



**GENERAL SERVICES AGENCY  
CAPITAL PROJECTS  
COUNTY OF TULARE  
AGENDA ITEM**

**BOARD OF SUPERVISORS**

KUYLER CROCKER  
District One

PETE VANDER POEL  
District Two

AMY SHUKLIAN  
District Three

EDDIE VALERO  
District Four

DENNIS TOWNSEND  
District Five

**AGENDA DATE:** March 19, 2019

Public Hearing Required	Yes <input type="checkbox"/>	N/A <input checked="" type="checkbox"/>
Scheduled Public Hearing w/Clerk	Yes <input type="checkbox"/>	N/A <input checked="" type="checkbox"/>
Published Notice Required	Yes <input type="checkbox"/>	N/A <input checked="" type="checkbox"/>
Advertised Published Notice	Yes <input type="checkbox"/>	N/A <input checked="" type="checkbox"/>
Meet & Confer Required	Yes <input type="checkbox"/>	N/A <input checked="" type="checkbox"/>
Electronic file(s) has been sent	Yes <input checked="" type="checkbox"/>	N/A <input type="checkbox"/>
Budget Transfer (Aud 308) attached	Yes <input type="checkbox"/>	N/A <input checked="" type="checkbox"/>
Personnel Resolution attached	Yes <input type="checkbox"/>	N/A <input checked="" type="checkbox"/>
Agreements are attached and signature line for Chairman is marked with tab(s)/flag(s)	Yes <input checked="" type="checkbox"/>	N/A <input type="checkbox"/>
CONTACT PERSON: Maria Benavides		PHONE: 205-1124

**SUBJECT:** Award the Contract for the Fire Station No. 1 Project

**REQUEST(S):**

That the Board of Supervisors:

1. Approve the bid protest filed by Forcum Mackey, Inc., determine that the bid submitted by Atkins Bergreen is materially non-responsive, and reject the bid submitted by Atkins Bergreen.
2. Award the contract for the Fire Station No. 1 project to the lowest responsible and responsive bidder, Forcum Mackey, Inc., in the amount of \$4,055,000.
3. Authorize the Chairman to sign the construction agreement upon receipt of certificates of insurance, bonds, license verification, and contract subject to review and approval as to form by County Counsel.

**SUMMARY:**

On December 18, 2018, the Board authorized the advertisement of bids for the Fire Station No. 1 project. The project will be located at Avenue 256 and Road 140 south of Visalia, adjacent to the Transportation Operation and Maintenance Facility (TOMF) currently under construction by the Resource Management Agency at the Visalia Central Road Yard.

The Fire Department has planned for the relocation of Fire Station 1 from its current location in a CALFIRE facility since the Department's formation in 2006. In an effort to strategically enhance the County's public safety services, the new Fire Station will provide a permanent County-owned facility centrally located in the area of response.

**SUBJECT:** Award the Contract for the Fire Station No. 1 Project

**DATE:** March 19, 2019

The new station consists of site improvements and new construction including, but not limited to, demolition, grading, site improvements, concrete, masonry, structural steel, rough carpentry, storefront system, glazing, metal doors and frames, plastic laminate faced doors, built-up roofing, metal roof panels, insulated metal roof panels, sealants, finishes, equipment, metal building systems, plumbing, mechanical and electrical systems. The bid included one alternate to provide a back-up generator which will provide electricity to the facility during a power outage, ensuring continuity of critical public safety services.

The award accepts the base bid and the alternate. The contract documents call for 270 calendar days of construction. Based upon these days of construction, the project is estimated to be complete, including relocation, by February or March 2020. Bids were opened for this project on February 7, 2019. A total of six bids were received and are summarized below.

<b>Contractor</b>	<b>Amount</b>	<b>Alternate #1</b>	<b>Total</b>
Atkins Bergreen	\$3,855,000	\$82,230	\$3,937,230
Forcum Mackey	\$3,920,000	\$135,000	\$4,055,000
Micham, Inc.	\$3,959,000	\$149,000	\$4,108,000
Seals Construction	\$4,013,000	\$130,000	\$4,143,000
Katch Environmental	\$4,230,000	\$168,884	\$4,398,884
Klassen	\$4,274,000	\$125,000	\$4,399,000
Architect's Estimate	\$3,900,000		

After the bid opening, Forcum Mackey, Inc. filed a bid protest claiming that Atkins Bergreen did not list subcontractors for electrical and masonry work as required by the project specifications. As a result of this failure, Forcum Mackey claimed that Atkins Bergreen's bid should be considered non-responsive. After completing the due diligence review of the bid protest, staff confirmed that these subcontractors were not listed on the subcontractor list as required by the project specifications and contract documents.

According to the contract documents, failure to submit a properly completed Subcontractor List form results in a nonresponsive bid. The only permitted exception is an inadvertent error in providing the contractor license number or the DIR registration number. In these instances, the errors may be corrected within 24 hours of the bid opening. However, failing to list a subcontractor is not an excusable error.

Atkins Bergreen responded to the bid protest and acknowledges they did not list the subcontractors as required. They claim they should be allowed to correct the clerical error and be awarded the project. However, in their response, Atkins Bergreen claims their correction is to substitute an incorrectly-listed subcontractor on the Subcontractor List form. The claim of the bid protest is that no subcontractor was listed at all by Atkins Bergreen. Therefore, staff agrees with the bid protest submitted by Forcum Mackey and recommends that the Board uphold the protest and award the project to Forcum Mackey.



**SUBJECT:** Award the Contract for the Fire Station No. 1 Project

**DATE:** March 19, 2019

It is requested that the Board approve the bid protest filed by Forcum Mackey, Inc; award the contract for the Fire Station No. 1 project to the lowest responsible and responsive bidder, Forcum Mackey, Inc., in the amount of \$4,055,000; and authorize the Chairman to sign the construction agreement upon receipt of certificates of insurance, bonds, license verification, and contract subject to review and approval as to form by County Counsel.

**FISCAL IMPACT/FINANCING:**

The total estimated project costs are shown in the table below.

Construction (Base Bid & Alternate)	\$4,055,000
Utility Cost Sharing with TOMF	\$ 5,000
Contingency (10%)	\$ 405,000
Special Inspection & Testing	\$ 30,000
Information Technology	\$ 30,000
Furniture, Fixtures & Equipment (FF&E)	\$ 35,000
<b>Total Expenses</b>	<b>\$4,560,000</b>

This project is funded in Capital Projects Fund 030-086-3200-8131 in the amount of \$2,936,000. In addition, \$1,200,000 is available in 030-086-3200-8131 for the rehabilitation of the Terra Bella Fire Station, for a total of \$4,136,000 available in the Capital Projects budget.

