

2780



July 16, 2020

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PORT OF LOS ANGELES  
RECEIVED

Port of Los Angeles  
ATTN: Shaun Shahrestani, Chief Harbor Engineer  
425 S. Palos Verdes Street  
PO Box 151  
San Pedro, CA 90733-0151

JUL 21 2020

CONSTRUCTION DIVISION  
HARBOR DEPARTMENT

Re: San Pedro Waterfront Promenade and Building Demolition (Specification 2780)  
Bid Opening: June 18, 2020

✓20-1316

Subject: **Appeal of Bid Protest Determination**

Mr. Shahrestani:

1. Introduction

This is Granite Construction Company's ("Granite"), appeal/supplemental protest of the Port of Los Angeles' (the "Port"), initial protest determination for the above Project ("Initial Determination"). Enclosed at like-numbered Tabs are: (1) Granite's original protest dated June 19, 2020; and (2) the Initial Determination.

The Initial Determination concluded the bid of Sully Miller Contracting Company ("Sully") was responsive despite failing to list a Los Angeles Department of Building & Safety ("LADBS") certified metal fabricator per the bid requirements. The conclusion was based on Sully's post-bid representation that its listed steel subcontractor, The Steel Erection Company ("TSEC"), would not perform steel fabrication. Instead, Sully represented TSEC would "subcontract" the steel fabrication to S&P Fabrication Services ("S&P"), a LADBS certified firm.

In attempting to overcome Granite's protest, Sully revealed a non-waivable bid defect: Sully did not meet the mandatory 5 percent participation by Very Small Business Enterprises (VSBEs). As such, Sully's bid is ineligible for award. The Project should be awarded to the lowest responsive bidder, Granite.

2. VSBE Requirement and Sully's Bid-Day Representation

The Project is subject to the Port's VSBE program. To become a certified VSBE, "A small business [must] average annual gross receipts of \$5,000,000 or less within the previous three years..."<sup>1</sup> The Port established a 5-percent VSBE participation minimum for the Project. (Notice Inviting Bids, § 8.) As such, Sully's VSBE participation minimum was \$2,595,001.00 (five percent of its bid), which Sully represented it met using TSEC's \$2,712,873.00 subcontract. TSEC

<sup>1</sup> <https://www.portoflosangeles.org/business/contracting-opportunities/how-to-do-business-with-the-port>



has a VSBE certification. Absent TSEC's participation as a VSBE, Sully's bid falls short of the mandatory VSBE participation requirement and may not be accepted. As detailed below, TSEC's participation may not be counted for multiple reasons.

3. Sully's Steel Work is Being Performed by an "Other Business Enterprise"

In rebutting Granite's initial protest, Sully represented to the Port that the vast majority of the TSEC's work on the Project—the fabrication—would not be performed by the listed VSBE. Instead, S&P would perform that work. According to the City of Los Angeles' Business Assistance Virtual Network ("LABAVN") database, S&P is not a VSBE and, instead, it is certified as an Other Business Enterprise ("OBE"):

Company Summary	
Name:	S&P Fabrication Services
Address:	1391 South Allec Street Anaheim, CA 92805
Phone:	(714) 686 - 6193
Website:	
Description:	We are a steel fabricator servicing Los Angeles and Orange Counties, as well as the surrounding areas.
Certification(s):	(OBE) - Other Business Enterprise
NAICS Code(s):	238120: Structural Steel and Precast Concrete Contractors
Admin:	Machai Pace , <a href="mailto:machai@spfabsvc.com">machai@spfabsvc.com</a>

The Port's bid documents define OBE at Section 00030-06 of the Specifications, stating an OBE is not either a: (1) SBE; or (2) VSBE:

**An OBE (Other Business Enterprise) is any enterprise that is not a SBE, VSBE, DVBE, MBE, or WBE.**

Accordingly, the scope of work that shifted from TSEC to S&P cannot be counted towards Sully's VSBE participation. The fabrication work represents more than \$2 million in value, such that Sully falls far short of the minimum. As mandated in Section 00030-06(B) of the bid documents, "[a]ny bid submitted which fails to meet the small and very small business requirements as shown in the notice inviting bids section will result in reject of the bid." Accordingly, the Port must reject the nonresponsive bid of Sully and award the Project to the lowest responsive and responsible bidder: Granite.

