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VIA FACSIMILE ONLY - (916) 227-6282

Jill Y. Sewell
Office Engineer, MS-43
DEPARTMENT OF TRANSPORTATION
DIVISION OF ENGINEERING SERVICES
P.O. Box 168041
Sacramento, CA 95816-8041

**Re: Contract No. 03-3F0904
03-Sac,SJ-5, 160-Var**

**Project ID 0312000056
Bid Opened: 08/01/2019**

Dear Ms. Sewell:

My office represents Myers and Sons Construction, LLC ("Myers"), the lowest responsive, responsible bidder on Caltrans' Contract No. 03-3F0904 (the "Project"). This letter is in response to Golden State Bridge, Inc.'s August 16, 2019, protest of Myers.

In an attempt to force Caltrans to spend additional funds for the Project, Golden State attempts to create issues with Myers' bid where none exist. As outlined below, Myers is the lowest responsive, responsible bidder on the Project.

A. Myers' Bid Is Responsive And Complies With the Project Specifications.

Applicable law provides that a state construction contract such as this one "must be awarded to the lowest bidder unless it is found that he is not responsive, i.e., not qualified to do the particular work under consideration." *City of Inglewood v. Super. Ct.*, 7 Cal.3d 861, 867 (1972). Put simply, a "bidder is responsible if it can perform the contract as promised." *MCM Constr., Inc. v. City and County of San Francisco*, 66 Cal.App.4th 359, 368 (1998). A successful bid must also be "responsive." The question of whether a bid is "responsive" to the bidding specifications is straightforward and, simply put, a "bid is responsive if it promises to do what the bidding instructions require." *Id.*

Golden State claims Myers' Bid is not responsive because Myers failed to select "yes" or "no" on two line items for subcontractors. Whether or not Myers failed to check yes or no is irrelevant, because, as Golden State acknowledges, pursuant to Public Contract Code section 4106, if Myers fails to list a subcontractor for a particular line item, the prime contractor agrees "he or she is fully qualified to perform that portion himself or herself." For bid items 69-72, and

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items 27, 48, and 51-53, Myers is qualified to perform those items and will perform those items itself. Thus, there is no error or irregularity in Myers' bid.¹

Golden State goes on to claim that Myers cannot perform the structural coating work as, pursuant to Standard Specifications, Section 59-2.01A(4)(b), the bidder "must hold SSPC certifications in good standing." Golden State claims Myers does not have such certification, and thus it cannot self-perform the structural steel coating.

First of all, Golden State misconstrues Caltrans' specification. Section 59-2.01A(4)(b) does not require a "bidder" to have an SSPC certification—it simply states that "You must hold SSPC certifications in good standing throughout the Contract to perform painting activities . . ." Thus, per the language of the Specification, Myers need not provide the required certification until the contract is issued, not at bid time. Therefore, Caltrans cannot reject Myers' bid on that basis, as that is not a requirement at bid time.

Moreover, contrary to Golden State's baseless allegation, Myers does have a SCCPC-QP certified subcontractor to paint the structural steel on the Project. The contract price for that subcontractor, however, is less than one half of one percent and, thus, the subcontractor need not be listed. One half of one percent of Myers' bid is \$131,885.99. The subcontract to paint the structural steel is less than that amount, which is why Myers did not list a subcontractor, nor was it required to list a subcontractor. (See Caltrans Standard Specification Section 2-1.10; Public Contract Code, § 4104).

Therefore, Myers' bid is responsive and cannot be rejected by Caltrans.

B. Myers' Bid Cannot Be Found Non-Responsive, Whether or Not Myers Met The DBE Goal Because Myers Met The Good Faith Effort Requirement.

In its further attempt to force Caltrans to pay more for this Project, Golden State claims that Myers failed to meet the 14% DBE Goal because Myers only listed Hillside Drilling Company as performing 1% of the work for bid item number 88, and listed the value of that 1% as \$223,000 in the DBE paperwork. Golden State claims, because the total bid value of bid item 88 was \$2,200,000, Myers is prevented from counting anything over \$22,000 ($\$2,200,000 \times 1\%$) toward the DBE goal.

Contrary to Golden State's contention, Myers' bid is responsive to the Project's 14% DBA goal because Myers' bid includes all of the DBA information that was required under the bid specifications. Specifically, to satisfy the 14% DBA goal, the bid specifications required Myers to complete and submit Caltrans' DBE Commitment Form ("DBA Commitment") by August 6, 2019. (See Caltrans Standard Specifications, Section 2-1.33B(2)(b)(ii).) Myers complied with this requirement by submitting a complete DBA Commitment on August 5, 2019, which listed DBE subcontractors that will perform at least 14% of the work.

¹ The issue appears to be the result of the new electronic bid software. Previously, unless "yes" was checked, a subcontractor's information would not appear on the final bid. Now it appears whether or not "yes" or "no" is checked. Regardless, Myers did not check "yes" and, thus, did not list those subcontractors for those items.

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Caltrans, however, need not even get into the issue of whether or not Myers can utilize \$22,000 or \$223,000 of Hillside Drilling Company's mobilization costs, because Myers also provided documentation of its good faith efforts to meet the contract goal as well. Pursuant to the Standard Specification, Section 2-1.12(B)(3), a bidder "can meet the DBE requirements by either documenting commitments to DBEs to meet the Contract goal or by documenting adequate good faith efforts to meet the Contract goal." Section 2-1.12(B)(3) goes on to state that "an adequate good faith effort means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal that, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to meet the DBE goal."

Myers complied with the DBE requirement by documenting "good faith efforts to meet the Contract goal", which documentation was timely filed on August 5, 2019, with Caltrans per the requirements of the Standard Specification.

Thus, Caltrans cannot reject Myers' bid as non-responsive even if Golden State were correct (which it is not) because Myers also timely submitted DBE Good Faith Efforts Documentation in compliance with the Standard Specification requirements. Therefore, Golden State's claim that Myers' bid is non-responsive for failure to comply with the DBE requirements is wrong and must be rejected by Caltrans.

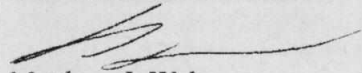
Conclusion

Myers is the lowest responsive, responsible bidder. It can and will self-perform the items for which Golden State claims it failed to list a subcontractor, and Myers does have a certified structural steel coatings contractor to perform the steel coatings. The contractor was not listed, as its subcontract value is below this listing threshold.

Finally, Myers clearly exceeded the DBE Goal and, even if it did not, its bid is still responsive because Myers timely submitted the DBE Good Faith Efforts Documentation. Because there is no support for Golden State's protest, Myers requests Caltrans reject Golden State's protest and award the Contract to Myers as the lowest responsive, responsible bidder.

Very truly yours,

DOWNEY BRAND LLP



Matthew J. Weber

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