

**DECLARATION OF COMPLIANCE  
Equal Benefits Ordinance**

Madsen Roof Company, Inc.

Name of Contractor

5960 Bradshaw Road, Sacramento, CA 95829

Address

The above named contractor ("Contractor") hereby declares and agrees as follows:

1. I have read and understand the Requirements of the Non-Discrimination in Employee Benefits Code (the "Requirements") provided to me by the City of Sacramento ("City") in connection with the City's request for proposals or other solicitations for the performance of services, or for the provision of commodities, under a City contract or agreement ("Contract").
2. As a condition of receiving the City Contract, I agree to fully comply with the Requirements, as well as any additional requirements that may be specified in the City's Non-Discrimination in Employee Benefits Code codified at Chapter 3.54 of the Sacramento City Code (the "Ordinance").
3. I understand, to the extent that such benefits are not preempted or prohibited by federal or state law, employee benefits covered by the Ordinance, are any of the following:
  - a. Bereavement Leave
  - b. Disability, life, and other types of insurance
  - c. Family medical leave
  - d. Health benefits
  - e. Membership or membership discounts
  - f. Moving expenses
  - g. Pension and retirement benefits
  - h. Vacation
  - i. Travel benefits
  - j. Any other benefit offered to employees

I agree that should I offer any of the above listed employee benefits, that I will offer those benefits, without discrimination between employees with spouses and employees with domestic partners, and without discrimination between the spouses and domestic partners of such employees.

4. I understand that I will not be considered to be discriminating in the provision or application of employee benefits under the following conditions or circumstances:

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**Equal Benefits Ordinance**

- a. In the event that the actual cost of providing a benefit to a domestic partner or spouse, exceeds the cost of providing the same benefit to a spouse or domestic partner of an employee, I will not be required to provide the benefit, nor shall it be deemed discriminatory, if I require the employee to pay the monetary difference in order to provide the benefit to the domestic partner or to the spouse.
- b. In the event I am unable to provide a certain benefit, despite taking reasonable measures to do so, if I provide the employee with a cash equivalent, I will not be deemed to be discriminating in the application of that benefit.
- c. If I provide employee benefits neither to employee's spouses nor to employee's domestic partners.
- d. If I provide employee benefits to employees on a basis unrelated to marital or domestic partner status.
- e. If I submit, to the Program Coordinator, written evidence of making reasonable efforts to end discrimination in employee benefits by implementing policies which are to be enacted before the first effective date after the first open enrollment process following the date the Contract is executed with the City.  
  
I understand that any delay in the implementation of such policies may not exceed one (1) year from the date the Contract is executed with the City, and applies only to those employee benefits for which an open enrollment process is applicable.
- f. Until administrative steps can be taken to incorporate, in the infrastructure, nondiscrimination in employee benefits  
  
The time allotted for these administrative steps will apply only to those employee benefits for which administrative steps are necessary and may not exceed three (3) months from the date the Contract is executed with the City.
- g. Until the expiration of a current collective bargaining agreement(s) where, in fact, employee benefits are governed by a collective bargaining agreement(s).
- h. I take all reasonable measures to end discrimination in employee benefits by either requesting the union(s) involved agree to reopen the agreement(s) in order for me to take whatever steps are necessary to end discrimination in employee benefits or by my ending discrimination in employee benefits without reopening the collective bargaining agreement(s).

**DECLARATION OF COMPLIANCE**  
**Equal Benefits Ordinance**

- i. In the event I cannot end discrimination in employee benefits despite taking all reasonable measures to do so, I provide a cash equivalent to eligible employees for whom employee benefits (as listed previously), are not available.

Unless otherwise authorized in writing by the City Manager, I understand this cash equivalent must begin at the time the union(s) refuse to allow the collective bargaining agreement(s) to be reopened or no longer than three (3) months from the date the Contract is executed with the City.

5. I understand that failure to comply with the provisions of Section 4. (a) through 4. (i), above, will subject me to possible suspension and/or termination of this Contract for cause; repayment of any or all of the Contract amount disbursed by the City; debarment for future contracts until all penalties and restitution have been paid in full; deemed ineligible for future contracts for up to two (2) years; the imposition of a penalty, payable to the City, in the sum of \$50.00 for each employee, for each calendar day during which the employee was discriminated against in violation of the provisions of the Ordinance.
6. I understand and do hereby agree to provide each current employee and, within ten (10) days of hire, each new employee, of their rights under the Ordinance. I further agree to maintain a copy of each such letter provided, in an appropriate file for possible inspection by an authorized representative of the City. I also agree to prominently display a poster informing each employee of these rights.
7. I understand that I have the right to request an exemption to the benefit provisions of the Ordinance when such a request is submitted to the Procurement Services Division, in writing with sufficient justification for resolution, prior to contract award.

I further understand that the City may request a waiver or exemption to the provisions or requirements of the Ordinance, when only one contractor is available to enter into a contract or agreement to occupy and use City property on terms and conditions established by the City; when sole source conditions exist for goods, services, public project or improvements and related construction services; when there are no responsive bidders to the Ordinance requirements and the contract is for essential goods or services; when emergency conditions with public health and safety implications exist; or when the contract is for specialized legal services if in the best interest of the City.

8. In consideration of the foregoing, I shall defend, indemnify and hold harmless, the City, its officers and employees, against any claims, actions, damages, costs (including reasonable attorney fees), or other liabilities of any kind arising from any violation of the Requirements or of the Ordinance by me.

**DECLARATION OF COMPLIANCE  
Equal Benefits Ordinance**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am authorized to bind the Contractor to the provisions of this Declaration.

Christian Madsen  
Signature of Authorized Representative

October 29, 2008  
Date

Christian Madsen  
Print Name

Vice President  
Title



**YOUR RIGHTS UNDER THE CITY OF SACRAMENTO'S  
NON-DISCRIMINATION IN EMPLOYEE BENEFITS BY CITY CONTRACTORS  
ORDINANCE**

On ..... (date), your employer (the "Employer") entered into a contract with the City of Sacramento (the "City") for ..... (contract details), and as a condition of that contract, agreed to abide by the requirements of the City's Non-Discrimination In Employee Benefits By City Contractors Ordinance (Sacramento City Code Section 3.54).

The Ordinance does not require the Employer to provide employee benefits. The Ordinance does require that if certain employee benefits are provided by the Employer, that those benefits be provided without discrimination between employees with spouses and employees with domestic partners, and without discrimination between the spouse or domestic partner of employees.

The Ordinance covers any employee working on the specific contract referenced above, but only for the period of time while those employees are actually working on this specific contract.

The included employee benefits are:

- Bereavement leave
- Disability, life and other types of insurance
- Family medical leave
- Health benefits
- Membership or membership discounts
- Moving expenses
- Pension and retirement benefits
- Vacation
- Travel benefits
- Any other benefits given to employees

(Employee Benefits does not include benefits that may be preempted by federal or state law.)

If you feel you have been discriminated or retaliated against by your employer in the terms and conditions of your application for employment, or in your employment, or in the application of these employee benefits, because of your status as an applicant or as an employee protected by the Ordinance, or because you reported a violation of the Ordinance, and after having exhausted all remedies with your employer,

**You May . . .**

- o Submit a written complaint to the City of Sacramento, Contract Services Unit, containing the details of the alleged violation. The address is:

City of Sacramento  
Contract Services Unit  
915 I St., 2nd Floor  
Sacramento, CA 95814

- o Bring an action in the appropriate division of the Superior Court of the State of California against the Employer and obtain the following remedies:
  - Reinstatement, injunctive relief, compensatory damages and punitive damages
  - Reasonable attorney's fees and costs



**YOUR RIGHTS UNDER THE CITY OF SACRAMENTO'S  
NON-DISCRIMINATION IN EMPLOYEE BENEFITS BY CITY CONTRACTORS  
ORDINANCE**

If your employer provides employee benefits, they must be provided to those employees working on a City of Sacramento contract without discriminating between employees with spouses and employees with domestic partners.

The included employee benefits are:

- Bereavement leave
- Disability, life and other types of insurance
- Family medical leave
- Health benefits
- Membership or membership discounts
- Moving expenses
- Pension and retirement benefits
- Vacation
- Travel benefits
- Any other benefits given to employees

If you feel you have been discriminated against by your employer . . .

**You May . . .**

- o Submit a written complaint to the City of Sacramento, Contract Services Unit, containing the details of the alleged violation. The address is:  
  
City of Sacramento  
Contract Services Unit  
915 I St., 2nd Floor  
Sacramento, CA 95814
- o Bring an action in the appropriate division of the Superior Court of the State of California against the employer and obtain reinstatement, injunctive relief, compensatory damages, punitive damages and reasonable attorney's fees and costs.