Staff recommends utilizing these funds for the construction of Fire Station 1. This will require using monies programmed in the Capital Improvement Plan for the rehabilitation of the Goshen Fire Station in Fiscal Year 2019/20 to proceed with the Terra Bella Fire Station, thereby postponing both projects by approximately four months from the original schedule.

The remaining \$424,000 will be provided by the County Administrative Office in the fiscal year 2019/20 Capital Improvement Plan, and will be primarily used for contingency funds.

**LINKAGE TO THE COUNTY OF TULARE STRATEGIC BUSINESS PLAN:**

The County's Strategic Business Plan includes the Safety and Security initiative to provide for the safety and security of the public. The Fire Station No. 1 Project aligns with the initiative by providing improved facilities for the protection of the public.

**ADMINISTRATIVE SIGN-OFF:**

  
\_\_\_\_\_  
Kyle Taylor  
Capital Projects Coordinator III

**SUBJECT:** Award the Contract for the Fire Station No. 1 Project

**DATE:** March 19, 2019

cc: County Administrative Office

Attachment(s)

A – Agreement with Forcum Mackey, Inc.

B – Forcum Mackey Bid Protest

C – Atkins Bergreen Protest Response



**BEFORE THE BOARD OF SUPERVISORS  
COUNTY OF TULARE, STATE OF CALIFORNIA**

IN THE MATTER OF AWARD THE )  
CONTRACT FOR THE FIRE STATION NO. 1 ) RESOLUTION NO. \_\_\_\_\_  
PROJECT ) AGREEMENT NO. \_\_\_\_\_  
)

UPON MOTION OF SUPERVISOR \_\_\_\_\_, SECONDED BY  
SUPERVISOR \_\_\_\_\_, THE FOLLOWING WAS ADOPTED BY THE  
BOARD OF SUPERVISORS, AT AN OFFICIAL MEETING HELD \_\_\_\_\_  
\_\_\_\_\_, BY THE FOLLOWING VOTE:

AYES:  
NOES:  
ABSTAIN:  
ABSENT:

ATTEST: JASON T. BRITT  
COUNTY ADMINISTRATIVE OFFICER/  
CLERK, BOARD OF SUPERVISORS

BY: \_\_\_\_\_  
Deputy Clerk

\* \* \* \* \*

1. Approved the bid protest filed by Forcum Mackey, Inc. , determined that the bid submitted by Atkins Bergreen is materially non-responsive, and rejected the bid submitted by Atkins Bergreen.
2. Awarded the contract for the Fire Station No. 1 project to the lowest responsible and responsive bidder, Forcum Mackey, Inc., in the amount of \$4,055,000.
3. Authorized the Chairman to sign the construction agreement upon receipt of certificates of insurance, bonds, license verification, and contract subject to review and approval as to form by County Counsel.



**VIA EMAIL and U.S. MAIL**

February 8, 2019

Kyle Taylor  
County Capital Projects Coordinator III  
Tulare County Capital Projects  
KMTaylor@co.tulare.ca.us

General Services Agency/Tulare County  
Capital Projects Division  
2637 W. Burrel Ave., Suite 200  
Visalia, California 93291

Re: County of Tulare Fire Station 1  
*Forcum/Mackey Construction, Inc. Bid Protest*

Dear Mr. Taylor,

Forcum/Mackey Construction, Inc. ("FMC") submits the following bid protest with respect to the County of Tulare Fire Station 1 project (the "Project") let by the County of Tulare ("County"), for which bids were opened on February 7, 2019. FMC respectfully disputes that Atkins Bergreen, Inc. ("Atkins") is the lowest responsive, responsible bidder, and hereby protests any award of the Project to Atkins. FMC submitted the lowest responsive bid, as the Atkins bid was nonresponsive and must, therefore, be rejected. As the lowest responsive and responsible bidder, the Project must be awarded to FMC.

The Atkins bid materially deviates from the strict requirements of the California Public Contract Code ("PCC") and the Notice Inviting Bids and Instructions to Bidders (hereinafter "bid solicitation"), rendering the bid nonresponsive and Atkins a nonresponsible bidder. Namely, Atkins failed to list subcontractors performing more than one-half of one percent of its Total Base Bid. Atkins' failure to list subcontractors performing electrical and masonry work renders its bid nonresponsive and Atkins nonresponsible.

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E-Mail Address: FM@forcummackey.com





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## **Subcontractors Performing Work in Excess of One-Half of One Percent Are Required to be Listed in the Subcontractor List Form**

The contract for the construction of the above-referenced Project was required by law to be competitively bid, and the County is required to award the work to the lowest responsible bidder. California Public Contract Code § 20162 provides in relevant part:

“20162. When the expenditure required for a public project exceeds five thousand dollars (\$5,000), it shall be contracted for and let to the lowest responsible bidder after notice.”

Section 00311- Subcontractor List Form, as set forth in the bid solicitation, requires bidders to list subcontractors performing work or labor in amount in excess of one-half of one percent of the total bid. It provides in pertinent part as follows:

This attachment to the Bid shall be submitted with the Bid. If no subcontractors are to be involved and work is to be performed solely by the Contractor, so state.

Pursuant to the provision of Section 4100 to 4113, inclusive, of the Public Contract Code of the State of California, the Contractor shall set forth the type of work to be performed, name, location of the place of business, contractor's state license number (“CSLB #”), and Department of Industrial Relations Registration Number (“DIR#”) of each subcontractor who will perform work or labor in or about the construction of the work of improvement (the “Work”) in an amount in excess of one-half (1/2) of one percent (1%) of the Contractor's total bid.

Failure to submit a properly completed Subcontractor List form results in a nonresponsive bid. (Underline added.)

The Subletting and Subcontracting Fair Practices Act (Pub. Contract Code, §§ 4100-4114) (the “Act”) regulates contracts for public works. (*Affholder, Inc. v. Mitchell Eng'g, Inc.* (2007) 153 Cal.App.4th 510, 516.) The Act requires a general contractor submitting a bid on a public contract to list the name of each subcontractor who will perform work or labor in excess of one-half of one percent of the prime contractor's total bid. (Pub. Contract Code, § 4104, subd. (a); *E.F. Brady Co., Inc. v. M.H. Golden Co.* (1997) 58 Cal.App.4th 182, 188.) For those general contractors who intend to utilize a subcontractor who will perform in excess of one-half of one percent of its total bid, the contractor must set forth in its bid: the name and location of the place of business of each subcontractor. (Pub. Contract Code, § 4104.)

