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August 8, 2013

VIA FACSIMILE & U.S. MAIL ONLY

John McMillan
State of California Department of Transportation/Caltrans
Division of Engineering Services
Office Engineer
1727 30th Street
Sacramento, CA 95816

**Re: Second Response to Highland Construction's Bid Protest Response
Contract Number 12-0L3804**

Dear Mr. McMillan:

As you may recall, this office represents the legal interests of Desert Concepts Construction, Inc. (hereinafter referred to as "Desert Concepts"). This correspondence is written in response to a letter dated August 6, 2013, provided by Highland Construction (hereinafter "Highland") in their ongoing defense of their improper DBE Commitment form, defective Subcontractor list and non-responsive bid.

The claims of Highland Construction and Ms. Stelle are disingenuous. The determination that Highland incorrectly failed to include Global Transloading on their Subcontractor List is not a difficult issue requiring a multitude of statutes and caselaw. As previous correspondences have stated, the failure to include Global Transloading was a violation of Section 4104 of the Subletting and Subcontracting Fair Practices Act and contrary to the instructions on the very face of the Subcontractor List itself.

In their August 6, 2013 letter, Highland attempts to paint Global Transloading as a simple equipment renter providing trucking services that will do absolutely nothing other than haul material. Highland goes to great lengths to explain that Highland will perform all work itself and that Global Transloading is merely providing end dump trucks. This issue and a quite similar claim was addressed in Leonard v. Hermreck (1959) 168 Cal.App.2d 142. In Leonard, the prime contractor on a highway project contracted with Leonard to haul 220,000 tons of dirt from a pit to the roadbed of the highway. When the prime contractor refused to pay Leonard for the hauling, Leonard filed suit. The court, however, granted the prime contractors' motion for nonsuit on the grounds Leonard was an unlicensed contractor. The court explained that Leonard came within the definition of a contractor because he "did

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subtract from the pit" and he "added to and improved" the highway. These facts showed Leonard was more than just a material supplier but was in-fact providing services for which a construction license was needed.

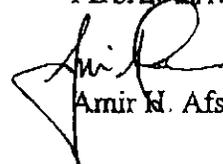
The facts of *Leonard* fall directly in line with the issue at hand. Highland is the prime contractor hiring Global Transloading to haul material. While Highland would like to characterize this work as "renting trucks" they are not in-fact renting trucks. They are hiring another business to conduct hauling activities of hazardous materials from the highway project. A role that undisputedly is akin to Leonard's subtracting from the pit and a clear improvement to the highway construction project.

The case selected to highlight the incongruence of Highland's argument is one that should be quite familiar to them. In fact, it was the *Leonard* case the Court of Appeals cited at length in Highland's September 2010 litigation against the State of California Department of Transportation.¹ In that action, Highland was awarded a contract to pave turnouts. In their bid, Highland failed to name a subcontractor utilized, Ortiz Paving Corporation, and a monetary penalty was assessed. Highland appealed the penalty and Ms. Stelle claimed the paving work was done by Highland and that Highland had only rented equipment with operators from Ortiz Paving Corporation – an argument virtually identical to the one made here. The court, however, determined that the work performed by Leonard reached a level which would require a license. Here, it is unquestioned that Global Transloading will be providing trucks with drivers (i.e. operated equipment) and that said trucks will be providing a service to the project by removing hazardous materials. As a result and similar to *Leonard*, Global Transloading will "render a service to the prime contractor in or about the construction of the work or improvement" and should have been listed on the Subcontractor List rendering their bid non-responsive.

If you have any questions or wish to discuss this correspondence in further detail, please contact this office or Desert Concepts Construction, Inc. at your earliest convenience.

Very truly yours,

AFSAR LAW GROUP, A.P.C.



Amir K. Afsar

cc: Client
AHA/jbl
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¹ Highland Construction, Inc. v. State of California Department of Transportation Second Appellate District, Division One, Case No. B221916 (Los Angeles County Superior Court Case No. BS119024).



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**Re: Contract Number 12-0L3804
Second Response to Highland Construction's Bid Protest Response**

Please see the attached correspondence.

If you have any additional questions, please don't hesitate to contact this office.

Thank you

Original Sent By U.S. Mail: Yes No

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