**Discrimination and Retaliation Prohibited.**

If you feel you have been discriminated or retaliated against by your employer in the terms and conditions of your application for employment, or in your employment, because of your status as an applicant or as an employee protected by the Ordinance, or because you reported a violation of this Ordinance . . .

**You May Also . . .**

Submit a written complaint to the City of Sacramento, Contract Services Unit, at the same address, containing the details of the alleged violation.



January 14, 2008

SB APP 20070824203106

REF# 0038816  
 SALINAS AND FARIAS & ASSOCIATES  
 7508 S LAND PARK DR  
 SACRAMENTO CA 95831

Dear Business Person:

Congratulations on your certified small business status with the State of California. Your certification entitles you to benefits under the state's Small Business Participation Program within state contracting, including a five percent bidding preference and special provisions under the Prompt Payment Act.

**Certification period**

Your certification period for each business type is:

<u>Industry</u>	<u>From</u>	<u>To</u>
CONSTRUCTION	08/24/2007	01/31/2009
SERVICE	08/24/2007	01/31/2009

**Annual Submission Requirement**

To maintain your certified status, you must annually submit to the Office of Small Business and DVBE Services (OSDS), proof of annual receipts and proof of employees for your firm and each of your affiliates (if any).

Proof of Annual Receipts

Submit to OSDS, a copy of your firm's and any affiliate firm's ENTIRE federal tax return each year following your certification. Include ALL accompanying schedules, forms, statements, and any other support documents filed with that specific tax return.

If you request a tax filing extension with the Internal Revenue Service, submit to our office a copy of the extension form. When your tax returns are filed, submit a copy of the entire federal tax return to our office.

Proof of Employees

If you have employees whose taxable wages are reported to the California Employment Development Department (EDD) on a quarterly basis, you must annually submit to our office along with your proof of annual receipts, proof of employees for your firm and any affiliates.

We will accept a copy of the EDD's "Quarterly Wage and Withholding Report" (Form DE6) or other format accepted by the EDD. Your employee documents must cover the same four quarters as the tax return you submit for your proof of annual receipts.

If you have out-of-state employees, submit the employee documentation comparable to EDD's "Quarterly Wage and Withholding Report" for the same four-quarter period.

**Maintaining Your Online Certified Firm Profile**

Office of Small Business and DVBE Certification

REF# 0038616 SALINAS AND FARIAS & ASSOCIATES

January 14, 2008  
SB APP 20070824203108

A secure access feature on our website enables you to maintain certain company profile information, including customizable keywords to best describe your business specialties with. Details about the Certified Firm Profile and your secure logon information are available on the final page of this letter. Please keep your logon information page in a secure place and DO NOT share it with anyone or include it with any of your bid documents or submittals.

**Reporting Business Changes**

You must notify OSDS of all business changes or your certification status will be subject to revocation. The enclosed "Certification Information Change" form identifies specific items that may be reported using the change form and it identifies other changes that require a new certification application submittal.

**Prompt Payment Rubber Stamp**

The Prompt Payment Act requires state agencies to pay the undisputed invoices of certified small businesses and registered nonprofit organizations on a timely basis. Prompt payment is reinforced by adding interest penalties for late payment. Covered under the Act are certified small businesses that are either a service, manufacturer, or non-manufacturer firm, and nonprofit organizations registered with OSDS.

Compensation on late or unpaid progress payments for certified construction firms is addressed in Public Contract Code, Section §10261.5.

Use of the prompt payment rubber stamp alerts state agencies of a firm's certified small business or registered nonprofit status.

Ordering a rubber stamp

To purchase a prompt payment rubber stamp, complete and submit the enclosed Prompt Payment Rubber Stamp Order Form.

**Proof of Eligibility**

Maintain this original certification letter for future business needs. To demonstrate your firm's small business eligibility, include a copy of this letter in your state contract bid submittals.

*Prior to contract award, agencies will assure the vendor is in compliance with Public Contract Code, Section 10410 et seq. addressing conflict of interest for state officers, state employees or former state employees.*

**Certification Renewal**

A renewal application will be mailed to you prior to the expiration of your small business certification. If you do not receive an application, please call us so that you may timely renew your certification.

Office of Small Business and DVBE Certification

REF# 0038616 SALINAS AND FARIAS & ASSOCIATES

3

January 14, 2008  
DVBE APP 20080114101717

**Standard Industrial Classification (SIC) and North American Industry Classification System (NAICS) Code(s)  
Certification Approval Attachment**

You selected the following Standard Industrial Classification (SIC) and North American Industry Classification System (NAICS) codes and/or contractor's license classifications to describe your firm's business:

\*Construction firms are classified by their California contractor's license classification(s).

<u>Industry</u>	<u>NAICS Code</u>	<u>NAICS Code Description</u>
SERVICE	541330	Engineering Services
	541811	Administrative Management and General Management Consulting Se
<u>Industry</u>	<u>SIC Code*</u>	<u>SIC Code Description</u>
CONSTRUCTION	B	General Building Contractor
SERVICE	8711	Engineering services
	8742	Management consulting services

Office of Small Business and DVBE Certification

REF# 0038616 SALINAS AND FARIAS &amp; ASSOCIATES

4

January 14, 2008  
DVBE APP 20080114101717

Keep this page in secure place. DO NOT share this page or information with anyone or include it with any of your bid documents or submittals.

#### Certified Firm Profile

The Online Certified Firm Profile feature enables California-certified small businesses and DVBEs with a convenient way to maintain certain company profile information, including customizable keywords to best describe business specialties with. The keywords help many state, local government and other agency buyers and potential business partners find you or a pool of businesses like yours when they use our online Certified Firm search tool. Don't let a business opportunity pass you by. Keep your contact information current and your keywords fine-tuned.

To access your online profile, go to [www.pd.dgs.ca.gov/smbus](http://www.pd.dgs.ca.gov/smbus) and click on the "Certified Firm Profile Login" link in the far right column of the webpage. Use the User ID and password below for your initial login session. You may change your password at any time after the initial login. Your password should consist of at least six (6) and no more than 20 alphanumeric, case-sensitive characters (Example: AbC1236#). Once you are accepted into the system, you can update your online profile and keywords anytime, 24 hours a day. If you don't have Internet access, please use the enclosed "Certification Information Change" form to update your profile and keywords.

User ID: 38616

Temporary Password: ThoBzB13

If you have any questions, please contact the Office of Small Business and DVBE Services (OSDS) at [osdshelp@dgs.ca.gov](mailto:osdshelp@dgs.ca.gov) or (916) 375-4940.

1 EILEEN M. TEICHERT, City Attorney (SBN 167027)  
2 ANGELA M. CASAGRANDA, Senior Deputy City Attorney (SBN 186122)  
3 CITY OF SACRAMENTO  
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5 Office: 915 I Street, 4th Floor, Sacramento, CA 95814  
6 Telephone: (916) 808-5346  
7 Telecopier: (916) 808-7455

8 Attorneys for the CITY OF SACRAMENTO

9 INSTITUTE FOR ADMINISTRATIVE JUSTICE  
10 MCGEORGE SCHOOL OF LAW

11 In the Matter of:

12 Bid Protest Hearing Relating to Sacramento  
13 Memorial Auditorium Roof Repair

DECLARATION OF REBECCA BITTER

Date: January 7, 2009  
Place: 3455 Fifth Avenue, 2nd Floor  
Sacramento, California 95817  
Time: 9:30 a.m.  
Hearing Examiner:  
Vincent Pastorino

14 I, Rebecca Bitter, declare:

- 15 1. I have personal knowledge of the facts stated herein and, if called to testify, I  
16 can competently testify thereto.
- 17 2. I am currently employed by the City of Sacramento, Department of Convention,  
18 Culture and Leisure, as a Program Manager. I have been so employed for five years and  
19 ten months.
- 20 3. On December 16, 2008, I interviewed SF&A President and CEO Paul Salinas,  
21 Jr. regarding this matter.
- 22 4. I asked him to describe the services SF&A would be providing to D7. He told  
23 me SF&A would be coordinating the purchase and delivery of materials from Tremco to D7.  
24 D7 will tell SF&A the quantity and type of materials needed for the Project and when and  
25

1 where the materials should be delivered. The materials would be hauled by Tremco and  
2 shipped to D7's yard or the job site.

3 5. When I asked why D7 was not purchasing the materials directly from Tremco,  
4 had stated so the contractor does not have to coordinate the purchase. I asked him if the  
5 reason a contractor would use SF&A is so the contractor does not have to spend time  
6 making these types of telephone calls and he said yes.