As clearly depicted in Atkins bid, it failed to list the name of each subcontractor it intends to utilize who will perform in excess of one-half of one percent of its Total Base Bid. (A true and correct copy of Atkins' Subcontractor List is attached hereto as Exhibit A.) Namely, Atkins failed to list a subcontractor to perform the electrical or masonry scope of work on the Project. Having

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submitted a Total Base Bid of \$3,855,000.00, Atkins was required to list all subcontractors it intends to utilize on the Project will will perform work in excess of \$19,275.00. FMC is informed and believes that the electrical scope of work on the Project far exceeds \$19,275.00, and actually accounts for as much as one-quarter of the scope of work to be performed, i.e., electrical scope of work will range anywere from \$700,000 up to \$900,000 -- far in excess of one-half of one percent of Atkins' Total Base Bid. Even taking into account the Alternate Bid submitted by Atkins in the sum of \$82,230.00, its failure to list a subcontractor to perform the electrical scope of work was a material deviation from the Public Contract Code, the bid solicitation, and the Subcontractor List Form.

Based upon a review of Atkins Contractor's State License, it holds a B License, which does not permit it to self-perform the electrical scope of work on the Project. (See Contractor's License Detail for Atkins attached hereto as Exhibit B.) In fact, existing law requires that persons performing work as an electrician under a C-10 licensed contractor be certified pursuant to certification standards established by the Division of Labor Standards Enforcement. "Electricians" is defined as all persons who engage in the connection of electrical devices for electrical contractors licensed pursuant to Section 7058 of the Business and Profession Code; specifically, contractors classified as electrical contractors in the Contractors State License Board Rules and Regulations [Labor Code § 108 (c)]. Atkins does not hold a C-10 license and is therefore not qualified to self-perform the electrical scope of work on the Project.

The same analysis applies to Atkins' failure to list a subcontractor to perform the masonry scope of work on the Project, which FMC is informed and believes is likewise in excess of one-half of one percent of Atkins Total Base Bid. Again, Atkins does not hold the requisite C-29 Masonry license to self-perform the masonry scope of work.

Its failure to list subcontractors for the electrical and/or the masonry scope of work renders Atkins' bid nonresponsive and Atkins a nonresponsible bidder.

### **Atkins Cannot Cure Its Failure to List Electrical and Masonry Subcontractors at the Time of Bid**

The responsiveness of a bid must be assessed on the face of the bid at the time the bids are opened, and may not be assessed on information submitted after the time of the bid submission. (Construction Bidding Law, Cushman and Doyle (1990) § 1.9, p. 13.) The rule of responsiveness is, in effect, the unyielding barrier to favoritism and manipulation in the application of the solicitation requirements. The awarding authority is required to comply with the provisions of the California Public Contract Code and Government Code, and it must review the responsiveness of all bids based upon a uniform standard imposed by statute and by the solicitation to ensure that no contractor is afforded an advantage over its competitors.

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## **Atkins' Bid is Nonresponsive and Must be Rejected**

For a bid to be responsive, it must constitute a definite and unqualified offer to meet the material terms of the solicitation. "Material terms" are those which (1) could affect price, quantity, quality, or delivery, or (2) are clearly identified by the solicitation, and which, for reasons of public policy, must be complied with at the risk of bid rejection for nonresponsiveness. (Construction Bidding Law, Cushman and Doyle (1990) §1.8, p. 11.) The causes which make a bid nonresponsive may be placed into one of three categories: (1) reservation of rights, (2) "two bites at the apple," and (3) failure to meet specified requirements. (Construction Bidding Law, Cushman and Doyle (1990) § 1.8, p. 11, and cases cited therein.) The competitive bidding statutes are not intended to be for the benefit of bidders, but for the benefit and protection of the public. (Universal By-Prod., Inc. v. Modesto (1974) 43 Cal.App.3d 145, 152; Rubino v. Lolli (1970) 10 Cal.App.3d 1059, 1062.) A bid defect is viewed as material if it causes the awarding entity to doubt the extent to which it may rely on the posted bid security. (Construction Bidding Law, Cushman and Doyle (1990) § 3.13, p 63.)

As you know, the competitive bidding process has been enacted to ensure that no bidder is afforded an unfair advantage over other bidders.<sup>1</sup> In that sense, bids are required to be sealed and presented by a time certain. In addition, subcontractors are required to be listed for that portion of work that is intended to be performed. The purpose and intent of the Act is to ensure that a prime contractor awarded the project does not engage in bid shopping - for example, contacting unlisted subcontractors to solicit lower bids and substituting the lower subcontractor for the listed subcontractor.

In this instance, the failure to list and specify the subcontractor to perform the electrical and/or masonry scope of work affords Atkins an unfair advantage over the other bidders to the extent it permits bid shopping and peddling. The deviation is material and goes directly to the quality and price of Atkins' bid.

Additionally, the failure to list subcontractors will perform the electrical and/or masonry scope of work on the Project afforded Atkins a luxury other bidders like FMC did not have: time. Atkins failed to adhere to the statutory and bid solicitation mandates. A bidder gains an unfair competitive advantage over other bidders if it is allowed to ignore bidding requirements, particularly where, as here, such an omission would provide that bidder with additional valuable time to evaluate the scope of work and prepare its estimates—a luxury not enjoyed by its competitors. The law holds that if a bid irregularity gives a bidder a competitive advantage over

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<sup>1</sup>The Legislature has determined that the practices of bid shopping and bid peddling in connection with the construction public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils. (Pub. Contract Code, § 4101.)

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other bidders, the irregularity cannot be waived by the public entity, and the bid must be rejected. (Valley Crest Landscape, Inc. v. City Council of the City of Davis (1996) 41 Cal.App.4th 1432.)

That Atkins was afforded additional time to compile and submit its bid without the necessity of reviewing the subcontractor bids and pricing, compiling the final numbers, and listing the subcontractors to perform the electrical and/or masonry scope of work on the Project, it obtained an unfair advantage, rendering its bid nonresponsive.

Atkins does not hold the requisite specialty licenses to perform the electrical or masonry scope of work on the Project, and therefore cannot claim that it intended to self-perform the work post-bid.

### **The County Must Award the Project to FMC, the Low Responsive and Responsible Bidder**

In deciding whether a public contract award is proper and can be upheld, it is important to consider the purpose of requiring governmental entities to have public bidding of public works contracts, which is articulated in California Public Contract Code section 100. There, it is provided that the Legislature intends to “ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds,” to give all qualified bidders “a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices,” and to “eliminate favoritism, fraud, and corruption in the awarding of public contracts.”

While the County may reject all bids and re-advertise, in its discretion and if it so chooses, it is not allowed to award the contract to a bidder who has not submitted the lowest responsive bid. The public interests are only served if the lowest responsive bid is accepted. In this situation, rebidding the Project should not be necessary, as FMC’s bid is completely responsive to the bid solicitation in all regards, and it is within the County’s budget constraints.

