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January 31, 2014

**Sent Via U S Mail & Facsimile**

Mr. John C. McMillan  
California Department of Transportation  
Division of Engineering Services  
Office Engineer  
1727 30<sup>th</sup> St, MS 43  
Sacramento, CA 95816-8041  
Fax: (916) 227-6282

**Re: Award of Contract No. 06-0Q8404**

Dear Mr. McMillan:

This firm represents Windsor Fuel Company ("Windsor"). This is provided in response to your letter dated January 16, 2014, wherein the Department of Transportation ("Caltrans") made an initial determination that Windsor's bid on the above-referenced contract is non-responsive. As demonstrated below, Windsor submitted the lowest responsive bid for the project as there is no inconsistency between Windsor's Disadvantaged Business Enterprise ("DBE") Commitment form and Subcontractor Listing form.

**1. KRC Need Not Be Listed On The Subcontractor Listing Form**

Windsor is not required to list a subcontractor for work less than ½ of 1% percent of the total bid amount. (Pub. Contract Code §4104(a)(1).) Under Caltrans' standard specifications, Windsor need not list subcontractors performing work less than ½ of 1% of the bid amount, or \$10,000, whichever is greater. (Caltrans Standard Specifications, Section 2-1.33C.)

Similarly, Windsor is not required to list vendors that merely furnish or lease equipment. For purposes of listing requirements, the term "subcontractor" is defined by Public Contract Code section 4113 as a "contractor within the meaning of Business and Professions Code section 7000, et seq (i.e. the contractor licensing laws). Thus, a company is only a "subcontractor" if it is performing a task or trade that requires a contractor's license.

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California courts have repeated the rule that when construction equipment rented with operators, and the company furnishing the equipment and operators does not provide the overall supervision and management for the work, the company leasing the equipment and operators is not a contractor for purposes of the license laws. (*Borello v. Eichler Homes, Inc.* (1963) 221 Cal.App.2d 487; see also *Dahl-Beck Electric Co., Inc. v. Rogge* (1969) [company that provided backhoe and operator paid by the hour was not required to be licensed]; see also *Andrew v. Connor* (1951) 101 Cal.App.2d 621 [company furnishing bulldozers and operators, and paid \$26 per hour for the manned equipment, did not require a contractor's license].)

As Windsor's letter dated January 20, 2014 sets forth factually, KRC Safety Co., Inc. ("KRC") is retained, either in whole or in part, for Bid Items #2 (Construction Area Signs), #3 (Traffic Control) and #4 (Portable Changeable Message Boards). As explained in Windsor's January 20<sup>th</sup> letter, none of these bid items either exceed the statutory threshold under the listing laws, or qualify as "work" to require that KRC be listed as a "subcontractor" on the Subcontractor List form.

**Bid Item #2 (Construction Area Signs):** This item to be performed by KRC is to install construction area signs. Notwithstanding the fact that this bid item does not constitute "work" to deem KRC a "subcontractor" to be listed, the value of KRC's services and equipment, \$7,550.00, is nevertheless under the statutory threshold and that established under Caltrans' Standard Specifications, Section 2-1.33C.

**Bid Item #3 (Traffic Control):** Windsor is self-performing all traffic control services on the Project. KRC will not be performing any of the traffic control, but rather it will merely supplement the traffic control operations by furnishing Automated Flagger Assistance Devices ("AFAD"), such as an AF-100 or IntelliStrobe equipment. Thus, since KRC is only furnishing equipment on a rental basis, it does not constitute "work" and KRC does not qualify as a "subcontractor" to be listed as a matter of law pursuant to the authority cited above.

Further, this is in no way inconsistent or at variance with Windsor's listing of Pacific Coast Markings ("PCM") for this bid item. Windsor specifically notes in the Subcontractor List form that PCM is furnishing partial work for traffic control, which relates to PCM's striping work only as explained in Windsor's January 20<sup>th</sup> letter. KRC's furnishing of traffic control equipment on a rental basis does not conflict with the listing of PCM, nor again is KR D required to be listed in the first instance.

**Bid Item #4 (Portable Changeable Message Boards):** Here, too, KRC is not furnishing any work that qualifies it as a "subcontractor" requiring listing. KRC is only furnishing Portable Changeable Message Boards, which is simply rented equipment. As with the traffic control equipment under Bid Item #3, above, Windsor is not required to list KRC in its Subcontractor List form for this bid item.

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Attached for Caltrans' review is a letter from KRC attesting to the facts stated above.

## **2. Windsor's Bid Is Not Non-Responsive Because Its DBE Commitment Form Is Not Inconsistent In Any Way With The Subcontractor List Form**

As the DBE Commitment form states, "DBE Subcontractors and their respective item(s) of work listed above must be consistent, *where applicable*, with the names and items of work in the 'Subcontractor List' submitted with your bid." (Emphasis added.) At all times, Windsor's Subcontractor Listing is consistent with its submitted DBE Commitment form because, as established above, KRC need not have been a listed subcontractor under Caltrans' standard specifications or California's Subletting and Subcontracting Fair Practices Act (also known as the "subcontractor listing laws").

Thus, the addition of KRC, an active and certified DBE (Certification #000447), to the DBE Commitment form does not demonstrate any violation of the listing laws. The two forms are in fact consistent, because, *as applicable*, KRC was not a company that was required to be listed as a subcontractor. Accordingly, Windsor's bid is not in any way non-responsive, as it complies with all aspects of the bidding instructions and Caltrans' standard specifications. As the lowest responsive bidder, the contract must be awarded to Windsor.