7 6. I asked for a total estimate for SF&A's services. He stated D7 only asked for  
8 line item quotes and that SF&A will not provide a total estimate until a contract between  
9 SF&A and D7 is executed. SF&A would then execute a contract with Tremco.

10 7. Mr. Salinas informed me that the portion of SF&A's quote for the services  
11 portion of his quotation were the profit and overhead charges of sixteen percent.

12 8. I asked if he was an exclusive distributor for Tremco. He informed me that they  
13 have a teaming Agreement with the manufacturer. I asked if that was the same as an  
14 exclusive distributor and he said it was not the same.

15 9. I asked for any documents or notes regarding his quote or his conversations  
16 regarding the job and what SF&A will be doing for D7. He stated all D7 wanted was the  
17 price sheet.

18 10. I asked whether SF&A would be the hauler. He informed me the manufacturer  
19 hauls to the contractor's yard or the job site.

20 11. On December 19, 2008, I conducted a search on the website for the State of  
21 California, Department of General Services, Office of Small Business and DVBE Services for  
22 "Tremco, Inc." There was no record of Tremco as a SBE or DVBE.

23 12. On November 12, 2008, I asked D7 Estimator, Norm Deeg, for D7's SBE  
24 certification. On November 14, 2008, D7 Project Manager, Marty Jenkins, provided a DVBE  
25 certification for SF&A. On November 17, 2008, I informed Marty Jenkins that the City does  
26 not accept DVBE certification and asked for SF&A's SBE certification which I received on  
27 the same date. A true and correct copy of the SBE certification I received from Marty Jenkins  
28 is attached as Exhibit K to the response.

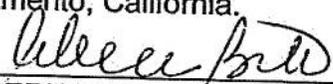
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13. I reviewed Madsen's bid for this project, a true and correct copy of which is included as Exhibit J to the City's Response to the Bid Protest. The bid is the lowest responsive bid to the City's Invitation to Bid for this project.

14. On December 23, 2008, I sent via e-mail a Revised Preliminary Recommendation of Contract Award to all bidders on the Memorial Auditorium Roofing Project, informing them that the City staff intends to recommend that this contract be awarded to Madsen Roofing Company, Inc.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on December 23, 2008 in Sacramento, California.

  
REBECCA BITTER

Attachment 4

INSTITUTE FOR ADMINISTRATIVE JUSTICE  
UNIVERSITY OF THE PACIFIC  
McGEORGE SCHOOL OF LAW  
3200 Fifth Avenue  
Sacramento, CA 95817  
Telephone: (916) 739-7049

**CITY OF SACRAMENTO**

**BID PROTEST HEARING  
SACRAMENTO MEMORIAL AUDITORIUM ROOF REPAIR PROJECT**

In the matter of:	)	Case No.: SACBP010709-1
	)	
MADSEN ROOF COMPANY, INC.,	)	<b>DECISION ON ADMINISTRATIVE</b>
Protesting Bidder,	)	<b>APPEAL WITH FINDINGS OF</b>
	)	<b>FACT AND RECOMMENDED</b>
vs.	)	<b>DETERMINATION</b>
	)	
D7 ROOFING SERVICES,	)	
Protested Bidder,	)	
and	)	
	)	
CITY OF SACRAMENTO,	)	
Awarding Agency.	)	

**I. INTRODUCTION**

The bid protest by Madsen Roof Company, Inc., (Madsen Roof) concerning the City of Sacramento's proposed award of the Sacramento Memorial Auditorium Roof Repair Project, contract number B09-17001111-001, to D7 Roofing Services (D7) was heard before Vincent L. Pastorino, Hearing Examiner for the Institute for Administrative Justice, University of the Pacific's McGeorge School of Law, on January 7, 2009, in Sacramento, California.<sup>1</sup>

**II. APPEARANCES**

Attorney Deon R. Stein appeared on behalf of the protesting bidder, Madsen Roof. Also present on behalf of Madsen Roof was Christian Madsen, vice president of Madsen Roof. Attorney Gregory L. Maxim appeared on behalf of the protested bidder, D7. Also present on behalf of D7 was Martin Jenkins, project manager for D7. Senior deputy city attorney Angela M.

<sup>1</sup> The impartial hearing examiner was appointed pursuant to Sacramento Municipal Code section 3.60.520.

Casagrande appeared on behalf of the awarding agency, City of Sacramento (City). Also present on behalf of the City was Rebecca Bitter, program manager for the Convention, Culture, and Leisure Department of the City. Each party submitted documentary evidence and written argument. Testimony was received from Mr. Madsen, Mr. Jenkins, and Ms. Bitter. Each party presented oral closing argument and the matter was then submitted for decision.

**III. JURISDICTION AND SCOPE OF REVIEW**

Section 3.60.520 of the Sacramento Municipal Code (SMC) sets forth the procedures for bid protest hearings before a hearing examiner appointed by the City Council. The protesting bidder has the burden of showing the existence of all facts necessary to support the bid protest. The hearing examiner shall issue a written decision that includes findings of fact and a recommended determination of the bid protest based on those findings of fact. Section 3.60.530 provides that after the hearing examiner issues a decision, the city council shall consider the protest at a public meeting. The council may hear the bid protest as part of the council's consideration of the award of the contract to which the bid relates, or it may hear the bid protest as a separate item. Section 3.60.540 states that "the scope of the bid protest considered by the city council shall be limited to the issues and evidence set forth in the bid protest," and the section lists various procedures that the City may exercise, in its discretion, before taking final action on the bid protest.

**IV. ISSUES PRESENTED FOR HEARING**

- Issue 1:** Did D7 fail to properly complete the Form 440 submitted with D7's bid package and, if so, should that render the bid nonresponsive?
- Issue 2:** Did D7 fail to timely submit ESBE certifications to the City and, if so, should that render the bid nonresponsive?
- Issue 3:** Did D7's bid fail to meet the 20 percent SBE/EBE participation level requirements?

The Hearing Examiner will make a recommended determination of the bid protest in the final section of this Decision.

**V. BACKGROUND**

On October 10, 2008, the City published an Invitation to Bid (Invitation) on the Sacramento Memorial Auditorium Roof Repair Project, number B09-17001111-001 (hereafter, Project). The Invitation listed the estimated construction cost as \$400,000, and it listed the estimated construction time as 60 calendar days. The Project was subject to the City's Emerging Small Business Development Program. Bidders were required to submit bids demonstrating Small Business Enterprise (SBE) or Emerging Business Enterprise (EBE) participation (collectively referred to herein as ESBE participation) in the performance of the contract. The minimum ESBE participation level established for the project was 20 percent of the bidder's contract price. The Invitation also included the requirement that bidders complete the City of Sacramento Subcontractor and ESBE Participation Verification form, known as FM 440, and

include the form in the bid package. FM 440 is used to identify and provide information regarding certain subcontractors that, in turn, is used to calculate the bidder's total ESBE participation percentage.

Other provisions in the Invitation included the contract requirement that the roofing materials be purchased from roofing materials manufacturer Tremco, Inc. (Tremco), or a City approved equivalent manufacturer. Tremco is not a certified SBE. Tremco provided an itemized price list for its pertinent materials in an October 23, 2008 memorandum to the City. The memorandum specifically references the Project.

Madsen Roof, D7, and two other bidders submitted bid proposals to the City prior to the October 29, 2008 deadline. The City opened the bids on that same date after the 2:00 p.m. deadline. The lowest bidder was D7, at \$492,661. The next lowest bidder was Madsen Roof, at \$519,883. On November 7, 2008, the City issued a Preliminary Recommendation of Contract Award to D7.<sup>2</sup>

After reviewing D7's bid, Madsen Roof filed the current protest. Madsen Roof asserted that D7's bid should be rejected as nonresponsive because D7 failed to properly complete the FM 440 in the bid package, failed to timely submit the ESBE certifications, and failed to meet the City's mandatory 20 percent ESBE participation goal. City staff investigated the bid protest and concluded that all three of Madsen Roof's primary contentions had merit. On December 23, 2008, the City issued a Revised Preliminary Recommendation of Contract Award to all bidders, informing them that City staff intended to recommend that the contract be awarded to Madsen Roof.

This matter convened for hearing on January 7, 2009. Although the City staff has announced its intention to recommend award of the contract to Madsen Roof, Madsen Roof is still regarded as the protesting bidder in this hearing.