#### 4. TSEC's VSBE Certification is Invalid

In its bid documents, the Port specifically incorporates the size determination rules established by the Small Business Administration in Title 13, Code of Federal Regulations, Part 121. These rules include limitations on small business affiliations so that firms may not "spin off" or segregate portions of their operation in order to qualify as small businesses (e.g., by artificially limiting revenue within the "small business" in order to meet the revenue limitations). In other words, if a certified small business is affiliated with another firm, and the combined revenue of the firms exceeds the small business limitations, then the certification is invalid. (13 C.F.R. § 121.103.)

Here, contrary to Sully's representation that TSEC will "subcontract" to S&P, TSEC and S&P are affiliates—the same company under the small business regulations. TSEC and S&P share a common address, 1391 S. Allec Street, Anaheim, CA 92805, and advertise themselves as a single operation with shared ownership and leadership. Below is a screenshot from the TSEC/S&P website:

The screenshot displays two logos at the top. The left logo is for "S&P FABRICATION SERVICES" with "L.A. CITY FAB SHOP #FB03206" written in a semi-circle above it. The right logo is for "TSEC THE STEEL ERECTION COMPANY" with "CONTRACTOR LICENSE #1052898" written in a semi-circle above it. Below the logos, the text reads "Servicing Southern California's Steel Fabrication and Installation Needs". To the right, under the heading "Contact", there is a "LOCATION" section listing "1391 South Allec Street, Anaheim, CA 92805" and a "CONTACT" section listing "(562) 380-1819" and "Sales@SPFabricationServices.com". A small paragraph of text is also present on the left side of the screenshot.

The TSEC/S&P website also confirms TSEC/S&P have a single/common leadership team, which overlaps precisely with the data in LABAVN:

Leadership Team		
<b>CHRISTIAN SURRETT</b>	<b>SCOTT PACE</b>	<b>MACHAI PACE</b>
1 (562) 760-3277	1 (562) 755-8323	1 (714) 686-6193
csurrett@spfabsvc.com	space@spfabsvc.com	machai@spfabsvc.com

TSEC and S&P are affiliated companies under nearly all the criteria set forth in 13 C.F.R. § 121.103 (violating just one of the criteria is fatal). For example, they have common leadership under subdivision (e), as confirmed on their website. They appear to be a commonly owned joint venture, under subdivisions (c) and (h). The firms have “contractual relationships” and “economic dependency” under subdivisions (a), (f), and (g). They also trigger the “newly organized concern” rule under subdivision (g).

As a result, in applying for a small business certification, TSEC had a duty to disclose S&P as an affiliate. This apparently did not happen, as S&P is confirmed—within the City’s database—to be an OBE. An OBE, by definition, is not a VSBE. As such, TSEC’s certification as a VSBE is invalid, causing Sully’s bid to fall short of the 5-percent VSBE participation minimum. For this reason, Sully’s bid is non-responsive and cannot be accepted.

#### 5. California Law Precludes Waiver of the Defect

California law precludes the Port from waiving any bid defect that either: (1) could have affected Sully’s price; or (2) could have afforded Sully an advantage over its competition. (*Valley Crest Landscape, Inc. v. City Council*, 41 Cal. App. 4th 1432, 1441.) Here, both elements are met. Sully’s use of TSEC/S&P *actually* resulted in a lower bid price, as detailed further in Granite’s initial protest at Tab 1. Further, Sully’s reliance on TSEC/S&P allowed it to avoid having to—genuinely—meet the mandatory VSBE participation requirement. As such, the TSEC/S&P defect may not be waived under the standard California waive-ability test.

Additionally, the Port is precluded from waiving the defect under *Pozar v. Dep’t of Transportation*, 145 Cal. App. 3d 269, 270, which requires public entities to follow bid evaluation rules set forth in their bid documents. Here, the Port confirmed in Section 00030-06(B) of the bid documents, “[a]ny bid submitted which fails to meet the small and very small business requirements as shown in the notice inviting bids section will result in reject of the bid.” As such, under *Pozar*, the Port does not have discretion to waive Sully’s bid defect.

