

*Build the Best. **Be the Best.***



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April 28, 2014

**By Email and Facsimile and Certified Mail**

Mr. John McMillan, Deputy Division Chief  
State of California Department of Transportation  
Division of Engineering Services  
Office Engineer, MS 43  
1727 30<sup>th</sup> Street  
Sacramento, CA 95816-8041

**Re: Contract 11-406704  
Construction on State Highway in San Diego County Near Oceanside from Cockleburrr  
Overcrossing to the San Diego County Line  
Letter of Protest  
Lowest Responsive Bidder: Flatiron West, Inc.  
Non-Responsive Bidder: Security Paving Company, Inc.**

Dear Mr. McMillan,

In accordance with the Caltrans contract bid protest procedure and the California Public Contract Code, please accept this letter as Flatiron West, Inc.'s formal protest against the bid submitted by Security Paving Company, Inc. ("Security") for the above referenced Project.

The bid from Security must be rejected as non-responsive for violation of the Subletting and Subcontracting Fair Practices Act (CA Public Contract Code Section 4100 et seq) (the "Act"). Summarily, in its detailed/post-bid subcontractor listing, Security reduced the amount of work it had previously committed to subcontract in its bid-day listing. By reducing the subcontracted scope without following the procedures in the Act, Security rendered its bid non-responsive. Moreover, California law precludes waiver of the subcontractor-listing defect because, by taking back the initially subcontracted scope, Security's bid defect could have affected the amount of its bid or given Security a competitive advantage.

Accordingly, Flatiron respectfully requests Caltrans award it the project as the lowest responsive bidder.

**The Subcontractor Listing Requirement**

Section 4104 of the Act specifically states:



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"...any person making a bid or offer to perform the work, shall, in his or her bid or offer, set forth: (a)(1) The name and the location of the place of business of each subcontractor who will perform work or labor..."

And

"(b) The portion of the work that will be done by each subcontractor under this act..."

Furthermore, Section 4109 states that "Subletting or subcontracting of any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which no subcontractor was designated in the original bid shall only be permitted in cases of public emergency or necessity..."

### Security's Inconsistent Subcontractor Lists

Security submitted its Subcontractor List with its bid, listing the name, location and description of the work to be performed by its subcontractors ("Original Bid"). Following bid submission, within the deadline established by Caltrans, Security submitted a completed Subcontractor List including Bid Item Nos. and Percentages of Bid Item Subcontracted (Columns 2 and 3) ("Post-Bid Submission"). The Post-Bid Submission is intended to complete the information regarding the subcontractors listed in the Original Bid. It is not an opportunity to make changes and such changes violate the Act.

Security's subcontractor listing violates the Act—and renders Security's bid non-responsive—for the following reasons:

- The Post-Bid Submission removes a scope of work which was listed on the Original Bid.

In the Original Bid, Security listed and committed to subcontract the following scopes to Our Valley Fence ("OVF"): "Treated Wood Waste, Remove Guardrail, Guardrail Delineator, Transition Railings, Alt Terminal Systems & Crash Cushion System." (Underline added.) In its Post-Bid Submission, Security listed OVF for bid items #21, 22, 89, 90, 91 to 98. Security failed to list OVF for bid item #99 – Alternative Crash Cushion System. In other words, Security reduced the scope of the work assigned to OVF in its Post-Bid Submission.

If Security asserts that this change in scope of work is a "clerical error," it should have given notice to Caltrans within 2 working days after the time of the prime bid opening, per Section 4107.5. Flatiron is not aware that such a notice was given.

On past projects, Caltrans has disqualified bidders as non-responsive due to Subcontractor List revisions. In these disqualifications, Caltrans has stated the following in regard to revisions of a Subcontractor List:

"...the Department cannot accept the revised "Subcontractor List" as it would violate the Subletting and Subcontracting Fair Practices Act of the Public Contract Code."

Therefore, the Subcontractor List originally submitted by the bidder with its bid on the day of bid will be used. The Subcontractor List submitted on the day of bid did not include the bid item numbers or percent of bid items subcontracted, as required in columns 2 and 3.