**VI. LEGAL ANALYSIS AND FINDINGS OF FACT**

**Issue 1: Did D7 fail to properly complete the FM 440 form submitted with D7's bid package and, if so, should that render the bid nonresponsive?**

The instructions on the FM 440 state that for the bidder to be eligible for the award of the contract, the bidder shall list on that form any business entity used to attain the ESBE goal. The form instructs bidders to enter the bidder's name, the bidder's total bid amount, and the date. The form also has boxes in which the bidder must enter subcontractor information as follows: (a) "Business Entity or Subcontractor Name and Location," (b) "Indicate EBE or SBE (subject to verification)," (c) "Items of Work and/or Description of Work or Service Subcontracted or Materials to be provided to complete the contract," and (d) "Estimated Dollar Value of Work /

<sup>2</sup> Nothing in the portions of the Invitation submitted into evidence by the City expressly states the criteria that the City would apply in determining the bid winner. This appears to be a bid process whereby the City would award the contract to the lowest responsible bidder.

**Services Provided."**

D7 entered its name and the date on the FM 440, but it did not enter its total bid amount. D7 listed "SF&A, Inc." (hereafter SF&A) as a subcontractor, but it did not list SF&A's location, such as a city or address. For SF&A's EBE/SBE status, D7 entered "SDVE." For SF&A's items of work and dollar value, D7 entered "Material Supplier" and \$100,000. Thus, the evidence confirms that D7 violated the FM 440 instructions by failing to indicate D7's total bid amount, the location of SF&A, and whether SF&A was an EBE or SBE, instead listing SF&A as an SDVE. The next inquiry is whether those omissions on the FM 440 render D7's bid nonresponsive.

The FM 440 instructions state that "the inclusion of false information or the omission of required information will render the bid non-responsive. **READ THE ABOVE REQUIREMENT CAREFULLY.**"<sup>3</sup> In spite of that warning, the Invitation packet states elsewhere that the City has discretion in deciding whether to find the bid nonresponsive. The Invitation states that "the right to reject Proposals or to waive any error or omission in any Bid Proposal received is reserved by the City."<sup>4</sup> (City Ex. A, p. 3.)

Citing the FM 440 instructions, Madsen Roof asserts that D7's bid should be rejected as nonresponsive because of D7's omissions on the FM 440. Madsen Roof also asserts that D7's bid is nonresponsive because those omissions violate section 4104(a)(1) of California's Public Contracts Code. D7 asserts that before a bid can be rejected as nonresponsive, there must be a showing that the omissions conferred a competitive advantage on the bidder. In the alternative, D7 asserts that its omissions on the FM 440 are inconsequential and should be waived. The City's position is that it has discretion to waive certain errors or omissions in any bid proposal, such as the errors or omissions on D7's FM 440, but "in consideration of the totality of the facts underlying D7's bid, City staff will be recommending to the City Council that it not waive these errors and omissions, and that it reject D7's bid as non-responsive." (City's Response to Bid Protest, p.4.)

The Hearing Examiner will first address Madsen Roof's contention regarding application of section 4104 of the Public Contracts Code. Section 4104 states that any officer or department taking bids for the construction of any public work or improvement shall provide in the specifications or general conditions that any person making a bid or offer to perform the work shall, in his or her bid or offer, set forth the name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor. The City references section 4104(a) of the Public Contracts Code in its written brief and states that the City's Standard Specifications, to which the contract is subject, restates the requirements set forth in section 4104.

Section 1100.7 of the Public Contracts Code states that all provisions of the Public

<sup>3</sup> Upper case and bold type is present in the original.

<sup>4</sup> In addition, section 3.60.140 of the Sacramento Municipal Code gives the City Council the authority to reject the bid or "waive any informalities or minor irregularities" in the bid.

Contracts Code apply to charter cities unless a particular city's charter or ordinances expressly exempt the city from those provisions. In SMC section 3.60.075, the City has declared itself to be "exempt from any and all provisions of the Public Contracts Code except as the city expressly chooses to subject itself to specific provisions as specified in this section..." Although nothing in SMC section 3.60.075 specifically mentions section 4104 of the Public Contracts Code as being a provision to which the City has chosen to subject itself, the argument can be made that by restating the requirements of section 4104 in the City's Standard Specifications, the City has chosen to subject itself to the provisions of section 4104. In either event, the Hearing Examiner notes that nothing in section 4104, or among the remedies/penalties listed in sections 4110 and 4111, mandates the awarding agency to reject the bid due to the bidder's failure to provide the information specified by section 4104. Thus, the Hearing Examiner concludes that section 4104 of the Public Contracts Code does not deprive the City of discretion to waive errors or omissions regarding the listing of a subcontractor's location on FM 440.

The Hearing Examiner will next address Madsen's assertion that D7's bid should be rejected as nonresponsive pursuant to the FM 440 instructions. D7 has responded to that assertion by arguing in its written brief and at the hearing that "for Madsen's claims to possess any merit, it must demonstrate that D7's variations in its bid proposal resulted in a competitive advantage over those other competitors." (City Ex. E, p.2.) The Hearing Examiner takes D7's argument to mean that the City *must* waive the errors and omissions in D7's bid unless such waiver would confer to D7 a competitive advantage over the other bidders. The City would thus have a legal mandate to waive D7's omission of information on FM 440 unless the omission met, as phrased by D7, "the minimum threshold requirement of demonstrating that the challenged disparities in D7's bid proposal provided competitive advantage or benefit afforded to D7 over other bidders." (City Ex. E, p. 2.)

The cases cited by D7, discussed below, do not support D7's restrictive interpretation of the law concerning an awarding agency's discretion to waive or not waive errors and omissions in a bid. California courts have treated favorably a portion of an opinion the Attorney General, which states that

"a basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted....However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted *if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential....*"<sup>5</sup> [Konica Business Machines U.S.A., Inc. v. Regents of University of California (1988) 206 Cal.App.3d 449, 454, quoting from 47 Ops.Cal.Atty.Gen. 129, 130-131 (1966), in turn quoting from Dougherty v. Folk (1941) 46N.E.2d 307, 311. See also; National Identification Systems, Inc. v. State Board of Control, et al. (1992) 11 Cal.App.4th 1446, 1453.]

<sup>5</sup> Italics from Konica, supra.

The above principle gives the City discretion to accept a bid that is not strictly responsive if the variance in the bid cannot have affected the bid amount or conferred a competitive advantage to the bidder. This principle falls short of D7's suggestion that the City *must* waive the omissions on D7's FM 440 if those omissions cannot have affected the bid amount or conferred a competitive advantage to D7.

D7 also cites Ghilotti Construction Co. v. City of Richmond (1996) 45 Cal.App.4th 897, 907, 911, for the proposition, as phrased by D7, that "an inconsequential deviation in a bid proposal will not invalidate the bid if the deviation does not 'give the bidder an unfair competitive advantage [quoting from Ghilotti]' and does not affect the amount of the bid." (City Ex. E, p. 2.) The Hearing Examiner is not certain whether the language "will not," as used by D7, is intended to mean that an inconsequential deviation *cannot* invalidate, or that it *does not necessarily* invalidate, a bid if the deviation does not give the bidder an unfair advantage. In either event, Ghilotti applied the same principles cited above in Konica, described by Ghilotti at p. 912 as "the leading California case on deviation from specifications." A primary issue in Ghilotti was whether a particular deviation was consequential or inconsequential. The Hearing Examiner reads Ghilotti as being consistent with the principle that "the rule of strict compliance with bidding requirements does not preclude the contracting entity from waiving inconsequential deviations." Ghilotti at p. 908. Again, this principle falls short of saying that the contracting entity *must* waive inconsequential deviations.

The evidence showed no competitive advantage gained by D7's failure to properly complete the FM 440. There has been no suggestion that the omissions "could be a vehicle for favoritism, affect [the] amount of [the] bid, influence potential bidders to refrain from bidding, or affect ability to make bid comparisons." [Konica, *supra*, at 455.] Applying the above-discussed standards set forth in Konica, the Hearing Examiner concludes that the City therefore has discretion to waive the deficiencies arising from the omissions on D7's FM 440.

