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September 29, 2014

John C. McMillan
Deputy Division Chief
Division of Engineering Services
State of California, Department of Transportation
P.O. Box 168041, MS-43
Sacramento, CA 95816-8041Re: Contract No. 10-0W1904
10-SJ-99-22.9/38.8
State Hwy 99 from Hammer Lane to Sacramento County line
Bid Opened: September 3, 2014

Dear Mr. McMillan:

My office represents A. Teichert & Son, Inc. dba Teichert Construction ("Teichert"). Teichert is the apparent low bidder on Contract No. 10-0W1904 ("Contract"). The purpose of this letter is to respond to the arguments set forth in the protest letter from Chester Bross Construction Company ("Chester") dated September 19, 2014. As detailed below, the arguments lack merit and Teichert should be awarded the Contract. First, Teichert presented a balanced bid and any arguments to the contrary are not supported by the facts. Second, Teichert followed the specifications in identifying DBE subcontractors, and Teichert exceeded the 7% DBE goal for the project. Finally, Teichert provided the required subcontractor information both in its bid submission and the 24 hour subcontractor percentage listing. For these reasons, Chester's protest should be denied and Teichert should be awarded the Contract as the lowest responsive and responsible bidder.

Teichert Submitted a Balanced Bid

Chester spends several pages arguing that Teichert's bid is unbalanced as it relates to Tack Coat (Item 45). Chester further argues that the alleged unbalanced nature of the bid item will inevitably lead to a higher cost to Caltrans. There is no factual support for this argument.

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A mathematically unbalanced bid is defined in 24 CFR §635.102 as "a bid containing a lump sum or unit bid items which do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs." To determine whether a bid is mathematically unbalanced, it should be evaluated for reasonable conformance with the engineer's estimate through an examination of the underlying basis for the bid. It should also be compared to the bids of other bidders.

The subcontractor who is providing 100% of the Tack Coat line item is Janet Simas Paving, Inc., dba Spirit Road Oils ("Spirit"). The subcontractor bid of Spirit is attached as an exhibit to Teichert's DBE submission and is attached hereto for ease of reference. Below is a summary of the line items taken from Spirit's bid.

Tack Coat
Bid Item 45

Item	Qty	Unit	Unit Price	Tax	Total
Tack Oil (SS-1H)	150	TN	\$ 505.00	\$ 40.40	\$ 81,810.00
Delivery Charge	110	EA	\$ 290.00	\$ -	\$ 31,900.00
Spread Charge	880	HR	\$ 185.00	\$ -	\$ 162,800.00
Total Cost for Item					\$ 276,510.00
Cost per TN (150 Tons)					\$ 1,843.40
Item Bid Price					\$ 1,850.00

The unit prices for tack oil, delivery and spread were taken directly from Spirit's bid. Because the spreading is planned to take place at night, the hourly rate is \$185. Teichert also reasonably estimated 110 days of delivery and eight hours a day of spreading based on the plans and specifications. Consequently, there is nothing unbalanced about the Tack Coat line item, and Chester's erroneous calculations pertaining to Teichert's bid should be disregarded.

The balanced nature of Teichert's bid is further demonstrated when the Tack Coat bids of the eight contractors are compared.

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Tack Coat Bid Item 45	
Granite Construction	\$3,450
George Reed	\$3,250
Ghilotti Construction	\$2,900
DeSilva Gates Construction	\$2,000
Bay Cities Paving & Grading	\$1,891.05
Teichert Construction	\$1,850
O.C. Jones & Sons	\$1,500
Chester Bross Construction	\$1,000

As demonstrated, Teichert has the third lowest bid on Tack Coat, and it was below the average bid price of \$2,230. Therefore, a comparison of the bids further supports the conclusion that Teichert's bid was not mathematically unbalanced. Because the bid was not mathematically unbalanced, there is no basis for asserting that the bid is materially unbalanced, which is defined as "a bid which generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost. . ." 24 CFR § 635.102.

