

# Facsimile Transmittal

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**Fax:** (805) 781-1229                      **Date:** January 8, 2013

**From:** Steven Andriese, Paralegal to P. Terence Schubert, Esq.

**Subject:** *Reconsideration of San Luis Obispo County Department of Public Works and Transportation Finding of Non-Responsiveness of Bid for Widening of Templeton Road from Bluebird Hill Lane to South El Pomar near Templeton, CA, Contract No. 300386, Federal Aid Project No. HRRRL-5949(111)*

**Pages:** 7 (including this cover sheet)

**Enclosure:** Correspondence of today's date.

**If transmission is incomplete, please call Steven Andriese at (805) 543-1113.**

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January 8, 2013

Via Electronic Mail and Facsimile TransmissionDave O'Halloran, SLO County Public Works Construction Division  
Russ Thompson, City of Atascadero Public Works Director  
Reinie Jones, Caltrans District 5 DBE Coordinator  
c/o San Luis Obispo County Department of Public Works  
Room 207, County Government Center  
976 Osos Street  
San Luis Obispo, California 93408Re: Reconsideration of San Luis Obispo County Department of Public Works and  
Transportation Finding of Non-Responsiveness of Bid for Widening of Templeton Road  
from Bluebird Hill Lane to South El Pomar near Templeton, CA, Contract No. 300386,  
Federal Aid Project No. HRRRL-5949(111)

Dear Mr. O'Halloran, Mr. Thompson and Ms. Jones:

I represent Raminha Constructions, Inc. ("Raminha" or "RCI"), with regard to the above-referenced Project. It is Raminha's position that it has fully complied, in good faith, with the disadvantaged business enterprises ("DBE") requirements set forth in the bidding documents for the Project, and as the low bidder, it should be awarded the Contract to undertake and complete the work by the County of San Luis Obispo.

This letter is written to briefly present RCI's position with regard to the County Public Works Department's stated intention to recommend, to the County Board of Supervisors, that RCI's bid be deemed non-responsive for an alleged failure to "(1) meet the DBE contract goal of 4% **and** (2) demonstrate a good faith effort to meet the DBE participation goal for this project." (See that letter of December 28, 2012, from Jeff B. Werst to David Raminha; emphasis supplied.) Further presentation of information will be provided at the Good Faith Effort Reconsideration Meeting.

Unfortunately, Raminha did not have the opportunity to meet with County Public Works Department ("CPWD") Staff prior to Staff's completion of its analysis of RCI's compliance with these DBE requirements. It is believed that had RCI been able to respond to the points raised by CPWD Staff and educate Staff on the actions that Raminha undertook to comply, that Staff would not have reached the conclusions set forth in Mr. Werst's letter of December 28<sup>th</sup>, 2012 ("the Werst letter"), and the Memorandum of December 27, 2012 ("the CPWD Memorandum").

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## **I. Introduction**

By way of background, Raminha's Project bid was \$587,000.00, while Whitaker Construction ("Whitaker") submitted a bid for \$633,000.00, which is approximately \$46,000, and 8% higher than the Raminha bid. CPWD Staff has indicated that they will recommend that the bid be awarded to Whitaker, despite this difference.

## **II. The Reason Provided for Finding RCI's Bid Non-Responsive is Contrary to Federal Law**

Initially, it must be noted that at the top of the second page of the Werst letter of December 28<sup>th</sup>, 2012, it is stated that "the Public Works Department intends to recommend that the County Board of Supervisors find RCI's non-responsive for failure to (1) meet the DBE contract goal of 4% **and** (2) demonstrate a good faith effort to meet the DBE participation goal for this project." (Emphasis supplied.)

This basis for recommendation is clearly flawed. RCI is **not** required to meet both the DBE contract goal and to demonstrate that it undertook good faith efforts to do so. Raminha's bid is responsive if Raminha can demonstrate that it has taken "all necessary and reasonable steps to achieve a DBE goal or other requirement of [49 Code of Federal Regulations Part 26] which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if [Raminha was] not fully successful." (49 CFR 26, Appendix A.)

In considering RCI's efforts to achieve DBE participation, County Staff is required to make a fair and reasonable judgment as to whether this a bidder, which did not achieve the participation goal, made adequate good faith efforts to do so.

