



Eldorado County Department of Transportation
Attn: Janel Gifford, P.E. -Sr. Civil Engineer
Contract Services Unit
2850 Fairlane Court
Placerville, CA 95667

April 26, 2012

Ref: Wentworth Springs Road at Gerle Creek-Bridge Replacement Project

**Subject: Response to Bid Protest by JFC Construction and
Protest of Non-responsive bid submitted by JFC Construction, Inc.**

Dear Ms. Gifford,

CW Fox is in receipt of the Bid Protest dated April 24, 2012 from JFC Construction, Inc (JFC). In its protest JFC argues that both CW Fox Construction, Inc (CW Fox) and RNR Construction, Inc (RNR) should be disqualified because neither company listed a Crane Service on the subcontractor listing sheet turned in with the bid documents.

CW Fox is cognizant of all the requirements of Public Contract Code §4104 and related sections and finds the reasoning of JFC flawed in several respects as follows:

1. **Status as Subcontractor** – Section 4104(a)(1) of the Public Contract Code requires “The name and the location of the place of business of each subcontractor. . .” (emphasis added) to be included in the bid documents or proposal. Section 4113 further provides:

“As used in this chapter, the word "subcontractor" shall mean a contractor, within the meaning of the provisions of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, who contracts directly with the prime contractor.”

Section 7026 of the Business and Professions code defines the term contractor. Section 7028(a) of the Business and Professions code further provides:

It is a misdemeanor for a person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless the person is particularly exempted from the provisions of this chapter.

While the definition of Contractor contained in section 7026 of the Business and Professions code is broad it does not extend to rented equipment used in the course of construction whether or not the equipment comes operated. If it did there would be a great many equipment rental companies including crane rental companies in violation of section 7028 of the Business and Professions Code. Most equipment rental companies do not possess a contractor’s license because equipment rental is distinctly different from subcontracting for the following reasons:

- a. The rental company is not in charge of the schedule, order of work or methods and means.

*CW Fox Construction, Inc. – 2701 Secret lake Trail, Cool CA 95614 – Phone: (530) 823-0591 – Fax: (888) 400-8169
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11-0005.3G.1



- b. The payment terms do not follow the standard “pay when paid” terms typically used in California public works subcontracting.
- c. Equipment rental companies are not required by the Business and Professions code to be licensed as contractors.
- d. Equipment rental companies do not have warranty obligations for materials and workmanship.

Some crane rental companies also offer engineered lift and rigging service which may rightfully be considered subcontracting because in those scenarios they take responsibility for the above items. We encourage you to review the website advertisements of crane companies such as Bigge and Maxim where a clear distinction is made between crane rental and the other services they can provide. CW Fox did not, at bid time, anticipate using a crane company in that capacity and accordingly did not list one as a subcontractor.

2. **In House Capability** – While the assumption of JFC that CW Fox does not own a 300 ton crane is correct, the conclusion that CW Fox therefore lacks the “in house capacity” to complete the work is mistaken. Although we will not disclose the details of our work plan here because it is proprietary in nature suffice it to say that the required work can be completed with a much smaller crane or no crane at all.
3. **Crane Rental Amount** – Even though the vendor of rental equipment is not a subcontractor and therefore not required by PCC §4104 to be listed at bid time; the fact that the work can be accomplished with a much smaller crane may result in a rental price that does not exceed the greater of one half of 1 percent or \$10,000 that would otherwise trigger the listing requirement. Even if JFC was correct in its claim that a rental crane would need to be listed, their claim that the amount is necessarily over \$10,000 is pure conjecture.
4. **Appropriate Remedy** – JFC is incorrect in their interpretation of listing law, their conjecture about the “in house capacity” of CW Fox and their assumption of the amounts we intend to spend on a rented crane. However, even if they were correct in every aspect of their analysis and conjecture the request that CW Fox and RNR be deemed non responsive is outside the scope of the remedy provided in section 4106 of the Public Contract Code which provides:

If a prime contractor fails to specify a subcontractor or if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself.

If after award of contract, the prime contractor subcontracts, except as provided for in Sections 4107 or 4109, any such portion of the work, the prime contractor shall be subject to the penalties named in Section 4111.

If the County ultimately determined that a rental crane, exceeding the listing threshold, could not be utilized, CW Fox is prepared to complete the work with a rented crane, for an amount that does not reach the listing threshold or with no crane at all.



Although we are confident in each and every one of the justifications expressed above, any one of the reasons alone is adequate grounds for the County to deny JFC's request to consider the bids of CW Fox and RNR non-responsive. Accordingly we request that the County move forward with the award of this project to CW Fox.

In the event that this project is not awarded to CW Fox or RNR, the bids of both JFC and Bowcon Company, Inc. must be deemed non responsive based on the fact that neither contractor turned in a complete set of bid documents.

In **SECTION 2 PROPOSAL REQUIREMENTS AND CONDITIONS** of the special provisions, part **2-1.01 GENERAL** It states:

The first sentence of the second paragraph in section 2-1.05, "Proposal Forms" of the Standard Specifications is amended to read:

"The proposal form is bound together with the Notice to Bidders, Special Provisions, Agreement and attendant documents." (emphasis in original)

A Proposal shall be deemed "Non-Responsive" if the proposal is submitted without the entire Contract Document package attached.

Neither JFC nor Bowcon submitted the entire Contract Document package as required and the consequences are clearly laid out in the contract documents.

Therefore, if CW Fox and RNR are deemed non responsive based on the arguments made by JFC all the bids must be thrown out and the project put out to bid again.

We believe the protest put forward by JFC lacks merit and argues for an inappropriate remedy to bid irregularity that in fact does not even exist. We respectfully request that the County deny the protest of JFC and move forward with award of the project to CW Fox.

If we can be of any assistance in moving forward with award please let us know.

Sincerely,

A handwritten signature in black ink, appearing to read "WR Fox".

William R. Fox P.E., J.D.
Vice President
CW Fox Construction, Inc.