



Lic #743775

August 6, 2013

John McMillan
Department of Transportation
Division of Engineering Services
Office Engineer, MS 43
1727 30th Street
Sacramento, CA 95816-8041

Re: Contract Number 12-0L3804
Bid Opening Date: June 27, 2013
Response to Bid Protest 2 by Desert Concepts Construction

Dear Mr. McMillan:

Reference is made to Bid Protest No. 2, submitted by AFSAR Law Group on behalf of Desert Concepts Construction (DCC) dated August 2, 2013 and to HighLand Construction, Inc.'s (HCI) previous response dated July 24, 2013.

HCI restates our position, which is supported by case law, that we did not "fail to list" Global Transloading (GT) as a subcontractor because GT is not a subcontractor as defined by the Subletting and Subcontracting Fair Practices Act and/or Business & Professions Code. GT is a "trucking" firm that is Certified DBE, whose classifications are defined as trucking. GT does not possess a contractor's license, which demonstrates that they are not a subcontractor nor are they required to be listed as a subcontractor, because GT is not providing any service other than hourly trucking to the said project.

DCC purports that HCI should have listed GT as a subcontractor for Item #28, Roadway Excavation, Type Z2 Aerially Deposited Lead (ADL), which is completely unsupported by the facts, Public Contract Code and California Case Law. DCC appears to not fully understand the entire scope of work involved in performing this item. It also appears that DCC representatives, who are protesting this public works contract, are incapable of differentiating between a subcontractor, as defined by law, and a trucker and/or equipment renter.

DCC cites Public Contract Code, Section 4104(a)(1) to support their unfounded theory, but ignores the key words cited in the Code, which states in part: *"Any officer, department, board or commission taking bids for the construction of any public work ... shall in his or her bid or offer, set forth:*

John McMillan
August 6, 2013
Response to Bid Protest #2 DCC
Page 2 of 3

"... the name and the location of the place of business of each "subcontractor" [emphasis added] who will perform work or labor or render service to the prime contractor ... or a "subcontractor" [emphasis added] licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications ..."

Public Contract Code, Section 4113 defines subcontractor: *As used in this chapter, the word "subcontractor" shall mean contractor, within the meaning of the provisions of Chapter 9 [commencing with Section 7000] of Division 3 of the Business & Professions Code, who contracts directly with the prime contractor who contracts directly with the awarding authority.*

Business & Professions Code, Section 7026 provides that: *"Contractor is synonymous with "builder" and, within the meaning of this chapter, a contractor is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, constructs, alters, repairs, add to, subtract from, improve, move, wreck or demolish any building, highway, road, ... excavation or other structure, project, development or improvement or do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning grounds ... , or the preparation and removal of roadway construction zones, lane closures, flagging or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance work herein described involves the addition to, or fabrication into, any structure, project, article of merchandise."*

GT has not submitted to undertake, or purported to have the capacity to undertake, or submitted a bid to undertake nor will GT undertake to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road ... excavation or structure! GT will not have an independent calling to perform any work on Item #28, other than to provide the end dump trucks to haul the ADL soil off-site.

PCC, Section 4106 states in pertinent part that: *"if a prime contractor fails to specify a subcontractor or if the contractor specifies more than one subcontractor for the same item ... the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime shall perform that portion himself or herself."*

It is our position that HCI is performing the scope work required for Item #28 with our own forces. HCI will direct and control 100 percent of the work for Item #28. HCI is directing the means and the methods of the work. HCI will perform the entire excavation of the hazardous materials with its own forces. HCI is providing the equipment and personnel required for the actual excavation. HCI is providing the equipment and personnel to perform the required traffic control for the excavation. HCI will control all aspects of the work for Item #28.

John McMillan
August 6, 2013
Response to Bid Protest #2 DCC
Page 3 of 3

By contrast, GT, is not a licensed contractor by the State of California and this fact alone, precludes GT from even being listed as subcontractor on a public works contract. Further, GT is not providing any laborers to said project. GT is not providing any materials to the project. GT is not providing any changes, additions or deletions to the project. GT is not fabricating or installing any materials to the said project, which means that, under PCC, Section 4106, HCI must self-perform the work of this item, which is exactly how HCI has submitted its proposal for this contract. GT will merely provide end dump trucks, on an hourly basis, to haul the material from the jobsite to the disposal facility, which by definition means GT is renting trucks.

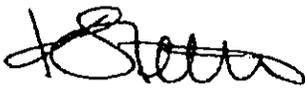
California Courts have distinguished between subcontractors and renters of equipment; see *Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal.App.4th 152, 165*. Appellate courts have upheld findings that a company that furnished equipment for use under the supervisions and control of a contractor was not acting in the capacity of a subcontractor; see *Andrew v. Conner (1951) 101 Cal.App.2d 621, 623*, see also *Rodin v. Harbor Engineers (1961) 191 Cal.App.2d 560, 562-563*.

There are no inconsistencies between HCI's Subcontractor Listing and HCI's DBE Commitment. It appears that DCC has tried to concoct this alleged discrepancy in order to detract from their own non-responsive bid for the failure to list a subcontractor for the electrical work (an item they are not qualified to self-perform) and the submission of their dishonest DBE Commitment/ GFE.

HighLand Construction, Inc.'s bid proposal is not only responsive, but without doubt consistent with the Subletting & Subcontracting Fair Practices Act, Business & Professions Code, Code of Federal Regulation and California Case Law, as such, we hereby request award this contract.

If you have any further questions, please do not hesitate to contact our office. Thank you.

Respectfully,



Kristi Stelle
VP of Operations

KS:er
VIA: FAX & MAIL