state." This statute expressly contemplates that bidders shall be properly licensed "at the time the project is awarded" and contemplates that bidders shall "obtain proper and

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adequate licensing for an award of contract.” (emphasis added). It would be a violation of California law for Caltrans to determine that Windsor’s bid is invalid because of Synergy’s allegations that Windsor is not licensed in accordance with applicable laws. Consistent with Section 10164 of the Public Contract Code, section 3-1.06 of Caltrans’ General Provisions requires only that “the Contractor must be properly licensed as a contractor from contract award through Contract acceptance (Pub Cont. Code § 10164).” (emphases added).

In order to avoid violating California law and to comply with its own General Provisions, Caltrans must disregard Synergy’s arguments regarding licensure for the purpose of determining whether Windsor is the lowest responsive and responsible bidder.

3. Windsor Holds A Valid And Active Class A General Engineering License.

The pocket card issued to a licensee by the CSLB “shall be evidence that the licensee is duly licensed.” Bus. & Prof. Code § 7072.5. Attached hereto is a photocopy of the pocket card issued to Windsor, which constitutes sufficient evidence necessary to establish that its license is valid and active. *Id.* Only the CSLB has the authority to change the status of Windsor’s license. The CSLB’s website indicates that Windsor’s license remains active and valid.¹

A contractor’s license is not automatically invalidated by purported violations of the licensing laws in the absence of express statutory language to that effect. Ball v. Steadfast-Blk, 196 C.A.4th 694, 703 (2011). Even if any of Synergy’s arguments had merit, the validity of Windsor’s license remains intact until determined otherwise by the CSLB.

4. Business And Professions Code Section 7068.1 Authorizes Michael Telfer To Act As The Qualifying Person For Telfer Oil Company Doing Business As Windsor Fuel Company Because Mr. Telfer Owns More Than Twenty Percent Interest In Telfer dba Windsor And There Is Common Ownership Or Management.

Each licensee is investigated by the CSLB at the time the application is submitted. By issuing licenses to Michael Telfer, Telfer Oil Co., Windsor, and Continental Western and renewing some or all of those licenses, the CSLB has determined each applicant satisfied California’s licensing laws. Had that not been the case, any entity not confirming with licensing requirements, including Business and Professions Code section 7068, would not have been issued a license.

California law allows a natural person to qualify for the license of other firms. Bus. & Prof. Code § 7068.1. Mr. Telfer is the “natural person”² qualifying for the license that he holds as an individual. As a “natural person” Mr. Telfer may act in the capacity

¹ See <https://www2.cslb.ca.gov/onlineservices/checklicenseII/LicenseDetail.aspx?LicNum=776848>.

² “Persons,” as used in Business and Professions Code section 7068.1, means “natural person.”

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of the "qualifying person" for any firm in which he holds at least a twenty percent ownership. Bus. & Prof. Code § 7068.1(a) Mr. Telfer's ownership in Telfer Oil Company (including Telfer Oil Company doing business as Windsor Fuel Co.) exceeds the minimum twenty percent requirement. While Mr. Telfer's ownership interest alone is sufficient to allow him to act as the qualifying person for the Telfer, Windsor, and Continental Western licenses, the fact that the "majority of partners, officers, or managers are the same" for Telfer (including Windsor) and Continental Western is an additional basis allowing him to act as the qualifying person for Telfer/Windsor and Continental Western. Bus. & Prof. Code § 7068.1(c).

Synergy's bid protest is without factual support because Synergy erroneously speculates that Mr. Telfer may own less than a twenty percent interest in Telfer dba Windsor or that there is no majority of common ownership or management. Synergy is wrong. Moreover, the assertions of an insufficient ownership interest and a lack of common management are made in bad faith because Synergy and its attorneys are aware from their prior communications with Windsor that Synergy's assertions in its protest letter to Caltrans and the Department are untrue.

5. Synergy Has Misconstrued Business And Professions Code Section 7068.1, Which Permits An Individual To Act As The Qualifier For Three Additional Firms.