It is apparent, from review of the documentation that was submitted to the County Department of Public Works by Raminha, the Werst letter and the CPWD Memorandum of December 27<sup>th</sup>, that the CPWD Staff parsed through RCI's bid documents and selectively highlighted certain information which was then presented in an unfavorable manner, while either misunderstanding or misstating information that was not to RCI's benefit. In so stating this position, RCI is not attributing any bad faith to the County; in fact, as stated above, had there been an opportunity for discussion and explanation of information between Raminha and County Staff prior to Staff's dissemination of the Werst letter and the Memorandum, RCI is confident that the recommendation would be to accept RCI's low bid.

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**III. Raminha Demonstrated Good Faith Efforts in Soliciting Certified DBEs Who Have the Capability to Perform the Work of the Contract.**

It was interesting to note, in reviewing the CPWD Memorandum, that while reference was made to Appendix A of 49 CFR 26, the County did not follow the order in which the analysis is presented in that Appendix. For example, The first factor set forth in Appendix A is a consideration of the efforts taken by a bidder to solicit DBE participation through all reasonable and available means, including advertising and written notices. For reasons left unstated in the Memorandum, this single solicitation factor was broken into two separate areas of consideration, "Solicitation Effort Documentation" (found at the bottom of page 3 of the Memorandum) and "Publication Effort Made to Advertise the Project to Include DBE Participation." (See page 5 of the Memorandum.)

Based upon its analysis, CPWD Staff found the solicitation efforts "marginal" and the publication efforts "sufficient." It is RCI's position that these are not two separate factors,<sup>1</sup> and that a fair and reasonable consideration of Raminha's efforts demonstrated that RCI made a good faith effort to meet the DBE participation goal for this project.

In fact, (1) RCI commenced its advertising efforts on November 30, 2012, almost a week prior to publication by Whitaker Construction; (2) RCI directly solicited 44 DBE firms initially, while Whitaker, the next lowest bidder only solicited 22 DBE firms (based upon my review of Whitaker's submittals); (3) By the time that Whitaker had published and contacted any DBEs, RCI had already published and directly solicited DBE participants; (4) The County Memorandum implies that RCI did not make follow up telephone calls until December 19<sup>th</sup>; in fact, telephone follow up calls were made as early as December 17<sup>th</sup>. Ultimately, RCI directly contacted 53 DBEs prior to the bid submittal.

In summary, it is respectfully suggested that, had the County not separated out the various DBE solicitation undertaken by RCI into two categories, and had it fairly considered all information that Raminha had presented to the County detailing these efforts and analyzed this information in a fair and reasonable manner, it would have come to the conclusion that Raminha demonstrated that it met its obligation to engage in good faith efforts to solicit certified DBEs through all reasonable and available means.

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<sup>1</sup>It is RCI's position that the County did not make a fair and reasonable judgment as to whether the bidder met good faith efforts in this area when it separated out these two areas of the same solicitation factor, and analyzed them in the manner presented in the Memorandum.

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#### **IV. The County Staff Analysis of the Items of Work Made Available by RCI to DBEs is Severely Flawed**

Another factor to be considered in determining whether Raminha made sufficient good faith efforts to allow DBE's to successfully bid on this Project is a consideration of the portions of work that were made available by RCI to be performed by DBEs, so as to enable RCI to achieve the DBE goals. It is Raminha's position that it properly did so, by offering and specifically designating not less than 11% of the Project to DBEs; moreover, DBEs were also invited to bid on any portion of the work, as set forth in RCI's published solicitations.

Unfortunately, the County's analysis of Raminha's efforts contain a number of misstatements that do not provide a basis for the Staff finding that RCI's efforts were insufficient.

Perhaps the most blatant example of the Staff's analysis that unfairly diminishes Raminha's efforts is found in the Second Item on Page 3 of the December 27<sup>th</sup> CPWD Memorandum. In that section, the County criticizes Raminha's failure to solicit to firms which provide paving services in District 5, and specifically refers RCI's failure to solicit Rebel Concrete. **In fact, Rebel Concrete had it's contractors' license revoked, and is was not legally able to contract within the State of California in December of 2012.**

Staff also cites RCI's failure to solicit a second company, Stoloski and Gonzalez ("S&G") for paving work in support of its position that RCI DBE efforts were insufficient. RCI did not directly solicit this firm because it is located in Half Moon Bay, California, and **it will not bid any jobs which are located in San Luis Obispo County**, or for that matter, any Project located south of Gilroy.