D7 asserts that its omissions on the FM 440 are inconsequential and should therefore be waived. D7 argues that the omitted information can be found in other portions of its bid proposal packet. A review of that packet shows that although D7 failed to enter its total bid amount on the FM 440, D7 did enter its total bid amount of \$492,661 on page 1 of the packet. (City Ex. B, p. 1.) However, that packet, as submitted on October 29, contains no information regarding the location of the subcontractors and no further indication of whether SF&A is an EBE or SBE. The City subsequently received information about SF&A's location, and it also received information confirming that SF&A had the requisite ESBE certification status, but none of that information was received until more than two business days after bid opening.<sup>6</sup>

Ms. Bitter's testimony indicated that the failure of a bidder to list locations of

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<sup>6</sup> The Invitation states that "Bidders shall include copies of the Certification as a SBE or EBE and the SBE or EBE Certifications for each subcontractor, mucker, material supplier, or other business entity listed on the forms submitted with the sealed proposal. Failure to submit the required ESBE information by the close of business two days after bid opening will be grounds for finding the bid non-responsive." (City Ex. A, p.3; underline and bold in the original.)

subcontractors or other information on the FM 440 is sometimes waived by the City. However, City staff decided that because of their investigative findings regarding other irregularities in D7's bid, as claimed in Madsen Roof's protest, they would not waive D7's FM 440 omissions. Accordingly, the Hearing Examiner will defer additional discussion of this issue until after Madsen Roof's other claims have been addressed in Issues 2 and 3 below.

**Issue 2: Did D7 fail to timely submit ESBE certifications to the City and, if so, should that render the bid nonresponsive?**

Madsen Roof asserts that D7's bid was nonresponsive because D7 failed to submit ESBE certification statements to the City within two business days after bid opening.

The FM 440 instructions state, in bold print on the bottom of the form, that EBE and SBE certification statements are due by the close of business two days after bid opening. The Invitation contains a similar directive in the ESBE Requirements section, stating "bidders shall include copies of their Certification as a SBE or EBE and the SBE or EBE Certifications for each subcontractor, trucker, material supplier, or other business entity listed on the forms submitted with the sealed proposal." Immediately thereafter, in bold and underlined print, the instructions state that "Failure to submit the required ESBE information by the close of business two days after bid opening will be grounds for finding the bid non-responsive." (City Ex. A, p. 4.)

There is no dispute that D7 failed to submit the required ESBE certifications to the City within the close of two business days after the October 29 bid opening. D7 asserts that application of the requirement that a contractor be held to submission of an ESBE certification within two days after bid opening is subject to the City's discretion. D7 argues that it provided SF&A's certification to the City prior to a November 25 deadline allegedly imposed by the City, that the City had received SF&A's certification prior to the City's receipt of Madsen Roof's protest, and that there was no demonstration that D7's delay in submitting the certification gave D7 a competitive advantage.

The evidence shows that the City opened the bid packages on October 29, 2008. On November 7, the City issued notice of the City's Preliminary Recommendation of Contract Award to D7. Ms. Bitter asked D7 for SF&A's SBE certification on November 12. D7 provided SF&A's DVBE certification to Ms. Bitter on November 14, and Madsen Roof also filed its bid protest on November 14. Ms. Bitter told D7 on November 17 that the City would not accept a DVBE certification, and D7 provided SF&A's SBE certification to the City on November 17. (City Ex. L, p. 2.) Although those facts are somewhat different from D7's alleged sequence of events, there has been no showing that D7 either gained or could have gained a competitive advantage over other bidders by not submitting the ESBE certification until November 17.

When the City asked D7 on November 12 to submit the ESBE certification, the City's actions indicated, at least to that point, that the City intended to waive D7's violation of the two-day deadline for submitting ESBE certifications as long as D7's responded to the November 12 request in a timely manner. D7 responded to Ms. Bitter's November 12 request in a timely

manner, but, in the interim, Madsen Roof submitted its bid protest. After investigating Madsen Roof's bid protest, the City staff decided to use D7's delay in providing the certifications as a factor in deciding to recommend that the City Council award the contract to Madsen Roof. Therefore, prior to addressing the appropriate consequences for D7's delay in submitting the ESBE certification, the Hearing Examiner will consider Madsen Roof's chief objection to the D7's bid, which involves D7's alleged failure to meet the mandatory 20 percent SBE participation level.

**Issue 3: Did D7's bid fail to meet the 20 percent SBE/EBE participation level requirements?**

SF&A is the only entity that D7 identified as an SBE in its bid. Thus, to meet the City's ESBE requirements for the Project, D7 must show that SF&A is (a) an appropriately certified SBE that is (b) performing a commercially useful function which has (c) a dollar amount at or above the minimum participation level of 20 percent of D7's bid amount. (City Ex. A, ESBE Requirements, p. 4.) Madsen Roof asserts that D7's bid fails in all three of the above areas. The Hearing Examiner will first address the question of whether SF&A is an appropriately certified SBE.

**A. Is SF&A an appropriately certified SBE?**

The certification requirements set forth in the Invitation state that "an SBE designated in the bid must be certified as such by the State of California or by the City, as defined herein, prior to the time bids are received." (City Ex. A, p. 4.) Although there is no dispute that D7 was certified by California's Department of General Services (DGS) Procurement Division as an SBE prior to the time that bids were received, D7's FM 440 describes SF&A's work or service as "material supplier." Madsen Roof asserts that "material supplier" is outside the scope of SF&A's DGS certification.<sup>7</sup>

DGS has a standardized Small Business & DVBE Certification Application form. (City Ex. I, pp. 1-6.) Section 1.1 of that form lists four possible "business types" and instructs the applicant to check all that apply. The four possible choices for business type are "Service," "Construction," "Manufacturer (Transforms Materials into New Products)," and "Non-manufacturer (Reseller, Wholesaler, Distributor, or Retailer of Goods)." Section 6 requires the applicant to list business classification codes and provides space for the applicant to "enter up to three SIC and three corresponding NAICS codes which best classify your line of business."<sup>8</sup>

<sup>7</sup> The City stated in its brief that SF&A's apparent decision to not check a box on its application for either Manufacturer or Non-manufacturer suggests that "SF&A is not a materials supplier, contrary to D7's representations," and the City's brief further concludes that "there is no indication that SF&A is a certified SBE in the business of reselling or distributing materials."

<sup>8</sup> SIC is the Standard Industrial Classification and NAICS is the North American Industrial Classification System.

However, for construction firms, section 6 states that "construction firms' are classified by their contractors state license board classification codes....Do not select SIC or NAICS codes." Section 6 further instructs all firms, including construction firms, to enter keywords that best describe the firm's business, with the purpose being to facilitate buyers and potential business partners to locate the firm on the state's online SBE search engine. Section 6 states that after DGS certifies a firm as an SBE, the firm can update its keywords online.

The text of DGS's four-page certification letter to SF&A, dated January 14, 2008, includes the following lines:

**Certification period**

Your certification period for each business type is:

<u>Industry</u>	<u>From</u>	<u>To</u>
CONSTRUCTION	08/24/2007	01/31/2009
SERVICE	08/24/2007	01/31/2009

The certification letter also lists the SIC and NAICS codes that SF&A had selected to describe its business. Under the NAICS heading, SF&A had entered "SERVICE" as the applicable industry and had selected two NAICS codes, corresponding to "Engineering Services" and "Administrative Management and General Management Consulting Services." Under the SIC heading, SF&A had entered "CONSTRUCTION" and "SERVICE" as its applicable industries. Under the SIC code system, construction firms are classified by their California contractor's license classifications. For CONSTRUCTION, SF&A had identified its contractor's license classification, "B," corresponding to "General Building Contractor." For "SERVICE" it had selected the SIC codes for "Engineering services" and for "Management consulting services." The letter goes on to state that DGS has a secure Web site that enables certified firms to maintain certain company profile information, including customizable keywords chosen to best describe a firm's business. (City Ex. K.)

Thus, the evidence shows that SF&A's SBE certification letter from DGS lists two of the four possible business types that can be selected on an application. The two business types listed on the certification letter are "Construction" and "Service." Although Section 1T of the application instructs applicants to check all of the business types that apply, SF&A did not select "Manufacturer (Transforms Materials into New Products)" or "Non-manufacturer (Reseller, Wholesaler, Distributor, or Retailer of Goods)." The boilerplate content of DGS's applications and certification letters shows that SBEs, after receiving their initial certification letter, have the flexibility to log onto the DGS Web site and unilaterally change keywords, and possibly even change their SIC and NAICS codes, without receiving permission from DGS, but there is no evidence to demonstrate that an applicant can unilaterally add a new business type, meaning add

another of the four possible business type choices, to its profile.<sup>9</sup>

On the basis of the above, the Hearing Examiner concludes that for SF&A to be a properly certified SBE for purposes of the work assigned to it by D7, that work must fall within the scope of "Construction" and/or "Service," the two business types listed on its certification letter.