Chester also argues in its letter that Caltrans erroneously estimated the quantity of Tack Coat as being 150 tons. Without any evidence, Chester claims that Teichert somehow knew of this estimating error and intentionally overbid the line item knowing that the final quantities would be much greater. In a convoluted analysis, Chester concludes that "the bid quantity for item 45 is understated by no less than 202 tons."

Chester's speculation regarding Teichert's bidding practice is both fanciful and wrong. The 150 tons is a reasonable estimate for Tack Coat and is consistent with Teichert's estimate of quantity for this item. Teichert bid the item appropriately with the sums it obtained from its subcontractor. For the reasons stated above, Teichert submitted a balanced bid and Chester's arguments to the contrary should be rejected.

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Teichert Exceeded the 7% DBE Goal

Chester erroneously claims that Teichert's subcontractor listing incorrectly omits a subcontractor that was identified on the DBE Certification. Chester's argument demonstrates a fundamental misunderstanding of the California subcontractor listing law and the Caltrans Standard Specifications.

Public Contracts Code §4104(a)(1) requires the listing of subcontractors who will perform in excess of one-half of 1 percent of the prime contractor's bid. This requirement is expressly stated in Section 2-1.33C of the Standard Specifications. Pursuant to that requirement, Teichert submitted a Subcontractor List with its bid submission that listed only those subcontractors whose bid exceeded one-half of 1 percent. Subcontractor A.C. Dike Co. was not listed because its contract value of \$101,437 is less than .5% of Teichert's bid ($\$101,437 \div \$23,029,680 = .0044$).

Chester argues that A.C. Dike Co. should have been identified on the Subcontractor List despite the fact that its work constituted less than .5% of Teichert's bid because A.C. Dike Co. was identified as a DBE subcontractor. Notably, Chester does not cite to the Standard Specifications to support its argument. If it had, it would realize that there is no requirement that all DBE subcontractors be listed on the Subcontractor Listing, regardless of the percentage of the total bid.¹ Absent a requirement in the bid specifications, the listing of a DBE subcontractor in the Subcontractor List that has a contract value of less than .5% of the bid price is not required.

In an attempt to manufacture an argument, Chester cites to a statement in the DBE Prime Contractor Certification Form which reads:

IMPORTANT: Identify all DBE firms being claimed for credit, regardless of tier. Names of the First Tier DBE Subcontractors and their respective item(s) of work listed must be consistent, where applicable, with the names and items of work in the Subcontractor List submitted with your bid. (emphasis added).

This statement says that, where applicable, the listings in the Subcontractor List and the DBE Certification form must be consistent. This form does not say that DBE subcontractors who are performing less than .5% of the work need to be listed on the Subcontractor List. Rather, it is stating that when subcontractors are listed on both the DBE Certification and the Subcontractor List pursuant to the requirement in the Standard Specifications, i.e. where applicable, they need to be consistent.²

¹ This should be contrasted with the DVBE requirement under Section 2-1.15C(1) which specifically requires the bidder to list all 1st tier DVBE subcontractors in the Subcontractor List, regardless of percentage of total bid.

² It is revealing to note that Caltrans' Certified DVBE Summary Form deletes the phrase "where applicable." This is consistent with the fact that the Standard Specifications specifically require all DVBE subcontractors to be listed

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Teichert followed the Standard Specifications in identifying subcontractors in the Subcontractor List and the DBE Certification, and Chester's arguments to the contrary should be summarily dismissed.

Teichert Followed the Specifications in Listing Subcontractors

Section 2-1.33C of the Standard Specifications states in relevant part that the Subcontractor List "must show the name, address, and work portions to be performed by each subcontractor listed." Section 2-1.33A allows the bidder to submit the percentage of each bid item either with the bid or within 24 hours after bid opening.