In this case, FMC is the lowest responsive bidder, and the County is obligated to award the Project to it, accordingly, not only pursuant to the Public Contract Code, but in accordance with the County’s own bid solicitation documentation. FMC’s bid conformed in all material respects to the requirements of the bid solicitation, and it represents an unqualified and unconditional offer to perform such requirements in accordance with the material terms and conditions of the specifications.

### **Conclusion**

In summary, Atkins’ failure to list subcontractors for the electrical and/or masonry scope of work on the Project is a material deviation from the bid solicitation and statutory mandates which may not be waived. This is not a minor irregularity that can be waived, but rather a major deviation from the requirements of the bid solicitation and the law.

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As such, FMC hereby formally protests the award of the subject project to Atkins, or to any bidder other than FMC, and requests a hearing and an opportunity to be heard in that regard, should the County not be inclined to make the award to FMC.

We look forward to hearing from the County as soon as possible. In the interim, please feel free to call me if you have any questions or require further information.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Joey Mackey', is written over the typed name and title.

Joey Mackey  
President

Cc: Atkins Bergreen, Inc.  
Oral E. Mitcham, Inc.  
Seals Construction, Inc.  
Klassen Corporation  
Katch Environmental  
Quall Cardot LLP

Enclosures

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The following is the required list of subcontractors:

**CONTRACTOR'S LIST OF SUBCONTRACTORS**  
(Use other side & extra sheets if necessary)

Type of Work	Name of Subcontractor	Address of Subcontractor	CSLB #	DIR #
				10000_____
Paoling/Demo EARTHWORK	Hoffman	Tulare	489700	10000028384
TERMITE CONTROL	Rescom	Tulare		10000_____
fence	Fresno Fence For Sanger		692620	1000014751
LANDSCAPE/ IRRIGATION	Rainscape	visalia	38642	10000002773
<del>FENCING</del>				10000_____
CONCRETE	Chazmal	Sanger	860138 61	10000050660
CONCRETE POLISH	Heritage	Fresno	83278	1000006911
A...				10000_____
S. FRAMING Drywall	Superior	Porterville	805844	1000019997
METAL FAB				10000_____
MISC METAL WORK				10000_____
CABINETS	Pyramid	Hamford	721011	10000021660
INSULATION	Broken Drum	Visalia	831088	1000084823
ROOFING	George Reed	Visalia	376884	090832 0000 3774
Cabinets	Pyramid	Hamford		10000_____

02/07/2019

Date

*Ed Bergreen*

Contractor's Signature ATKINS BERGREEN, INC.

(Continue list on page 2)



(Subcontractor List continued)

Type of Work	Name of Subcontractor	Address of Subcontractor	CSLB #	DIR #
				10000_____
				10000_____
				10000_____
				10000_____
				10000_____
				10000_____
				10000_____
				10000_____
Rebar	Harris	Fresno	699033	10000_02379
Tile	U-file		481599	10000_00896
SIP				10000_____
Acoustic Polymer	Western	Fresno	248606	10000_03005
Paint	Kreel	Corcor	754499	10000_09568
Glazing	Atasadero Glass		493692	10000_00340
Plumb	MLS			10000_____
Metal Bldg	Suprem, Lindsay		931667	10000_51219
Fire Sprinkler	Johnson Visden		945000	10000_22713
HVAC	Staree	Mac HVAC		10000_____

END OF SECTION 00311



# Contractor's License Detail for License # 831784

**DISCLAIMER: A license status check provides information taken from the CSLB license database. Before relying on this information, you should be aware of the following limitations.**

CSLB complaint disclosure is restricted by law (B&P 7124.6) If this entity is subject to public complaint disclosure, a link for complaint disclosure will appear below. Click on the link or button to obtain complaint and/or legal action information.  
Per B&P 7071.17, only construction related civil judgments reported to the CSLB are disclosed. Arbitrations are not listed unless the contractor fails to comply with the terms of the arbitration.  
Due to workload, there may be relevant information that has not yet been entered onto the Board's license database.

Data current as of 2/8/2019 8:47:19 AM

### Business Information

ATKINS BERGREEN INC  
P O BOX 967  
VISALIA, CA 93279  
Business Phone Number:(559) 733-0123

Entity Corporation  
Issue Date 02/03/2004  
Expire Date **02/29/2020**

### License Status

**This license is current and active.**

**All information below should be reviewed.**

### Classifications

B - GENERAL BUILDING CONTRACTOR

### Bonding Information

#### Contractor's Bond

This license filed a Contractor's Bond with WESTERN SURETY COMPANY.

**Bond Number:** 69553485  
**Bond Amount:** \$15,000  
**Effective Date:** 01/01/2016  
Contractor's Bond History

#### Bond of Qualifying Individual

The qualifying individual EDWIN CHARLES BERGREEN certified that he/she owns 10 percent or more of the voting stock/membership interest of this company; therefore, the Bond of Qualifying Individual is not required.  
**Effective Date:** 09/25/2013

### Workers' Compensation

This license has workers compensation insurance with the STATE COMPENSATION INSURANCE FUND

**Policy Number:** 9076719  
**Effective Date:** 11/01/2014  
**Expire Date:** 11/01/2019  
Workers' Compensation History

### Other

Personnel listed on this license (current or disassociated) are listed on other licenses.







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**VIA EMAIL and U.S. MAIL**

February 13, 2019

Kyle Taylor  
County Capital Projects Coordinator III  
Tulare County Capital Projects  
KMTaylor@co.tulare.ca.us

General Services Agency/Tulare County  
Capital Projects Division  
2637 W. Burrel Ave., Suite 200  
Visalia, California 93291

Re: County of Tulare Fire Station 1  
*Forcum/Mackey Construction, Inc. Reply in Support of Bid Protest*

Dear Mr. Taylor,

Forcum/Mackey Construction, Inc. (“FMC”) has reviewed the documentation submitted by Atkins Bergreen, Inc. (“Atkins”) in response to FMC’s bid protest with respect to the County of Tulare Fire Station 1 project (the “Project”) let by the County of Tulare (“County”). In sum, Atkins’ reliance upon Public Contract Code 4107.5 for the proposition that it should be permitted to list Cable Links Construction (“Cable Links”) after bid opening and after the submission of its bid on the grounds of “inadvertent mistake” is misplaced and ineffectual. In fact, the Affidavit submitted by Atkins in support of its claim of inadvertent mistake confirms that Atkins bid is nonresponsive and must be rejected.