As stated previously, D7's FM 440 described SF&A's work or service as "material supplier." In its brief, D7 stated that SF&A's tasks would include (1) purchasing the roofing materials from Tremco, the product manufacturer specified in the Invitation; and (2) "coordinating delivery of materials to SF&A with Tremco, storing the materials so that they will not have to be stored on site, and coordinating and supervising delivery of the materials on site with the contractor." D7 further explained in its brief that "SF&A is directly benefitting and serving a useful function for D7 by assuming responsibility for the coordination, procurement, shipping and storage of these materials that would otherwise become the responsibility of D7." Mr. Jenkins, project manager for D7, testified as to the above and also that SF&A's responsibilities would include obtaining permits for street closures on the dates anticipated for delivery of materials to the job site, and obtaining a crane and operator for the job site.<sup>10</sup>

The Hearing Examiner will first examine whether the above work would fall under the scope of the "Construction" business type. Neither the DGS application form nor the DGS certification letter to SF&A expressly defines the business type "Construction" within the context of SBE certification. The application form and the certification letter show that SBEs in the Construction business type are classified according to their contractors state license board classification codes, not SIC or NAICS codes. In SF&A's case, that classification is "B," corresponding to general building contractor.

Section 7057 of California's Businesses and Professions Code (B&PC) describes the classification of general building contractor and states:

"(a) a general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

This does not include anyone who merely furnishes materials or supplies under section 7045 without fabricating them into, or consuming them in the performance of the work of

<sup>9</sup> Neither the application form nor DGS's certification letter to SF&A states whether "business type" or the SIC and NAICS codes can be modified online by the firm. The certification states that a Certification Information Change form is attached to the letter. That form was not offered as evidence at the hearing.

<sup>10</sup> D7 offered no explanation as to why its written brief did not mention a crane or street closure permits.

the general building contractor.”<sup>11</sup>

SF&A is licensed as a general building contractor, so there is no dispute that SF&A's principal contracting business involves the type of activities set forth in the first sentence of section 7057(a) above. Courts have interpreted section 7057 as defining a general building contractor in terms of its principle business, but not as prohibiting a general building contractor from contracting occasionally for other types of work. Home Depot, U.S.A., Inc. v. Contractors' State License Bd. (1966) 41 Cal.App.4th 1952; Hazard, Jr., Enterprises, Inc. v. Insurance Co. of the West (1997) 52 Cal.App.4th 1088; Denver D. Darling, Inc. v. Controlled Environments Construction, Inc. (2001) 89 Cal.App.4th 1221. Thus, the business of merely furnishing materials or supplies without fabricating them into or consuming them in the performance of the work of the general building contractor would not qualify one to be a general building contractor, but section 7057(a) does not necessarily preclude a general building contractor from furnishing materials or supplies to another contractor.

In the present case, that latter principle is significant because, as both D7 and Madsen Roof agreed at the hearing, Tremco will not sell its roofing materials to everyone who makes a purchase request. For warranty reasons, among others, Tremco sells those materials only to contractors certified by Tremco. Madsen Roof, D7, and SF&A all have that Tremco certification. Setting aside, for the moment, the question of whether SF&A would be providing a commercially useful function to D7, the Hearing Examiner will make the inference that SF&A's status as a general building contractor is a significant factor in SF&A's having acquired certification status from Tremco. Accordingly, SBEs whose DGS certification lists the business type "Non-manufacturer (Reseller, Wholesaler, Distributor, or Retailer of Goods)" would likely be unable to obtain Tremco's certification to purchase Tremco's roofing materials unless that SBE also had credentials applicable to the "Construction" business type, meaning a relevant classification from the contractors state license board.

In summary, the Hearing Examiner acknowledges Madsen Roof's point that mere registration as an ESBE in one classification does not necessarily entitle an entity so registered to act as an ESBE for all purposes. However, there is no express definition as to what the "Construction" business type means for purposes of receiving SBE certification and performing work within the scope of one's SBE certification. Given all of the considerations discussed above, the Hearing Examiner concludes that the nexus between SF&A's status as general building contractor and its ability to procure and purchase the Tremco materials places SF&A's proposed work within the scope of its SBE certification for "Construction" business type.

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<sup>11</sup> Section 7057(b) states that "a general building contractor shall not take a subcontract involving trades other than framing or carpentry, unless the subcontract requires at least two unrelated trades or crafts other than framing or carpentry, or unless the general building contractor holds the appropriate license classification. The general building contractor may not count framing or carpentry in calculating the two unrelated trades necessary in order for the general building contractor to be able to take a prime contract or subcontract for a project involving other trades...." In this case, SF&A would not be taking a subcontract for a trade or craft, so subdivision (b) does not apply.

Having found that SF&A's SBE certification is appropriate for the responsibility of purchasing the Tremco materials and coordinating the delivery of those materials to the job site, the Hearing Examiner will not address the question of whether the work assigned to SF&A by D7 is within the scope of SF&A's SBE certification as a "Service" business type.

**B. Is SF&A performing a commercially useful function?**

Madsen Roof asserts that SF&A would not be performing a commercially useful function.

Section III(B) of the ESBE requirements, set forth in the Invitation, states that to receive credit for ESBE participation, the "ESBE must perform a commercially useful function; i.e., must be responsible for the execution of a distinct element of the work and must carry its responsibility by actually performing, managing, or supervising the work." (City Ex. A, p. 4.) The invitation's description of commercially useful function is similar to the more detailed definition contained in Government Code section 14837, applicable to contracts with the State. Section 14837(d)(4) states

"...the certified small business or microbusiness shall provide goods or services that contribute to the fulfillment of the contract requirements by performing a commercially useful function as defined below:

(A) A certified small business or microbusiness is deemed to perform a commercially useful function if the business does all of the following:

- (i) (I) Is responsible for the execution of a distinct element of the contract.
- (II) Carries out its obligation by actually performing, managing, or supervising the work involved.
- (III) Performs work that is normal for its business services and functions.
- (ii) Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

(B) A contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if the contractor's, subcontractor's, or supplier's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of small business or microbusiness participation."

Madsen Roof points out that Tremco provided material pricing for the project in Tremco's October 23, 2008 memorandum to the City and that all bidders received the price list. The memorandum also contained instructions to call for a freight quote. (City Ex. C, pp. 27-28.) From the above, Madsen Roof concludes that under the terms of the Invitation, Tremco was to

supply the materials directly to the successful bidder and no intermediary participation was anticipated. Madsen Roof argues that SF&A's participation as an intermediary in procuring the materials would serve no useful, beneficial, or otherwise advantageous function whatsoever. Instead, according to Madsen Roof, D7's proposed participation by SF&A was a "sham" designed to satisfy the 20 percent SBE participation requirement.

D7 asserts that SF&A will be providing a commercially useful function to D7 by purchasing the materials from Tremco and coordinating delivery of those materials on the dates that delivery is needed. Mr. Jenkins testified, as mentioned above, that SF&A would also arrange for street closure permits and to have a crane on site for handling the materials. Testimony from the parties showed that if one used Tremco's price sheet, the materials cost for the project would be about \$84,000. D7's FM 440 stated an estimated dollar value of \$100,000 for SF&A's participation. Thus, D7 had estimated the dollar value of SF&A's work to be about \$16,000 more than what D7 would pay for the materials if D7 purchased the materials directly from Tremco.

Ms. Bitter, investigating this matter for the City, contacted SF&A president Paul Salinas on December 16, 2008, and interviewed him regarding SF&A's role. According to Ms. Bitter's declaration, Mr. Salinas told Ms. Bitter that SF&A would be "coordinating" (see below) the purchase and delivery of materials from Tremco to D7; that D7 would tell SF&A the quantity and type of materials needed for the Project and when and where the materials should be delivered; and that the materials would be hauled by Tremco and shipped to D7's yard or the job site. (City Ex. L.) He also reportedly told Ms. Bitter that he had provided line item quotes to D7 for the materials and had added profit and overhead charges of 16 percent to cover the "services portion of his quotation."

