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June 25, 2015

VIA FACSIMILE

Mr. John C. McMillan  
Deputy Division Chief  
California Department of Transportation  
Division of Engineering Services  
1727 30<sup>th</sup> Street  
Sacramento, CA 95819-8041

Re: Liberty Maintenance, Inc./Caltrans - Contract No. 07-1W2404  
DBE Reconsideration Decision dated June 22, 2015

Dear Mr. McMillan,

As you know, this firm represents Liberty Maintenance, Inc., with respect to its bid for Caltrans Contract No. 07-1W2404. Liberty Maintenance received the Reconsideration Committee's decision memorandum dated June 22, 2015, and has asked me to address several errors and inconsistencies that appear in the Committee's memorandum.

First, the decision is equivocal with respect to Anderson Paint Store's role. It uses two terms whose definitions are contradictory in the Code of Federal Regulations (CFR). The Committee concluded that Anderson Paint Store, LLC "is acting as an extra participant and is acting as a transaction expediter/broker" for the contract, and that "Anderson Paint's participation adds little to no value to the contract." Under applicable CFR provisions, a supplier cannot be both an "extra participant" and "transaction expediter/broker" because the terms are mutually exclusive.

Under 49 CFR Part 26, §26.55(c), a party that is an "extra participant" in a transaction does not serve a commercially useful function and their participation is not counted toward the contract goal. Transaction expeditors/brokers, on the other hand, do serve a commercially useful function and their fees and/or commissions are counted toward the contract goal. See 49 CFR Part 26, §26.55(e)(3). Anderson Paint Store cannot be both an extra participant and a broker for DBE participation purposes. The latter serves a commercially useful function and the former does not. Since the Committee also concluded that Liberty Maintenance would be entitled to credit for Anderson Paint Store's brokerage fees, it appears that the Committee determined that

Anderson Paint Store does serve a commercially useful function, but that it should be counted as an expediter/broker rather than a regular dealer, as Liberty Maintenance argued.

Since the Committee decided that Anderson Paint Store served a commercially useful function, it should have classified Anderson Paint Store as either a regular dealer or broker/expedited according to the criteria set forth in 49 CFR Part 26, §26.55(e). According to §26.55(e)(2)(ii),

“[A] regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.”

Section 26.55(e)(2)(ii)(C) states that “[p]ackagers, brokers, manufacturers’ representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).” The broker/expediter role is not affirmatively defined in the CFRs, but is defined by reference to the regular dealer requirements. Consequently, a DBE material supplier that serves a commercially useful function but does not meet the regular dealer criteria in §26.55(e)(2)(ii) is a broker/expediter. The Committee’s decision does not discuss any of the aforementioned criteria or CFR sections, or any other legal basis for its conclusion regarding Anderson Paint Store.

The applicable CFR sections referenced above were discussed at length during the June 11, 2015 meeting, and Liberty Maintenance presented ample information concerning why Anderson Paint Store qualifies as a regular dealer. The Committee’s decision fails to address any of the relevant CFR criteria. Instead, the Committee identified the following factors in its discussion of Anderson Paint Store’s role:

1. Anderson Paint Store’s price quote to Liberty Maintenance did not contain contract terms and conditions;
2. The Committee was unclear where the paint would be delivered from;
3. The Committee did not know where delivery would take place; and
4. The Committee did not know who would be transporting the materials.

None of the above considerations are relevant to the regular dealer or broker/expediter inquiry under the applicable CFRs. Moreover, neither Caltrans’ contract specifications nor its DBE Participation forms require bidders to submit such information. The DBE Participation Form only requires bidders to submit written confirmation from each subcontractor that it will participate in the contract. It does not state that specific contract terms or logistic information should be submitted. In addition, Caltrans did not ask Liberty Maintenance or Anderson Paint Store for this information during its evaluation, and the Committee informed Liberty Maintenance that it would not consider “new” information during the reconsideration hearing.

The Committee's decision is therefore based on information that Liberty Maintenance was not told to submit with its bid, was never requested by Caltrans, and could not be introduced at the hearing. By limiting its inquiry and refusing to request or consider relevant information, Caltrans has failed to provide Liberty Maintenance with the "the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so," as it is required to provide under 49 CFR Part 26, §26.53(d)(1).

It is clear from the Committee's written decision that it followed the mistaken line of inquiry first undertaken by Mr. Steve Lu, the Contract Analyst that originally evaluated Liberty Maintenance's bid. Mr. Lu sent Liberty Maintenance a letter on April 17, 2015, that purported to ask questions regarding Anderson Paint Store's commercially useful function. Mr. Lu asked how many trucks would be required to transport the paint, what licenses Anderson Paint Store needed to complete its work, and where the paint was coming from. Liberty Maintenance fully answered Mr. Lu's questions in writing on April 20, 2015.

Caltrans has applied the wrong CFR section throughout its evaluation of Liberty Maintenance's bid. The questions Mr. Lu posed, and the factors the Committee discussed in its decision, come from a CFR section that applies to bulk material suppliers, not ordinary material suppliers like Anderson Paint Store. Section 26.55(e)(2)(ii)(B) states,

"A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis."