## **3. Consequences Of An Award To Another Bidder**

For the reasons set forth above, an award to a contractor other than Windsor would be illegal and void. (*Valley Crest Landscape, Inc. v. Davis* (1996) 41 Cal.App.4th 1432 (1996); *Monterey Mechanical v. Sacramento Regional County Sanitation District*, (1996) 44 Cal.App.4th 1391.)

Payment of any funds to another bidder also would violate the California Constitution. Section 10 of Article XI of the Constitution provides that "a local government body may not ... pay a claim under an agreement made without authority of law."

Any concerned taxpayer may bring an action to enjoin payments on a contract awarded to another bidder and to require the disgorgement of any such payments. (*Rubino v. Lolli* (1970) 10 Cal.App.3d 1059; *Miller v. McKinnon* (1942) 20 Cal. 2d 83.) The public policy underlying competitive bidding is so strong that a court is required, on its own initiative, to order the return of payments even if the parties to a lawsuit do not request such an order. (*Greer v. Hitchcock* (1969) 271 Cal.App.2d 334.)

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We therefore respectfully request that Caltrans proceed to award the contract to Windsor as the lowest responsive bidder. If for any reason Caltrans considers otherwise, Windsor asks that it be given the opportunity to present evidence and argument as the law requires. (*City of Inglewood-LA County Civic Center v. Superior Court* (1972) 7 Cal.3d 861, 867; *D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal. App. 4<sup>th</sup> 757.)

#### 4. Conclusion

The bid submitted by Windsor is complete, responsive and fully complies with applicable law. The team that Windsor Fuel Company has marshaled for the project has significant experience on similar projects. Windsor has a strong record of successful completion of difficult projects and looks forward to working with Caltrans.

It is our expectation that Caltrans will examine the facts and issues carefully and make an award to Windsor, which is the lowest responsive bidder. Again, if Caltrans were to consider an award to another bidder, however, we would ask that Caltrans holds a full and open hearing on all relevant issues.

Please let us know if we can provide you with any additional information.

Very truly yours,

  
ROGER F. LIU

cc:  
Mulissa Smith, Contract Awards Branch Chief (via email – mulissa.smith@dot.ca.gov)  
Client

Enclosure:

# KRC SAFETY CO., INC.

BARRICADE RENTAL - TRAFFIC CONTROL

P.O. Box 6385 Visalia, California 93280-6385 • Phone (559) 732-0393 • FAX (559) 732-2684

January 29, 2014

Marc Armstrong  
Windsor Fuel Company  
1150 Willow Pass Rd.  
Pittsburg, CA 94565

Phone: 1 (925) 427-5266

Fax: 1 (925) 427-1216

Project: Caltrans # 06-0Q8404

Dear Mr. Armstrong:

KRC Safety CO. INC. (KRC) is currently an active certified DBE, Certification # 000447. KRC submitted a quotation for project 06-0Q8404 on 1-7-2014 to Windsor Fuel Company (WFC) for Bid Items # 2, 3 and 4. Please see that the "note" at the bottom of the quote specifies that prior to accepting this quote all stipulations listed on quote and on the attachment "A" must be understood and accepted. With this being said all stipulations on the attachment "A" 1-22, which is considered part of the quote, must be accepted. Please note stipulation #5 on attachment "A" states that traffic control is not included in any item unless noted. Stipulation #6 also states that an executed subcontract or PURCHASE ORDER is required prior to performing any work. KRC regularly quotes and bids to provide supplemental / flaggers to contractors, for their traffic control operations, whether performed by the prime contractor or used in conjunction by a subcontractor on the same project.

In this case KRC will be utilized by WFC to install construction area signs per Item #2 for the sum of \$7,550.00. KRC can work under a subcontract or purchase order due to the amount being less than \$10,000.00. KRC will also be utilized for item #4, portable changeable message boards on a rental basis by purchase order. See attachment "A" #18 (PCMS are strictly a rental item). Item #3 is based upon an as needed basis and will be utilized as requested by the prime contractor / subcontractor to supplement their traffic control operations with AFAD (Automated Flaggers Assistance Devices) (such as AF-100 or IntelliStrobe). KRC will NOT be performing any of the traffic control for this project. Therefore KRC will provide a standard rental agreement for this service and NOT require a subcontract. This is mainly due to the needs of the prime contractor at the time service is required. This could include more than (2) AFAD or even no AFAD's but additional PCMS's or provide symbol message boards as requested. WFC stated on the DBE commitment form traffic control (Partial) -- Devices. This is an industry standard and should be considered acceptable. If you need further information regarding this please feel free to contact me at 559-732-0393

Sincerely,



Michael Castro  
Project Manager/Estimator

**LEONIDOU & ROSIN**  
 Professional Corporation  
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 (650) 691-2889 (FAX)

**FACSIMILE TRANSMISSION**

**DATE:** January 31, 2014

**TO:**

NAME	Fax#	Phone#
Mr. John C. McMillan California Department of Transportation Division of Engineering Services Office Engineer	(916) 227-6282	

**FROM:** Maria Nguyen on behalf of Roger Liu, Esq.

**RE:** Award of Contract No. 06-0Q8404

<b>CLIENT/MATTER:</b> 30521-1	Number of Pages, including Cover: 6
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**MESSAGE:**

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