Admittedly, Atkins failed to list Cable Links to perform the electrical scope of work on the Project. Acknowledging it does not hold the requisite licensure to self-perform the electrical scope of work, Atkins requests the County “follow the procedures specified by Section 4107.5” and permit it to effectively list Cable Link after bid opening. The request is unsupported by the statute upon which Atkins relies (PCC 4107.5) and the case law governing the Subletting and Subcontracting Fair Practices Act (the “Act”). Public Contract Code sections 4017 and 4107.5 are not applicable here because Atkins is not seeking to substitute a subcontractor listed in error. To the contrary, it is seeking to add a subcontractor it failed to list. Additionally, Atkins concedes it

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made a mistake that rendered its bid materially different than intended. Accordingly, Atkins had the ability to withdraw its bid without forfeiting its bid bond under PCC 5103. This constitutes an unfair advantage as a matter of law and the mistake cannot be waived as inconsequential.

**A. Public Contract Code Sections 4017 and 4017.5 Are Not Applicable; Allowing Atkins to Change Its Bid to List Cable Links After Bid Opening Will Violate the Subletting and Subcontracting Fair Practices Act.**

Cable links was not listed by Atkins in its bid submitted to the County. As such, PCC 4107 and 4107.5 and the claim by Atkins of “inadvertent clerical error” have no application. Section 4107.5 only applies when the bidder “lists” one subcontractor in error and intended to list a *different* subcontractor. The statute expressly contemplates the presence of three parties – the bidder (prime contractor), the subcontractor “listed in error,” and the “intended subcontractor.” Atkins did not list a subcontractor in error. In fact, it failed to list *any* subcontractor to perform the electrical scope of work on the Project. Section 4107.5 is simply inapplicable to Atkins’ claimed error as there is no subcontractor to “substitute.”<sup>1</sup>

Instead, Atkins is attempting to “list” a new subcontractor after bid opening. Any decision by the County to permit Atkins to list Cable Links post bid submission and after bid opening will violate the Act and will be subject to a writ of mandate. (See PCC 4104 [bidders must list at the time of bid each subcontractor that will perform more than “one-half of 1 percent of the prime contractor’s total bid.”].) Atkins’ assertion that FMC and Cable Links will have the opportunity to submit affidavits to the County and participate in a “hearing conducted pursuant to Section 4107” ignores the express language of the statutes and the underlying legislative intent for their enactment: to address inadvertent clerical mistakes in the listing of the *wrong* subcontractor.

<sup>1</sup> Even if section 4107.5 was applicable, which it is not, Atkins failed to timely adhere to the mandatory time frames and procedures for giving notice of the “clerical error.” Section 4107.5 provides as a condition precedent to assert a claim of inadvertent clerical error in the listing of a subcontractor, notice must be given by the prime contractor within 2 working days after the time of the prime bid opening:

The prime contractor as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor shall within 2 working days after the time of the prime bid opening by the awarding authority give written notice to the awarding authority and copies of that notice to both the subcontractor he or she claims to have listed in error and the intended subcontractor who bid to the prime contractor prior to bid opening. . . .

If the prime contractor does not discover the clerical error and give the required notice within 2 days of bid opening, courts will not overlook non-compliance with Public Contract Code section 4107.5, and any substitution based upon clerical error disallowed. (See R.J. Land and Associates Construction Company v. Kiewit-Shea (1999) 69 Cal.App.4th 416 [contractor’s failure to timely invoke 2-day clerical error basis for allowing substitution subjected contractor to damage claim from listed subcontractor]; Coast Pump Associates v. Stephen Tyler Corporation (1976) 62 Cal.App.3d 421 [Public Contract Code sections 4107 and 4107.5 provide procedures to be followed when a contractor asserts a claim of clerical error].)

As set forth in the Protest Answer and Affidavit in support thereof, Atkins failed to provide written notice to the County, FMC and other interested bidders until February 12, 2019 (5 days after bid opening).

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The bid solicitation for the Project is clear: “Failure to properly complete the Subcontractor List form results in a nonresponsive bid.” (See Section 00311- Subcontractor List Form.) To be responsive, a bid must conform to the material terms of the bid package. City of Inglewood v. Los Angeles County Civic Center Authority (1972) 7 Cal.3d 861; Menefee v. County of Fresno (1985) 163 Cal.App.3d 1175; Konica Business Machines v. University of California (1988) 206 Cal.App.3d 449, 456-457; Associated Builders & Contractors, Inc. v. Metropolitan Water Dist. (1997) 59 Cal.App.4th 1503, 1507 (“lowest responsible bidder does not mean lowest cost bidder”). A bid that differs materially from the bid specifications must be rejected. (Stimson v. Hanley (1907) 151 Cal. 379.)

Atkins attempt to “fix” its mistake after bid opening is unsupported by the statutes upon which it relies, the case law interpreting the Subcontractor Listing Laws, and the bid solicitation.

**B. Evidence Submitted by Atkins in Support of Its Request That It be Permitted to List Cable Links After Bid Opening Reflects Potential for Bid Shopping.**

The competitive bidding process has been enacted to ensure that no bidder is afforded an unfair advantage over other bidders.<sup>2</sup> The purpose and intent of the Act is to ensure that a prime contractor awarded the project does not engage in bid shopping—for example, contacting unlisted subcontractors to solicit lower bids and substituting the lower subcontractor for the listed subcontractor.

In conjunction with its Protest Answer and Affidavit in support, Atkins submits a purported copy of the bid proposal submitted by Cable Links to Atkins prior to bid submission.<sup>3</sup> Atkins alleges that it incorporated Cable Links quote into its bid, but then inadvertently omitted to list Cable Links.

However, based upon the Bid Tabulation Worksheet, it appears that Atkins did not, in fact, incorporate into its bid the “Additive Alternate G-1 (Generator)” quotation of \$139,005.00 submitted by Cable Links, but instead submitted a quote in the sum of \$82,230.00. (See Exhibit 1.) As reflected in Addendum No. 1 and Section 01100(1.02), Additive Alternate Bid No. G-1 entailed “All work related to the provision and installation of the permanent, fixed engine generator as indicated in the electrical Drawings.” (See Exhibit 2.) This was work to be performed by the subcontractor performing the electrical scope of work on the Project, i.e., Cable Links. Bidders were to submit the Lump Sum Bid as well as Add Alternate #1 in their respective bid. Here, it appears Atkins submitted a significantly lower bid for the Additive Alternate No. G-1 than quoted

<sup>2</sup>The Legislature has determined that the practices of bid shopping and bid peddling in connection with the construction of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils. (Pub. Contract Code, § 4101.)

<sup>3</sup> Although the Protest Answer alludes to an “Affidavit of Cable Links Construction” in support of Atkins’ bid, no such affidavit was provided.

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by Cable Links, belying its assertion that it had incorporated Cable Links quote into its bid, but more importantly affording it an unfair advantage over the other bidders; namely, the ability to bid chisel Cable Links down from the quoted \$139,005.00 to the listed \$82,230.00, post bid.