To act as the qualifying individual who is a natural person, the individual must possess a license in his or her name. The CSLB issued a license to Mr. Telfer. Business and Professions Code section 7068.1 authorizes such "qualifying individuals" to act as the qualifier for three firms. Section 7068.1 defines "firm" as a "partnership, a limited partnership, a corporation, a limited liability company, or any other combination or organization described in Section 7068.³ Had the legislature intended to include sole proprietorships in the definition of "firm," it would have done so. Were the intention of the statute to impose such a limitation, and were each licensee considered a "firm," the CSLB would not have approved each of the licenses now at issue. Instead, the CSLB determined that Michael Telfer may act as the qualifying individual for Telfer Oil, Windsor, and Continental Western. Were the limitations imposed by Section 7068.1 applicable, and had Mr. Telfer proposed to act as the qualifying individual in violation of section 7068.1(d), a license would not have been issued.

The wording of the statute also is inconsistent with meaning or intent that Synergy seeks to impose. Business and Professions Code section 7025 defines "qualifying individual" as the "person" who qualifies for the license under Section 7068. Section 7068.1 modifies the meaning of "person" given that term under section 7025 to mean only "natural persons". Section 7068.1 therefore intends that natural persons may act as the qualifier for three firms, and "firms" does not include natural persons. *Id.* "Other combination" as used in section 7068.1 refers to joint ventures. Accordingly, under Business and Professions Code section 7068.1, Michael Telfer may act as the

³ *Id.*

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qualifying person for Telfer, including Telfer dba Windsor, as well as Continental Western Transportation Co.

6. Michael Telfer May Act As The Qualifying Person For Windsor Because Windsor Is Not A Legal Entity Distinguishable From Telfer Oil Company

Even if Synergy's interpretation of section 7068.1 of the Business and Professions Code were given credence, Synergy is still wrong based on the underlying facts. Mr. Telfer is the qualifying person for only two firms, Telfer and Continental, because Windsor is not a separate legal entity.

The use of a fictitious business name does not create a separate legal entity distinct from the person or entity operating the business. The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner. Ball v. Steadfast-BLK, 196 C.A.4th 694 (2011). "Windsor Fuel Co." is merely a fictitious business name for Telfer Oil Company and indistinguishable from Telfer as a legal entity. Telfer obtained a separate license for Windsor in order to comply with Business and Professions Code section 7059.1, which requires a license for each name under which a contractor does business. Windsor and Telfer are the same entity and use the same tax identification numbers. Windsor is not a separate firm for purposes of Section 7068.1(d).

The Project Must Be Awarded To Windsor As The Lowest Responsive And Responsible Bidder

A bid is responsive "if it promises to do what the bidding instructions demand." Taylor Bus Serv. v. San Diego Bd. of Educ., 195 Cal. App. 3d 1331, 1341 (1987). Windsor's bid is fully responsive. Windsor submitted a bid that accurately and fully completed all required forms, met DBE goals, and indicated that Windsor possesses the requisite Class A license.

Caltrans Contract No. 06-0N7904 must be awarded to Windsor because it is the lowest responsive and responsible bidder. Valley Crest Landscape, Inc. v. Davis, 41 C.A.4th 1432 (1996). A contract awarded to a bidder other than Windsor would be illegal and void. Monterey Mech. v. Sacramento Reg'l County Sanitation Dist., 44 C.A.4th 1391 (1996).

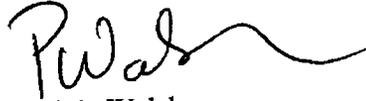
Conclusion

Windsor has demonstrated that Synergy's purported bid protest lacks support. It is unfortunate that Synergy has burdened Caltrans with a frivolous and improper protest. Windsor therefore respectfully request that Caltrans reject the protest and award the Project to Windsor Fuel Co., the contractor that submitted the lowest responsive bid. Windsor looks forward to Caltrans' decision and award.

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Please feel free to contact the undersigned if you would like to discuss this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'P Walsh', with a long, sweeping horizontal flourish extending to the right.

Patricia Walsh

cc: Ty Arbuthnot, Esq.
Enclosure


 State Of California
CONTRACTORS STATE LICENSE BOARD
 ACTIVE LICENSE 

License Number **776848** PART
 Business Name **WINDSOR FUEL CO**

Classification(s) A C61/D51

Expiration Date 03/31/2014

www.cslb.ca.gov

