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State of California, Department of Transportation
Division of Engineering Services
Office Engineer
1727 30th Street, MS-43
P.O. Box 168041
Sacramento, CA 95816

Attention: John C. McMillan
Deputy Division Chief

Re: Caltrans Contract No. 10-0Q17U4
Project: Construction on State Highway in San Joaquin County Near Tracy
From Stanislaus County Line to Alameda County Line

Dear Mr. McMillan:

I am the legal representative of DeSilva Gates Construction, LP ("DGC"), one of the bidders for the above referenced contract. By way of this letter, DGC is hereby formally protesting the bid submitted by Bay Cities Paving & Grading, Inc. ("Bay Cities") for the above-referenced contract, for the reasons set forth below.

Bidders were required to submit a subcontractor list with their bids identifying each subcontractor performing work in excess of one-half of one percent of the prime contractor's total bid. Public Contract Code section 4104; Revised Standard Specification Section 2-1.10. Accordingly, because Bay Cities' total bid amount was \$27,366,969.10, Bay Cities was required to list each subcontractor performing work in excess of \$136,834.85.

However, Bay Cities made a mistake in its bid by failing to list A.C. Dike Co. as a subcontractor on the Subcontractor List it submitted with its bid. On Page No. 2 of the DBE-Commitment form that Bay Cities submitted to Caltrans, Bay Cities stated that it would be subcontracting \$186,299 of work (portions of Bid Item Nos. 43, 65-67, and 68) to A.C. Dike Co. Likewise, Bay Cities submitted a DBE Confirmation form for A. C. Dike Co. (on Page No. 15 of Bay Cities' DBE Submittal), which also stated that A.C. Dike Co. would be subcontracting \$186,299 of work. This amount substantially exceeds one-half of one percent of Bay Cities' total bid.

Because of Bay Cities' mistake in bid in failing to list A. C. Dike Co. as a subcontractor on its Subcontractor List, Bay Cities' bid must be rejected.

The California courts have held that where a bidder makes a material mistake in listing subcontractors in its bid, the bidder can withdraw its bid without forfeiting its bid bond, pursuant to Public Contract Code section 5103. *MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal. App. 4th 359, 375-377 (1998); *Valley Crest Landscape, Inc. v. City Council of the City of Davis*, 41 Cal. App. 4th 1432, 1440-1442 (1996). The California courts have further held that a bidder who makes a material mistake in its subcontractor listings has an unfair competitive advantage over other bidders, because it has a benefit not available to other bidders: it could decide, after seeing the other bids, to back out of its bid without forfeiting its bid bond. *MCM Construction, Inc. v. City and County of San Francisco*, *supra*; *Valley Crest Landscape, Inc. v. City Council of the City of Davis*, *supra*. Accordingly, when a bidder has made a material mistake in listing subcontractors, the California courts have held that the owner is legally required to reject the bidder's bid. *MCM Construction, Inc. v. City and County of San Francisco*, *supra*; *Valley Crest Landscape, Inc. v. City Council of the City of Davis*, *supra*.

In *MCM Construction, Inc. v. City and County of San Francisco*, *supra*, the Court held that the City and County of San Francisco was required to reject a contractor's bid because the bidder had failed to comply with a bid solicitation requirement that it state on its Subcontractor Listing Form, the dollar amounts of work to be performed by several subcontractors, even though there was no statutory requirement that such amounts be provided. The Court reasoned in part as follows:

City and Myers do not contend the failure to list the dollar amount of work to be performed by each subcontractor could have affected the amount of the bid. Rather, they contend that MCM received an advantage or benefit not allowed other bidders in that it was given the opportunity to withdraw its bid. Several cases have concluded that "[w]aiver of an irregularity in a bid should be allowed if it would not give the bidder an unfair advantage by allowing the bidder to withdraw its bid without forfeiting its bid bond. [Citation.]" (*Valley Crest*, *supra*, at p. 1442, 49 Cal.Rptr.2d 184, citing *Menefee v. County of Fresno*, *supra*, 163 Cal.App.3d 1175, 1178-1181, 210 Cal.Rptr. 99.)

In *Valley Crest*, the court found the bidder had an unfair advantage where it could have withdrawn its bid under Public Contract Code section 5103. "Misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error. It makes the bid materially different and is a mistake in filling out the bid. As such, under Public Contract Code section 5103, North Bay [the low bidder] could have sought relief by giving the City notice of the mistake within five days of opening the bid. That North Bay did not seek such relief is of no moment. The key point is that such relief was available. Thus, North Bay had a benefit not available to the other bidders; it could have backed out. Its mistake, therefore, could not

be corrected by waiving an 'irregularity.'" *Id.* at p. 1442, 49 Cal.Rptr.2d 184.)

* * *

Valley Crest held that misstating the correct percentage of work to be done by a subcontractor was "in the nature of a typographical or arithmetical error. It makes the bid materially different and is a mistake in filling out the bid." As such, the contractor could have sought relief under section 5103. Consequently, the contractor's ability to withdraw its bid without forfeiting its bond constituted an unfair advantage and the city could not waive the irregularity. (*Valley Crest, supra*, 41 Cal.App.4th 1432, 1442, 49 Cal.Rptr.2d 184.)

We believe the failure to state dollar amounts of work to be performed by seven of nine subcontractors is, like the misstatement of the correct percentage of work to be done by subcontractors in *Valley Crest*, "in the nature of a typographical or arithmetical error." As such, MCM could have sought relief under the statute and had an advantage not available to other bidders. The City was without power to waive the deviation. [*Id.* at 375-377.]

Here, Bay Cities also made a material mistake on its Subcontractor List, by failing to list one of its subcontractors performing over one-half of one-percent of the work.

Because of its mistake in bid, Bay Cities could have decided, after seeing the bids of the other bidders, to withdraw its bid under Public Contract Code section 5103. This gave it an unfair competitive advantage over other bidders. As held in the decisions discussed above, the fact that Bay Cities may not have chosen to seek relief under Public Contract Code section 5103 is irrelevant. As stated in *Valley Crest Landscape v. City Council of the City of Davis, supra*, at 1442:

As such, under Public Contract Code section 5103, [the bidder] could have sought relief by giving the City notice of the mistake within five days of bid opening. That [the bidder] did not seek such relief is of no moment. The key point is that such relief was available. Thus, [the bidder] had a benefit not available to the other bidders; it could have backed out. Its mistake, therefore, could not be corrected by waiving an "irregularity."

Accordingly, Caltrans is legally required to reject Bay Cities' bid, and DeSilva Gates Construction L.P. respectfully requests that Caltrans do so.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. M. Smith', written over a faint horizontal line.

Randall M. Smith
Attorney for DeSilva Gates Construction, LP

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