#### 6. Conclusion

For the reasons stated above, Granite requests the Port reject the nonresponsive bid of Sully and award the Project to the lowest responsive and responsible bidder, Granite.



Please do not hesitate to contact me at 760-444-1992 or [Jesse.Espinoza@gcinc.com](mailto:Jesse.Espinoza@gcinc.com), should you require additional information.

Respectfully,  
**GRANITE CONSTRUCTION COMPANY**

A handwritten signature in blue ink, appearing to read "Jesse".

Jesse Shae Espinoza  
Chief Estimator

5860 El Camino Real #200  
Carlsbad, CA 92008

Phone: 760-444-1992  
Fax: 760-444-1988



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August 5, 2020

Granite Construction Company  
5860 El Camino Real #200  
Carlsbad, CA 92008

Attn: Jesse Espinoza

**SUBJECT: RESPONSE TO APPEAL OF BID PROTEST FOR THE BID OF SULLY-MILLER CONTRACTING COMPANY  
WILMINGTON WATERFRONT PROMENADE AND BUILDING  
DEMOLITION  
SPECIFICATION NO. 2780**

The Harbor Department-Construction Division has received your second bid protest letter dated July 16, 2020 on the subject project indicating that Sully-Miller's bid should be deemed non-responsive, due to The Steel Erection Company's affiliation to S&P Fabrication Services, and not fulfilling the Very Small Business Enterprise (VSBE) project requirements.

Per Specification Section 00030.06, in order to be certified as a VSBE (Harbor), the listed subcontractor or supplier must satisfy the micro-business definition set forth by the California Department of General Services (DGS). Following receipt of the July 16 protest letter, the Harbor Department contacted the City of Los Angeles Bureau of Contract Compliance and DGS. DGS conducted a certification compliance review and certified The Steel Erection Company as a micro-business. Therefore, pursuant to the Harbor Department's Small Business Enterprise Program, The Steel Erection Company qualifies as a VSBE (Harbor). Please see the attached certification. Based on this information, Sully-Miller fulfills the minimum VSBE (Harbor) requirement and we find their bid responsive.

Granite Construction Co.  
August 5, 2020

Page 2 of 2

The project will be recommended to the Board of Harbor Commissioners for contract award at the board meeting on August 20, 2020. Thank you for submitting a bid for this project and we hope that you consider bidding future Port projects.

If you have any additional questions or concerns, please contact Mahsa Pan, Project Construction Manager at (310) 732-7674.

Sincerely,

A handwritten signature in blue ink, appearing to read "Shaun for".

SHAUN SHAHRESTANI  
Chief Harbor Engineer  
Director of Construction

MHP:lh  
28112.doc  
File No.: Spec No. 2780-4.11

Attachment

Printed on: 7/28/2020 4:50:12 PM

To verify most current certification status go to: <https://www.caleprocure.ca.gov>

## Office of Small Business & DVBE Services

**Certification ID:** 2016462**Legal Business Name:**

The Steel Erection Company

**Doing Business As (DBA) Name 1:****Doing Business As (DBA) Name 2:****Email Address:**

scottpace1966@gmail.com

**Business Web Page:****Business Phone Number:**

562/755-8323

**Business Fax Number:****Address:**

1391 S. Allec St

California

Anaheim

CA 92805

**Business Types:**

Construction

Certification Type	Status	From	To
SB(Micro)	Approved	09/25/2019	09/30/2021
SB-PW	Approved	09/25/2019	09/30/2021

Stay informed! KEEP YOUR CERTIFICATION PROFILE UPDATED!

-LOG IN at [CaleProcure.CA.GOV](https://www.caleprocure.ca.gov)

Questions?

Email: [OSDSHELP@DGS.CA.GOV](mailto:OSDSHELP@DGS.CA.GOV)

Call OSDS Main Number: 916-375-4940

707 3rd Street, 1-400, West Sacramento, CA 95605