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The Subcontractor List form states in part: "Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the specified time will result in a non-responsive bid." No other revisions to the form are permitted. In other words, the instructions on Caltrans' subcontractor listing form—an essential part of the bid documents—mandate that Caltrans find Security's bid to be non-responsive.

#### The Defect May Not Be Waived

Bid defects may not be waived if they could have affected the amount of the bid or resulted in the bidder's competitive advantage. Here, both elements exist. Taking the opportunity to alter the subcontracted scope post-bid—after seeing the bids and subcontractor lists of all bidders—can certainly affect the amount of a bid. Whether, which, and how much work is subcontracted affects every bidder's price on bid day. Similarly, the opportunity to refine a subcontractor listing post-bid is unquestionably an advantage enjoyed by Security that was not afforded other bidders, as they were forced to fulfill their duties under the Act by allowing their listed subcontractors to perform the scopes they were listed to perform on bid day. Accordingly, California law precludes waiver of the defect in Security's bid.

#### Conclusion

The purpose of the Act is to provide fair competitive bidding and to prevent bid shopping and bid peddling after the initial bid submission. Allowing such violations of the Act leaves open the opportunity for a prime contractor to take advantage of a lack of enforcement and is the reason the Act should be strictly enforced.

Flatiron respectfully asserts that Caltrans should find Security's bid to be non-responsive and disqualify its bid, and award the subject contract to Flatiron.

If you have any questions please feel free to contact the undersigned at 760-594-1593 or [jturner@flatironcorp.com](mailto:jturner@flatironcorp.com).

Thank you.

A handwritten signature in black ink, appearing to read "Jeffrey A. Turner".

Jeffrey A. Turner  
Vice President  
Flatiron West, Inc.

ORIGINAL BID

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**SUBCONTRACTOR LIST**  
 DES-OE-0102.2 (REV 3/2011)

Bidder Name: SECURITY PAVING COMPANY, INC

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub Cont Code § 4100 et seq.). Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
AC Dike Company 2788 Venture Dr Lincoln CA 95648			Place Asphalt Dikes
American Steel Placers inc 603 S. Arrowhead Ave San Bernardino CA 92408			Furnish; Tie Reinforcing Steel.
<del>Crown Fence JF</del> <del>1218 Bloomfield Ave JF</del> <del>Santa Fe Springs CA JF</del> 90670 Our Valley Fence 2203 Inyo Kern Rd Ridgecrest CA 93555			Treated wood Waste, Remove Guard Rail, Guard Rail delineate Transition Railings, Alt Terminal Systems, 3 Crash Cushion System
Harber Companies 1880 E. Riverwood DR San Bernardino CA 92408			Grind Existing Pavement

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POST-BID SUBMISSION

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**SUBCONTRACTOR LIST**  
 DES-05-01022 (REV 3/2011)

Bidder Name: SECURITY PAVING COMPANY, INC

The bidder must identify each subcontractor performing work in an amount in excess of 1/2 of 1 percent of the total bid or \$10,000, whichever is greater (Pub. Cont. Code § 4100 et seq.) Complete columns 1 and 4 and submit with the bid. Complete columns 2 and 3 and submit with the bid or fax to (916) 227-6282 within 24 hours after the bid opening. Failure to provide complete information in columns 1 through 4 within the time specified will result in a nonresponsive bid.

Column 1: Business Name and Location	Column 2: Bid Item Nos.	Column 3: Percentage of Bid Item Subcontracted	Column 4: Description of Subcontracted Work
A.C. Dike Co. 2788 Venture Dr. Lincoln, CA 95648	48	100 %	Place asphalt dikes
	49	100 %	
	50	100 %	
	51	100 %	
	52	100 %	
American Steel Placers 603 S. Arrowhead Ave San Bernardino, CA 92408	67	23.1 %	Furnish and tie reinforcing steel.
	69	1.7 %	
	100	5.4 %	
Our Valley Fence 2203 Inyo Kern Rd Ridgecrest CA 93555	21	100 %	Treated wood waste, Remove guardrail, Guardrail, delineator, transition railings, All terminal systems & crash cushion system
	22	100 %	
	89	100 %	
	90	100 %	
	91 to	100 %	
	98	100 %	
Harber Companies, Inc 1880 E Riverview Dr. San Bernardino, CA 92409	65	100 %	Grind Existing Pavement

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