The Subcontractor List that Teichert submitted with its bid listed each subcontractor and described its work with reference to the item number in the bid. This method of describing the work has been routinely upheld by Caltrans as responsive to the requirements of the Standard Specifications, and Chester does not challenge the sufficiency of the description. Rather, Chester argues that by describing the work by item number in the Subcontractor List submitted with the bid, Teichert is saying that each subcontractor will perform 100% of the work. Then, when Teichert submitted the percentages within 24 hours of bid opening, it somehow changed the scope of the subcontractor work. This argument makes little sense, and it is inconsistent with what is allowed under Public Contracts Code §4104 and the Standard Specifications.

At its core, Chester is arguing that describing subcontractor work by bid item number in the Subcontractor List submitted with the bid automatically means that the subcontractor is going to do 100% of that work. This argument is entirely inconsistent with Section 2-1.33A which allows a bidder to submit the percentage of each bid item subcontracted within 24 hours after bid opening.

Teichert appropriately described the subcontracted work by referring to the bid item number. For example, the portions of work to be performed by FBD Vanguard Construction are described as "work as described in bid items: 59, 66, 74." Then, within 24 hours of bid opening, Teichert submitted the Subcontractor Listing form that applied a percentage to each portion of work. For items 59 and 74 the subcontractor is to perform 100% of the work, and for bid item 66 the subcontractor is to perform 60.36% of that line item. This is entirely consistent with the Standard Specification provision that allows for a percentage to be submitted after bid opening.

in the Subcontractor List, regardless of the percentage of the total bid. The Certified DVBE Summary Form (REV 3/2008) reads in relevant part: "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 (Pub Cont Code § 4100 et seq.) submitted with the bid."

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Conclusion

As described above, Teichert submitted a balanced bid, and provided responsive subcontractor information consistent with California law and the Standard Specifications. For these reasons, Chester's protest should be rejected, and Teichert should be awarded Contract No. 10-0W1904.

Thank you for your attention to this matter.

Very truly yours,

DOWNEY BRAND LLP



Scott D. McElhern

Attachment

cc: Eric Stannard, Teichert Construction (via e-mail)

SDM:mpd

1385525.1

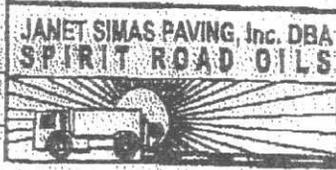
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Bid/Fax# 14514

Submitted to: Teichert Attn: Est. Dept.
Bid Date: 9/3/14 Time: _____ Project# 10-DW1904
Project: San Joaquin Co. - Pavement resurfacing

Item#	Est. Amount	Description	Unit	Est. Total
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150 Tons Tack Coat
for Bid item 45.

$105/TN$
 + Sales Tax (5%)
 $\$545.40/TN \times 150TN$
 $\$81,810.00 \times 60\% \text{ Credit}$
 $\$49,086.00 \text{ DBE Credit}$

	<u>SS-1H</u>	<u>505</u>	Per Ton + Sales Tax	
			Per Ton + Sales Tax	
Charge:		<u>\$290</u>	EACH DELIVERY	
Charge:		<u>\$175</u>	Per hour, 4 hour Minimum	
		<u>\$185</u>	per hour, Same Minimum Applies.	

INCLUDED

FROM BID DATE. PRICES GOOD FOR 90 DAYS AFTER QUOTATION IS ACCEPTED

We can arrange for delivery & spread of products, which is not UDBE. You will not be receiving UDBE credit for Spreading and Delivery.

2 Ton Minimum for DB Purchase. 0% RETENTION TO BE HELD.
Waiver of Subrogation for Workers Comp. Insurance shall be charged at \$250.00

DUE TO MARKET VOLATILITY THE PRODUCT QUOTED MAY BE INFLUENCED UP OR DOWN BY THE CALTRANS ASPHALT INDEX. ALL PRICES QUOTED STRAIGHT OR CUT WITH WATER. PROTECTION OF EXISTING CONCRETE AND STRIPPING BY OTHERS. ALL IN ROUTE CANCELLATIONS WILL BE CHARGED AT SPREAD RATE PORT TO PORT.

Quoted by: Janet Simas

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