The evidence shows that SF&A would be doing more than "coordinating" the purchase of Tremco materials. SF&A would be the actual purchaser. SF&A would then sell the Tremco materials to D7. That arrangement is confirmed by Mr. Salinas's October 28, 2008 letter to D7 with an attached price sheet. The letter states that SF&A's overhead and profit costs of 16 percent were included in each line item of the price sheet. SF&A's price sheet shows line items for materials each priced about 16 percent higher than for the corresponding line items on Tremco's October 23 memorandum to the City. (City Ex. G, pp. 2, 3.) Mr. Jenkins also testified that the amount of money D7 eventually pays to SF&A would cover, among other things, SF&A's cost of purchasing the materials, and this is consistent with the \$100,000 amount entered for SF&A on D7's FM 440.<sup>12</sup>

Viewed within the parameters of subpart (A) of section 14837(d)(4) of the Government Code, the evidence shows SF&A's role would be to provide goods (materials), as well as services incidental to the provision of those goods. That role would make SF&A responsible for executing

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<sup>12</sup> A 16 percent markup on \$84,000 would total \$97,440, or 19.8 percent of D7's bid amount. However, the \$84,000 figure is simply an estimate. For purposes of determining the dollar amount that D7 has attached to SF&A's role, the Hearing Examiner will use the \$100,000 figure on D7's FM 440.

one or more distinct elements of the contract. SF&A would actually perform, manage, or supervise that work, and, as discussed above, that type of work would be something that SF&A normally does, irrespective of the fact that it may usually be doing such tasks in conjunction with other work under the scope of its business as a general building contractor. By performing those tasks itself, SF&A would not be further subcontracting a portion of the work greater than that expected to be subcontracted by normal industry practices. Accordingly, the Hearing Examiner concludes that SF&A's role in purchasing the materials from Tremco and coordinating the delivery of those materials to the job site would meet all of the parameters set forth in section 14837(d)(4)(A) of the Government Code.

However, according to the City and Madsen Roof, SF&A's role does not meet the test set forth in subpart (B), the second portion of the two-pronged test for commercially useful function set forth in section 14837(d)(4) of the Government Code. Subpart(B) states that a contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of small business or microbusiness participation.

The City and Madsen Roof argue that while D7 may derive some benefit by relegating to SF&A the task of what the City and Madsen Roof have characterized as essentially making some phone calls, that benefit is far outweighed by SF&A's resulting 16 percent markup on the cost of materials. Thus, they view SF&A as an entity whose role is limited to that of an unneeded, extra participant in the overall task of purchasing Tremco's materials and getting those materials to the job site. They assert that D7's arrangement with SF&A therefore fails the test in section 14837(d)(4)(B) of the Government Code because SF&A is acting as an entity through which D7 simply passes funds to Tremco in order to obtain the appearance of SBE participation by SF&A.

The suggestion that SF&A's role primarily involves making some phone calls does not take into consideration other responsibilities that attach to SF&A as a purchaser and seller. As confirmed in the price sheets, SF&A would not be purchasing simply a few bulk items. Instead, SF&A would be purchasing multiple types and varying amounts of items from an extensive list, at a cost of about \$84,000. In addition to having the responsibility for paying Tremco, SF&A would likely have to perform practical tasks related to bookkeeping, accounting, inventory, and delivery arrangements, as well as whatever obligations and responsibilities may be conferred by contract or implied by law upon SF&A, both as a purchaser of the materials from Tremco and then as a seller of those materials to D7.

Although Madsen Roof and City staff have argued that the cost of the above to D7 and eventually to the City outweighs the benefit, the Hearing Examiner notes that reduction of project costs is not a stated purpose of the City's ESBE program. The stated purpose of the ESBE program is to provide enhanced opportunities for the participation of SBEs in the City's contracting and procurement activities. (City Ex. A, p. 4; SMC section 3.60.260.) D7 has given SF&A an opportunity to participate. SF&A's proposed role may have caused D7's bid to be higher than otherwise, but this was still a competitive bidding process. Bidders were competing

to make the lowest bid, not the lowest possible bid.

Accordingly, the Hearing Examiner concludes that SF&A would be performing a commercially useful function within the meaning of the ESBE program requirements set forth in the Invitation.

C. Does SF&A's participation meet the minimum level of 20 percent?

The Hearing Examiner has found that SF&A is an appropriately certified SBE that is performing a commercially useful function, but there has been no finding as to the ESBE participation value of SF&A's work. The question addressed in this portion of the Decision is whether SF&A's participation meets the minimum 20 percent participation level for ESBEs. Section III(A) of the ESBE program requirements states that the percent of ESBE participation shall be determined based on the dollar amount of the work to be performed by certified ESBEs, as that dollar amount is specifically stated on the FM 440, relative to the total dollar amount of the bid.<sup>13</sup> (City Ex. A, p. 4.) D7's total bid amount was \$492, 661. D7 attributed \$100,000 to SF&A on its FM 440, equal to 20.29 percent of the total dollar amount of D7's bid.

Madsen Roof and the City argue that even if SF&A is performing a commercially useful function, the materials cost as computed from Tremco's price list should be deducted from the \$100,000 amount or value that D7 estimated for SF&A on the FM 440. If one subtracts Tremco's price for the materials, that would reduce the applicable dollar amount of SF&A's participation to only about \$16,000, well short of the approximately \$100,000 amount needed for D7 to reach the 20 percent ESBE participation level.

Ms. Bitter indicated in her testimony that on the basis of how past bids have been analyzed, the City would likely have included SF&A's cost for purchasing the materials from Tremco if SF&A's subsequent handling of those materials involved some consumption, fabrication, or modification. However, SF&A's handling of the Tremco materials involves no such work. Thus, Madsen Roof and the City argue that the portion of SF&A's role that specifically involves the purchase of materials from Tremco and resale of those same materials to D7 should be deducted from the value of SF&A's work because that portion is simply a pass-through transaction designed to give the appearance of ESBE participation, especially when D7 could have purchased those materials directly from Tremco at a lower price.

SF&A would be acting as a materials supplier. Suppliers, as well as all other subcontracting entities, are subject to the rule stated in Section III(B) of the ESBE requirements, which states that to receive credit for participation, an ESBE must perform a commercially useful function. Section 14837(d)(4)(B) of the Government Code states that a contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if its role is limited

<sup>13</sup> The FM 440 refers to "dollar value" of work/services provided. Section IIIA of the ESBE requirements refers to "dollar amount" stated for the ESBE on the FM 440.

to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of SBE business participation. The Hearing Examiner has already found that SF&A would be performing a commercially useful function. Thus, the argument for subtracting SF&A's materials cost from the \$100,000 amount on the FM 440 rests on a premise that for purposes of assigning a dollar amount to an ESBE's participation, one can separate the ESBE's proposed participation into multiple components, subject each separate component to a commercially-useful-function test, and then count the dollar amounts of only those separate components that are found to be commercially useful functions.

Section III(C) of the ESBE requirements states that when determining a supplier's ESBE participation level, "credit for supplies by ESBE's will be 100 percent." This means, in principle, that when an ESBE supplies materials or goods, there is no separation or deduction for the amount that the ESBE paid to acquire those materials or goods, even though the ESBE's cost to obtain those goods is eventually passed on to the end user as part of a marked-up price. Instead, section III(C) treats 100 percent of the price that the end user pays to the supplier as being within the scope of a commercially useful function, and that entire price applies toward the dollar amount of ESBE participation.

Thus, materials suppliers such as resellers, wholesalers, distributors, or retailers of goods or materials are not to be summarily regarded as extra participants in a transaction through which funds are passed in order to obtain the appearance of SBE participation. Section III(C) of the ESBE requirements provides recognition that such suppliers perform a service to the end user, whether it be having a catalogue of available products that allows for efficiency in ordering supplies, having access to products that the end user perhaps could not purchase directly from the initial source, maintaining an inventory, providing a warranty or an option for returns, arranging for delivery, simple convenience, or other services common to the experience of shopping for goods or materials. Such services have a value, reflected in the marked-up price that the purchaser pays. Section III(C) confirms that for purposes of computing ESBE participation, the commercially useful function of a supplier in such instances is not limited, in terms of dollar amount, to the markup that the supplier charges to the purchaser for those services. Instead, the bidder receives ESBE participation credit for the entire amount that the bidder pays to the supplier.

SF&A's services to D7 in this matter are comparable to the above. While it is true that D7 could purchase the Tremco materials directly from Tremco at the same price that SF&A would pay, D7 is still receiving services from SF&A that are related to the purchase and delivery of those materials. As discussed above, SF&A will have to assume various practical tasks associated with the purchase and resale of the assorted roofing materials and will be assuming obligations and responsibilities as may be conferred by contract or implied by law upon SF&A, both as a purchaser and then a seller. By stating that suppliers are entitled to 100 percent credit for supplies, section III(C) of the ESBE requirements recognizes that these types of responsibilities as a whole constitute a service and, in turn, a commercially useful function.

In summary, the Hearing Examiner is persuaded that SF&A will not be an extra participant

whose role is limited to passing funds to Tremco. For the reasons discussed above, SF&A's role of purchasing the materials from Tremco and coordinating delivery of those materials will provide meaningful services, even if those services do not involve street closure permits or arrangements for a crane. Those services may or may not differ in some respects from services perhaps more typically associated with materials suppliers, but they are meaningful services nonetheless. To get those services, D7 is paying about a 16 percent markup on SF&A's cost for the materials. Just as other materials supplier transactions are entitled to 100 percent ESBE credit under section III(C), the Hearing Examiner concludes that D7's arrangement with SF&A entitles D7 to 100 percent credit for the \$100,000 item on D7's FM 440. Accordingly, D7 has met the 20 percent minimum ESBE participation requirement.