None of the other bidders were afforded this opportunity, providing Atkins with an unfair advantage it seeks to realize after bid opening.

**C. Atkins Ability to Withdraw Its Bid Without Forfeiting Its Bid Bond Constitutes an Unfair Advantage as a Matter of Law and the Mistake Cannot be Waived as Inconsequential.**

Atkins admits in its Protest Answer and Affidavit in support that it committed a material deviation or mistake in the submission of its bid by not listing Cable Links to perform the electrical scope of work. This deviation from the mandatory requirements of Section 4104 and Section 00311 of the bid solicitation provided Atkins with a distinct advantage over the other bidders, as it afforded Atkins the opportunity to withdraw its bid without forfeiting its bid bond pursuant to Public Contract Code section 5103.

Section 5103 of the Pubic Contract Code establishes the grounds the bidder must establish to gain relief from the court in the withdrawal of its bid. The bidder must establish 1) that a mistake was made, 2) that it gave notice to the awarding entity within 5 days after bids were opened, 3) the mistake made the bid materially different from what was intended, and 4) the mistake was a clerical error, not an error in judgment or carelessness.

Here, Atkins's bid failed to list Cable Links (or any other subcontractor) to perform the electrical scope of work on the Project. Therefore, in accordance with Section 4104 and the bid solicitation, the work would need to be self-performed by Atkins. However, Atkins does not hold the requisite specialty license to perform the electrical scope of work on the Project. Accordingly, if Atkins did not intend to self-perform the work (and could not self-perform due to licensure restrictions), then its "mistake made the bid materially different from what was intended." Having satisfied all four criterion of section 5103, Atkins would have had the opportunity to withdraw its bid, without forfeiting its bid bond. The ability to do so is a distinct "advantage not available to other bidders" and the County is therefore "without power to waive the deviation." (MCM Const., Inc. v. City & County of San Francisco (1998) 66 Cal.App.4<sup>th</sup> 359, 377.) The fact that Atkins "did not seek such relief is of no moment." (Valley Crest Landscape, Inc. v. City Council (1996) 41 Cal.App.4<sup>th</sup> 1432, 1442.) "The key point is that such relief was available." (*Id.*) Courts have repeatedly recognized a bidder may gain an unfair competitive advantage if its failure to strictly comply with bid specifications would allow the bidder to withdraw without forfeiting its bid bond. (Ghilotti Construction Co. v. City of Richmond (1996) 45 Cal.App.4<sup>th</sup> 897, 900; see also Bay Cities Paving & Grading, Inc. v. City of Richmond (2014) 223 Cal.App.4<sup>th</sup> 1181, 1193-1199.) This is because other bidders with no mistakes cannot similarly "back out" from its bid after bid prices are revealed. (Valley Crest, at p. 1442.)

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In light of the distinct unfair advantage, Atkins' mistake in failing to list Cable Links as a subcontractor is material and cannot be waived. (See Valley Crest, at p. 1442 [Waiver of an irregularity in a bid should only be allowed if it would not give that bidder an unfair advantage by allowing the bidder to withdraw its bid without forfeiting its bid bond."].) A bid defect is viewed as material if it causes the awarding entity to doubt the extent to which it may rely on the posted bid security. (Construction Bidding Law, Cushman and Doyle, 1990, Section 3.13, Page 63.)

As such, and as set forth in FMC's initial bid protest, Atkins' bid must be rejected as non-responsive and the deviation or mistake cannot be waived. The contract should therefore be awarded to FMC as the lowest, responsive and responsible bidder. If the County does not reject Atkins bid, and award the contract to FMC, we formally request a hearing and an opportunity to be heard in that regard.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Joey Mackey', is written over the typed name and title.

Joey Mackey  
President

Cc: Atkins Bergreen, Inc.  
Oral E. Mitcham, Inc.  
Seals Construction, Inc.  
Klassen Corporation  
Katch Environmental  
Quall Cardot LLP

Enclosures

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# **EXHIBIT 1**



## **EXHIBIT 2**



**SECTION 01100: ALTERNATE BID ITEMS**

**PART 1: GENERAL**

**1.01 DESCRIPTION OF WORK**

- A. This Section identifies each Alternate bid by number, and describes the basic changes to be incorporated into the Work, only when the Alternate is made a part of the Work by specific provisions in the Owner/Contractor Agreement.
- B. Related Requirements in Other Parts of the Project Manual:
  - 1. Incorporation of Alternates into the Work: Owner/Contractor Agreement.
- C. Coordinate pertinent related work and modify surrounding work as required to properly integrate the work under each Alternate, and to provide the complete construction required by Contract Documents.

**1.02 DESCRIPTION OF ALTERNATES**

- A. Additive Alternate Bid No. G-1

All work related to the provision and installation of the permanent, fixed engine generator as indicated in the electrical Drawings.

*End Of Section 01100*



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Transmitted by E-Mail ([KMTaylor@co.tulare.ca.us](mailto:KMTaylor@co.tulare.ca.us)),  
Fax (559-624-1022) and U.S. Mail

February 12, 2019 at 4:30 p.m.

Kyle Taylor, County Capital Projects Coordinator III  
TULARE COUNTY CAPITAL PROJECTS  
2637 W. Burrell Ave., Suite 200  
Visalia, CA 93291

Re: County of Tulare Fire Station I Bid

Dear Mr. Taylor:

We are in receipt of Forcum/Mackey Construction, Inc.'s February 8, 2019 bid protest in connection with the bid opening for the County of Tulare Fire Station I project. This response is being timely submitted to the County within two working days after our receipt of Forcum/Mackey Construction's protest, and copied on both Forcum/Mackey Construction and the subcontractor that Atkins Bergreen omitted to list in its bid, Cable Links Construction. Atkins Bergreen acknowledges that it inadvertently failed to list Cable Links Construction as a proposed subcontractor in its bid to the County. As set forth in the attached Sworn Affidavit, Atkins Bergreen received and incorporated Cable Links Construction's February 7, 2019 quote (Exhibit A) within its bid to the County and under a last minute rush simply failed to list Cable Links Construction as a subcontractor.