Transportation logistics and related licenses are relevant only if a DBE supplier is dealing in bulk goods like petroleum products, steel, cement, gravel, stone, or asphalt. **The CFRs do not apply these considerations to other regular dealers or brokers/expeditors.** By focusing on transportation logistics, Mr. Lu and the Committee have misunderstood and misapplied the CFRs, and the Committee's decision is not based on applicable Federal Regulations. Also, the portion of the Committee's decision that discusses Anderson Paint Store is entirely devoid of reference to the Federal Regulations or other law, and no authority is cited for the Committee's decision.

The final issue I will address concerning Anderson Paint store is the series of assumptions the Committee describes in its decision. The Committee wrote, "the e-mail provided by Anderson Paint to Ohio Liberty Maintenance lacked any terms and conditions and appeared to be computed by the bidder based on the quantity and price that Anderson Paint received from the manufacturer." I have attached a copy of the e-mail, which Liberty Maintenance submitted with its DBE package, for your reference. The documents submitted do not in any way support the Committee's assumption.

Anderson Paint Store provided Liberty Maintenance with a price per gallon for four different kinds of paint needed for the project. The Committee's assumption that any paint supplier, whether a regular dealer, broker, or otherwise, would simply pass through a manufacturer's price without any markup is beyond belief. It is inconceivable that any company would agree to participate in a transaction for free, and if the Committee had considered any other commercial transaction in America, as it was explicitly required to consider under §26.55(c)(2), it could not reasonably conclude that a commercial entity would supply a manufacturer's quote without markup.

The second assumption in the Committee's decision also relates to Anderson Paint Store's markup. As discussed above, the Committee stated that while "Anderson Paint might be entitled to some small amount for brokerage fees, any such amount would fall far below the necessary amount to meet the contract goal." The Committee's decision in this regard is pure speculation. Caltrans never asked Liberty Maintenance or Anderson Paint Store to provide information about the manufacturer's price or what Anderson Paint Store's markup or fee is. The Committee simply concluded, without requesting or reviewing any evidence whatsoever, that Anderson Paint Store's fee is insufficient to allow Liberty Maintenance to meet the contract goal. Liberty Maintenance respectfully submits that the Committee's decision should be based on actual evidence and information, not the speculation of the Committee members.

Finally, the Committee's decision fundamentally misstates the CFR criteria that apply to its evaluation of good faith efforts. The written decision states that 49 CFR Part 26, Appendix A requires contractors to solicit "through all reasonable and available means the interest of all certified DBE's who have the capability to perform the work of the contract." This statement is not true. No such requirement is found in the CFRs. 49 CFR Part 26, Appendix A states:

"[E]ven if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took **all necessary and reasonable steps to achieve a DBE goal or other requirement of this part 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 CFRs require bidders to take all necessary and reasonable steps to achieve the goal, not to solicit all potential DBE participants. The regulations state that efforts should be appropriate to their objective, meaning that the efforts required are proportional to the scope of work in question and the potential for DBE participation. Requiring bidders to undertake an exhaustive solicitation of all potential DBE subcontractors is patently unreasonable, especially where, as here, the collective participation rate that might be achieved would comprise two-one hundredths of one percent of the contract (0.02%). The additional work required to solicit an additional 110 participants is not commensurate with the level of DBE participation that could be realized, and it is unreasonable to require any bidder to do so. Liberty Maintenance directly solicited 57 individual firms to participate in the portion of the contract that the Committee

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discussed, and its efforts were reasonable and sufficient given the potential for an additional 0.02% in DBE participation.

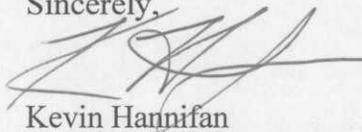
The Federal Department of Transportation strongly cautions participating agencies like Caltrans against requiring that a bidder meet a contract goal in order to be awarded a contract, and specifically prohibits ignoring or disregarding bona fide good faith efforts. (See 49 CFR Part 26, Appendix A, Paragraph III.) The Committee has indicated that nothing other than an unreasonably exhaustive nationwide search for DBE participants without regard to their potential level of participation is sufficient. It has also failed to account for the fact that Liberty Maintenance first reached out to DBE participants 30 days prior to the bid, not nine days as stated in the decision. The Committee has disregarded the reasonable and proportional bona fide efforts Liberty Maintenance undertook and documented, and has imposed an unreasonable standard that is not supported by the Code of Federal Regulations.

It is essential that the regulations governing DBE participation and good faith efforts be fairly and consistently applied. The deficiencies described above require the Committee to reconsider its decision regarding Anderson Paint Store and Liberty's good faith efforts. At minimum, a revised decision should address the following:

1. The extra participant/broker distinction discussed above;
2. Identify and discuss the specific CFR provisions that the Committee considered in its decision regarding Anderson Paint Store's classification as a regular dealer or broker;
3. Correct the misstatement of law that exists in the discussion of good faith efforts; and
4. Explain why Liberty Maintenance's efforts were determined to be not reasonably sufficient.

After the correct provisions are applied, the contract should be awarded to Liberty Maintenance.

Sincerely,



Kevin Hannifan  
for FELDMAN & ASSOCIATES, INC.

cc: Mark Feldman  
Client