**VII. RECOMMENDED DETERMINATION**

Madsen Roof asserts, and City staff agrees, that D7's bid should be rejected as non-responsive. The Hearing Examiner has made the following findings:

- (Issue 1) D7 violated the FM 440 instructions by failing to indicate, on the FM 440, D7's total bid amount, the location of the subcontractors, and whether SF&A was an EBE or SBE, instead listing SF&A as an SDVE. D7 gained no competitive advantage by its failure to properly complete the FM 440. There was no showing that D7 could have gained a competitive advantage over other bidders by its failure to properly complete the FM 440.
- (Issue 2) D7 violated the Invitation instructions by failing to submit the required ESBE certifications to the City within the close of two business days after the October 29 bid opening. That failure did not provide a competitive advantage to D7. D7 submitted the ESBE certifications to the City on November 17, and there was no showing that D7 could have gained a competitive advantage over other bidders by the delay in submitting the certifications.
- (Issue 3) SF&A's SBE certification is appropriate for the responsibility of purchasing the Tremco materials and arranging for the delivery of those materials to the job site. SF&A's proposed work includes a commercially useful function within the meaning of the ESBE program requirements set forth in the Invitation. D7's arrangement with SF&A entitles D7 to 100 percent credit for the \$100,000 item on D7's FM 440. D7's bid meets the Project's 20 percent ESBE participation goal.

The Invitation states that "the right to reject Proposals or to waive any error or omission in any Bid Proposal received is reserved by the City." In addition, section 3.60.140 of the SMC gives the City Council the authority to reject the bid or "waive any informalities or minor irregularities" in the bid. Case law discussed in this Decision shows that, in general, the City has discretion to accept a bid that is not strictly responsive if the variance in the bid cannot have affected the bid amount or conferred a competitive advantage to the bidder. However, the City can still reject a bid as nonresponsive even if the omissions cannot have affected the bid amount

or conferred a competitive advantage to the bidder.

In the present case, City staff had initially indicated an intention to waive D7's violation of the FM 440 instructions and D7's delay in submitting SF&A's SBE certification. However, after investigating Madsen Roof's bid protest and concluding that D7's bid failed to meet the 20 percent ESBE participation level, City staff also concluded that under those circumstances it would not waive the omissions on the FM 440 or the delay in submitting the SBE certification. Accordingly, on December 23, 2008, City staff notified the bidders that it intends to recommend to the City Council that it award the contract to Madsen Roof.

The Hearing Examiner has found that D7's bid meets the 20 percent ESBE participation level. Therefore, the focus now narrows to the omissions that D7 made on the FM 440 and the delay in providing the ESBE certification. It would be within the proper exercise of the City's discretion to *not* waive those violations of the Invitation instructions, as the instructions on the bid conspicuously state that either of those violations would render the bid nonresponsive. However, the City should consider that while the violations show a lack of attention to detail by D7 as a bidder, none of those violations conferred a competitive advantage on D7 over other bidders, and there was no showing that those violations had potential to confer a competitive advantage on D7. Viewed from that perspective, the omissions on the FM 440 and the delay in providing the ESBE certifications could be regarded as minor violations of the Invitation instructions.

The City eventually received all of the omitted or late information. It is noteworthy that the City most likely would have waived the violations had Madsen Roof not filed the bid protest. Such a waiver under those circumstances would have been consistent with Ms. Bitter's testimony indicating that the City has, at times, waived similar errors in the past. In light of the applicable law and the findings made in this Decision, in particular the finding that D7's bid meets the ESBE participation requirements, the Hearing Examiner concludes that the most appropriate way for the City Council to view this case is from the perspective that City staff had viewed it before Madsen Roof filed the bid protest. The City staff were well aware of the omissions on the FM 440 and the delay in submitting the ESBE certifications, yet the City staff were on track to waive those matters as long as D7, upon further request, provided the omitted information. D7 provided the information. With the primary basis for Madsen Roof's protest having been decided in D7's favor, the Hearing Examiner makes the recommended determination that the City deny the bid protest and waive the omissions and delays associated with D7's bid.

Dated: February 12, 2009



Vincent L. Pastorino, Hearing Examiner  
Institute for Administrative Justice

**PROOF OF SERVICE VIA U.S. MAIL AND FACSIMILE**

I, Stacy Conley, declare as follows:

I am employed in the County of Sacramento, California; I am over the age of 18 years and not a party to the within action. My business address is 3455 Fifth Avenue, Sacramento, California 95817. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On February 12, 2009, I served a copy of the following document:

**DECISION ON ADMINISTRATIVE APPEAL  
The Appeal of Madsen Roof Company, Inc.  
Case Number: SACBP010709-1**

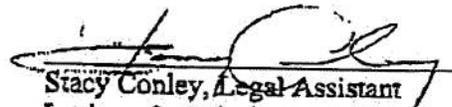
on the party or parties named below by following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

**Ms. Angela M. Casagrande  
City Attorney  
City of Sacramento  
915 I Street, Fourth Floor  
Sacramento, CA. 95814-2604**

**Mr. Deon R. Stein  
The Law Offices of Deon Stein  
885 University Avenue  
Sacramento, CA. 95825**

**Mr. Gregory Maxim  
Sproul Troust, LLC  
3721 Douglas Boulevard, Suite 300  
Roseville, CA. 95661**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 12, 2009, in Sacramento, California.

  
Stacy Conley, Legal Assistant  
Institute for Administrative Justice  
McGeorge School of Law

**RESOLUTION NO. 2009-**

Adopted by the Sacramento City Council

**REJECTING AND ADOPTING FINDINGS OF FACT ISSUED BY THE HEARING EXAMINER IN CONNECTION WITH A BID PROTEST FILED BY MADSEN ROOF COMPANY; REJECTING THE HEARING EXAMINER'S RECOMMENDATION THAT THE CITY WAIVE THE ERRORS AND OMISSIONS IN D7 ROOFING SERVICES' BID; GRANTING MADSEN'S BID PROTEST AND REJECTING D7'S BID AS NON-RESPONSIVE; AWARDED THE CONSTRUCTION CONTRACT FOR THE MEMORIAL AUDITORIUM ROOF REPAIR PROJECT (M17101000) TO MADSEN ROOF COMPANY IN AN AMOUNT NOT TO EXCEED \$519,883**

- A. City Code Chapter 3.60 identifies the general guidelines for completing contracts for public projects and procedures for bidding and issuing contracts over \$100,000. The City received four bids for roof repair work at the Memorial Auditorium on October 29, 2008. On November 14, 2008, the second lowest bidder filed a formal protest with the City Clerk.
- B. Pursuant to City Code section 3.60.510, City staff conducted an investigation into the bid protest and prepared a Response to Bid Protest which was submitted at the Bid Protest Hearing on January 7, 2009. Based upon the merits of the protest and the results of the investigation, staff recommends to City Council that the low bid be rejected as non-responsive and the contract be awarded to the second lowest bidder, Madsen Roof Company, Inc., in the amount not to exceed \$519,883.
- C. Pursuant to City Code section 3.60.530, the City Council may consider the protest as part of the City Council's consideration of the award of the contract to which the bid protest relates.
- D. Pursuant to City Code section 3.60.540, the City Council may hear factual evidence from any party prior to adopting or rejecting, in whole or in part, the findings of fact issued by the hearing examiner. In addition, the City Council may take any action on the bid protest that is authorized by law, including the adoption of a determination different from that recommended by the hearing examiner.
- E. There are adequate funds in M17101000 to award this construction contract.

**BASED ON THE FACTS SET FORTH IN THE BACKGROUND, AND THE EVIDENCE PRESENTED, THE CITY COUNCIL RESOLVES AS FOLLOWS:**

Section 1. The Hearing Examiner's findings of fact numbers 1 and 2 are adopted.

- Section 2. The Hearing Examiner's finding of fact number 3 and recommendation to waive the errors and omissions in D7's bid are rejected.
- Section 3. Madsen Roof Company's bid protest is granted and D7 Roofing Services' bid for the Memorial Auditorium Roof Repair Project (M17101000) is rejected as non-responsive.
- Section 4. The construction contract for the Memorial Auditorium roof repair project (M17101000) is awarded to Madsen Roof Company, the lowest responsive and responsible bidder, in an amount not to exceed \$519,883.
- Section 5. The City Manager, or his designee, is authorized to execute the contract with Madsen Roof Company.