We respectfully disagree with Forcum/Mackey Construction's assertion that the County of Tulare is required to reject Atkins Bergreen, Inc.'s bid as non-responsive. Quote the contrary, California Public Contract Code Section 4107.5 addresses this exact situation as follows:

*The prime contractor as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor shall within two working days after the time of the prime bid opening by the awarding authority give written notice to the awarding authority and copies of that notice to both the subcontractor he or she claims to have listed in error and the intended subcontractor who had bid to the prime contractor prior to bid opening.*

*The awarding authority shall, after a public hearing as provided in Section 4107 and in the absence of compelling reasons to the contrary, consent to the substitution of the intended subcontractor: (a) If (1) the prime contractor, (2) the subcontractor listed in error, and (3) the intended subcontractor each submit an affidavit to the awarding authority along with such additional evidence as the parties may wish to submit that an*



*inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening,*

*Any determination made shall be based on the facts contained in the declarations submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross-examination. The awarding authority may, on its own motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a bearing on the decision of the awarding authority.*

Failure to provide two working day notice of the error does not divest the County of its jurisdiction or lawful authority to entertain an inadvertent bid claim if the notice that was provided satisfies all statutory objectives of preventing improper bid shopping. Cal-Air Conditioning, Inc. v. Auburn Union School Dist. (1993) 21 Cal.App.4th 655. Thus, under these required procedures, both Forcum/Mackey Construction and Cable Links Construction will have the opportunity to submit Affidavits to the County, and after a hearing conducted pursuant to Section 4107, absent compelling reasons to the contrary the County should allow Atkins Bergreen to correct this inadvertent error by adding Cable Links Construction to its bid as a listed subcontractor. The evidence contained within Atkins Bergreen's Affidavit along with the Affidavit of Cable Links Construction will establish that Cable Links quoted Atkins Bergreen, Forcum/Mackey Construction and Oral Micham Inc (3 low bidders) prior to the bid, and that Atkins Bergreen incorporated its quote into its bid to the County, but then inadvertently omitted to list Cable Links Construction in its bid. The County should note that Forcum/Mackey Construction listed Valley Unique Electric and Micham listed Cable Links in its bid demonstrating that Atkins Bergreen has not been engaged in bid shopping, that Cable Links Construction quoted a number of prime contractors including Atkins Bergreen, Forcum/Mackey Construction, and Oral E. Micham and that no compelling reasons exists which would prevent Atkins Bergreen from correcting this inadvertent bid error.

As a result, we request that the County follow the procedures specified by Section 4107.5, determine that Atkins Bergreen inadvertently omitted to list Cable Links Construction as its subcontractor, allow it to correct this error, and award the Fire Station No. 1 to Atkins Bergreen.

Sincerely,

Ed Bergreen





# CABLE LINKS CONSTRUCTION

CABLE LINKS CONSTRUCTION GROUP, INC.  
5940 East Shields Avenue, Suite 101  
Fresno, California 93727  
Office (559) 277-8555  
Fax (559) 274-1555  
[www.cablelinks.us](http://www.cablelinks.us)

**SDVOSB, DVBE, DBE & SB**

## PROPOSAL

Attn: General Contractors

19-007

RE: Fire Station No. 1 Road 140 / Ave 256 – Visalia, CA

February 7, 2019

## SCOPE OF WORK

Please see our proposal for the above referenced project for your consideration. This proposal to include labor, materials and equipment for all work provided in bid documents for **Divisions 26, 27 & 28** (if/where applicable) per sheets noted below. Performance of work will be performed between 7:00 a.m. to 5:30 p.m. Monday through Friday.

**Drawing Sheets included in this proposal:** E1.1, E1.2, E1.3, E1.4, E2.1, E3.1, E3.2, E3.3, E3.4, E3.5, E3.6, E3.7, E.3.8, E4.1, E4.2, E.4.3, E5.1, E5.2, E5.3, E5.4, E5.5

Addenda Noted: 03

**Division 26, 27 & 28 Electrical / Low Voltage Price: \$735,272.00**

**Additive Alternate G-1 (Generator): \$139,005.00**

**Inclusions:**

- Provide and install new electrical equipment & devices including conduit and wire
- Provide and install new lighting package including controls, conduit and wire
- Provide and install parking lot pole lighting and controls per sheet E2.1
- Provide and install generator including ATS & pad (if/where applicable)
- Sothern California Edison Rule 16 (including transformer pad & bollards) per SCE design drawing 1045788\_0.01
- Fire Station signs w/ flashing red beacons
- UPS per sheet E1.2 & specs
- Provide and install Voice & Data Cabling & Hardware Components as noted per contract drawings and installed in compliance with EIA/TIA & BICSI Industry Standards.
- Provide and install Fire Alarm Cabling & Hardware Components as noted per contract drawings and installed in compliance with the NFPA 72 local AHJ Requirements.
- Trenching & backfill for electrical work
- Coordination/Arc Flash Study
- Title 24 testing
- Labor at current prevailing wage rates

**Exclusions (Unless Otherwise Noted):**

- Motor Starters, VFD's & PLC
- Active Network Equipment: (Switches, Routers, UPS's, PDU's)
- Temporary Power
- Saw Cutting, Coring, Painting and Patching
- BIM Coordination & Coordination Drawings
- Seismic Bracing, X-ray or Scanning
- All Sheet Metal or Closure Strips
- Accelerated Schedule, Overtime, Night or Weekend Work
- Carpentry
- Concrete and Asphalt Paving (including patch-back or temporary)
- Access Hatches, Bollards, Any Permits



## EXHIBIT A

### Article 5: Compensation

5.1 Unless otherwise agreed in writing, CABLE LINKS shall be compensated for the Work at its prevailing rates and reimbursed for costs and expenses (plus reasonable profit and overhead) incurred in its performance of the Work.

5.2 CABLE LINKS may invoice CLIENT on a monthly or other progress billing basis. Invoices are due and payable upon receipt or as otherwise set forth in the Agreement. If any payment is not received when due, CABLE LINKS may deem CLIENT to be in breach hereof and may enforce any remedies available to it hereunder or at law, including without limitation, acceleration of payments and suspension or termination of the Work at any time and without notice and shall be entitled to compensation for the Work previously performed and for costs reasonably incurred in connection with the suspension or termination. Any amount not paid within sixty (60) days of the date due shall accrue interest from the date due, until paid, at the rate of ten percent (10%) per annum. CLIENT shall reimburse CABLE LINKS for CABLE LINKS' costs and expenses (including reasonable attorneys' and witnesses' fees) incurred for collection under this Agreement. In the event of a dispute by CLIENT regarding any portion or all of an invoiced amount, it shall notify CABLE LINKS in writing of the amount in dispute and the reason for its disagreement within 21 days of receipt of the invoice, the undisputed portion shall be paid when due, and interest on the disputed, unpaid portion shall accrue as aforesaid, from the date due until the date of payment, to the extent that such amounts are finally determined to be payable to CABLE LINKS.