Again, Raminha is not suggesting that Staff was acting wrongfully, only that it did not have sufficient information upon which to base its decision in this regard.

With regard to other Items presented by Staff on pages 2 and 3 of the Memorandum:

- Page 2, with regard to the last paragraph discussing firms being solicited in Districts 5, 6 and 7, as stated above, Raminha solicited a total of 44 DBE firms with 26 being listed as willing to work in District 5. Whitaker solicited only 22 firms. Rather than recognizing and applauding RCI's effort to solicit more DBE firms from Districts 5, 6 and 7, County Staff denigrates those efforts. It has been RCI's experience that a number of firms that provide services in Districts 6 and 7 are willing to work in District 5, and that oftentimes, it is more likely that some of

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these firms will provide responsive bids, as opposed to those entities (such as S&G mentioned above) which are located in District 5, but in an area which is far removed from San Luis Obispo County.

- Page 3, first paragraph, Raminha did not search the Caltrans DBE website for the firms which fall under Code C5620; however, it did search this Code for District 5. Three firms were identified; Super Seal and Stripe and KRC Safety Company are two such firms which historically do almost all road jobs. Both of these companies were solicited by RCI. While one other firm can be found, it does not specifically list District 5 as a place they are willing to work.

While County Staff has stated that it has determined that Raminha's efforts were not sufficient to demonstrate a good faith effort to select portions of work to be performed by DBE's in order to increase the likelihood that DBE goals would be achieved, it is RCI's position that the analysis provided in the memorandum simply does not provide the factual basis for that conclusion.

#### **V. RCI Demonstrated That It Met Its DBE Participation Obligations In Rejecting DBE Bids Due to Non-Competitive Prices**

As set forth immediately above, with regard to DBE designated portions of the Project, the County Staff's analysis of Raminha's rejection of DBE bids is hampered by an apparent misunderstanding of the information that has been provided by RCI.

While Staff correctly indicates that RCI was not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable, Staff has incorrectly interpreted the information provided to the County by Raminha.

For example, with regard to the presentation of information in the second paragraph on page 5, Raminha did not list Super Seal and Stripe because of (1) the price difference and (2) due to the fact that their bid is marked with the wording "All Items on this proposal must be used. No removal of items will be accepted." Therefore, contrary to the conclusion reached by Staff, RCI could not have used SS&S for the striping. By using Toste Construction for the striping, and self performing the removal and installation of roadside signs, Raminha was able to save a total of \$1905.13 when in comparison with listing Super Seal & Stripe (not \$430.13, as set forth in the CPWD Memorandum). Moreover, Super Seal's stated price for additional move-ins was \$4200 **each; almost three times the price quoted by Toste** (\$1500 each). Given the nature of this type of work, Toste was clearly less expensive overall, with both its base bid along with any additional move-ins which may be necessary to complete the project.

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It is RCI's position that it met its legal obligations with regard to this factor of the DBE analysis.

**VI. Raminha Met Its DBE Obligations with Regard to the Other Factors Mentioned in the CDPW Memorandum**

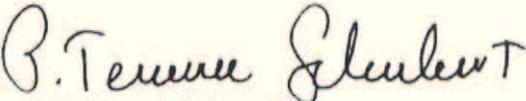
Factor G cited by County Staff is a consideration of efforts made by RCI to assist DBEs in bonding, lines of credit and other subcontract requirements. While the County found RCI's efforts "marginal," it did not find that Raminha failed to demonstrate that it made a good faith effort. Interestingly, RCI approached this factor in the same manner as Whitaker, and took the very same steps that Whitaker did in offering assistance to DBEs.

Lastly, in analyzing RCI's efforts to achieve the 4% DBE contract goal, the County finds that RCI could also have done so, with "additional reasonable efforts" which, unfortunately, are not identified.

RCI believes that it could meet the 4% goal as well, but only at a higher contract price, which it is not required to do under 49 CFR 26.

For the foregoing reasons, and for those which will be presented at the hearing, Raminha respectfully requests that the Reconsideration Panel find that RCI has fully and in good faith complied with its DBE obligations, and that it has demonstrated that it took all necessary and reasonable steps that could reasonably be expected to obtain sufficient DBE participation.

Respectfully yours,

  
P. Terence Schubert, Esq.

cc: Raminha Construction, Inc.  
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Dave Flynn, Deputy Public Works Director  
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Whitaker Construction Group, Inc.  
Jeff B. Werst, County Design Engineer