5.3 Except to the extent expressly agreed in writing, CABLE LINKS' fees do not include any taxes, excises, fees, duties or other government charges related to the Work, and CLIENT shall pay such amounts or reimburse CABLE LINKS for any amounts it pays. If CLIENT claims a tax exemption or direct payment permit, it shall provide CABLE LINKS with a valid exemption certificate or permit and indemnify, defend and hold CABLE LINKS harmless from any taxes, costs and penalties arising out of same.

### Article 6: Warranty, Insurance and Allocation of Risk

6.1 (a) Until one year from either the date the Equipment is installed or the date of first beneficial use, whichever first occurs, all Equipment manufactured by CABLE LINKS or bearing its nameplate will be free from defects in material and workmanship arising from normal use and service.

(b) Labor for all Services under this Agreement is warranted to be free from defects for one year after the earlier of the date the Services are substantially completed or the date of first beneficial use.

(c) Equipment will not fail to function because of errors in processing, providing or receiving date or time data involving dates between January 1, 1999 and March 31, 2001, provided other products and software, including the computer workstation, with which the system interacts properly exchange date and time data with the system.

6.2 (a) The limited warranties set forth in Section 6.1 will be void as to, and shall not apply to, any Work (i) repaired, altered or improperly installed by any person other than CABLE LINKS or its authorized representative; (ii) subjected to unreasonable or improper use or storage, used beyond rated conditions, operated other than per CABLE LINKS' or the manufacturer's instructions, or otherwise subjected to improper maintenance, negligence or accident; (iii) damaged because of any use of the Work after CLIENT has, or should have, knowledge of any defect in the Work; or (iv) Equipment not manufactured, fabricated and assembled by CABLE LINKS or not bearing CABLE LINKS' nameplate. However, CABLE LINKS assigns to CLIENT, without recourse, any and all assignable warranties available from any manufacturer, supplier, or subcontractor of such Equipment and will assist CLIENT in enforcement of such assigned warranties.

(b) Any claim under the limited warranty granted above must be made in writing to CABLE LINKS within thirty (30) days after discovery of the claimed defect, or with respect only to the warranty set forth in Subsection 4.1(c) prior to April 1, 2001, unless discovered directly by CABLE LINKS. Such limited warranty only extends to CLIENT and not to any subsequent owner of the Equipment. CLIENT's sole and exclusive remedy for any Equipment or Services not conforming with this limited warranty is limited to, at CABLE LINKS' option, (i) repair or replacement of defective components of covered Equipment, or (ii) re-performance of the defective portion of the Services, or (iii) to the extent previously paid, the issuance of a credit or refund for the original purchase price of such defective component or portion of the Equipment or Services.

(c) CABLE LINKS shall not be required to repair or replace more than the component(s) of the Equipment actually found to be defective. CABLE LINKS' warranty liability shall not exceed the purchase price of such item. Repaired or replaced Equipment will be warranted hereunder only for the remaining portion of the original warranty period.

6.3 THE EXPRESS LIMITED WARRANTIES PROVIDED ABOVE ARE IN LIEU OF AND EXCLUDE ALL OTHER WARRANTIES, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WHICH ARE HEREBY EXPRESSLY DISCLAIMED. CABLE LINKS MAKES NO WARRANTY, EXPRESS OR IMPLIED, THAT ANY EQUIPMENT PROVIDED HEREUNDER WILL PREVENT ANY LOSS, OR WILL IN ALL CASES PROVIDE THE PROTECTION FOR WHICH IT IS INSTALLED OR INTENDED. THE LIMITED EXPRESS WARRANTIES AND REPRESENTATIONS SET FORTH IN THIS AGREEMENT MAY ONLY BE MODIFIED OR SUPPLEMENTED IN A WRITING SIGNED BY A DULY AUTHORIZED CORPORATE OFFICER OF CABLE LINKS.

6.4 CABLE LINKS shall maintain the following insurance while performing the Work:

Workers' Compensation Statutory

Employers' Liability \$1,000,000 each accident

Commercial General Liability \$1,000,000 per occurrence and \$5,000,000 in the aggregate

Automobile Liability \$1,000,000 per occurrence/aggregate

6.5 Risk of loss of materials and Equipment furnished by CABLE LINKS shall pass to CLIENT upon delivery to CLIENT's premises, and CLIENT shall be responsible for protecting and insuring them against theft and damage. However, until CABLE LINKS is paid in full, CABLE LINKS shall retain title for security purposes only and the right to repossess the materials and Equipment.

6.6 CABLE LINKS will indemnify CLIENT from and against losses, claims, expenses and damages (including reasonable attorney's fees) for personal injury or physical damage to property, but not loss of use of the property resulting from such damage or from damage to any work performed hereunder. Such indemnification shall be solely to the extent caused by or arising directly from CABLE LINKS' or its employees', consultants' or agents' negligent acts or omissions or willful misconduct in connection with its performance of Services hereunder. CABLE LINKS' obligations under this indemnity provision shall not extend to claims, losses, expenses and damages arising out of or in any way attributable to the negligence of CLIENT or its agents, consultants or employees other than CABLE LINKS. CABLE LINKS' liability to CLIENT or any third party under this Section 6.6 or otherwise under the Agreement is expressly limited to, and CABLE LINKS shall not be liable other than for the direct losses, claims, expenses and damages arising as aforesaid. Neither party shall in any event be responsible under this Agreement for incidental, consequential, punitive, exemplary or special damages, including without limitation lost profits and/or lost business opportunities, whether arising in warranty, late or non-delivery of any Work, tort, contract or strict liability, and regardless of whether CABLE LINKS has been advised of the possibility of such damages. CABLE LINKS reserves the right to control the defense and settlement of any claim for which CABLE LINKS has an obligation to indemnify hereunder. The parties acknowledge that the price which CABLE LINKS has agreed to perform its Work and obligations under this Agreement is calculated based upon the foregoing limitations of liability, and that CABLE LINKS has expressly relied on, and would not have entered into this Agreement but for such limitations of liability.

### Article 7: Hazardous Materials Provisions

7.1 The Work does not include directly or indirectly performing or arranging for the detection, monitoring, handling, storage, removal, transportation, disposal or treatment of Oil or Hazardous Materials. Except as disclosed pursuant to Section 7.3, CLIENT represents that there is no asbestos or any other hazardous or toxic materials, as defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the regulations promulgated there under, and other applicable federal, state or local law ("Hazardous Materials"), present at CLIENT's locations where Services are performed. CABLE LINKS will notify CLIENT immediately if it discovers or suspects the presence of any Hazardous Material. All Services have been priced and agreed to by CABLE LINKS in reliance on CLIENT's representations as set forth in this Section 7.1 the presence of Hazardous Materials constitutes a change in the Proposed Solution equivalent to a change order whose terms must be agreed to by CABLE LINKS before its obligations hereunder will continue.

7.2 CLIENT shall be solely responsible for testing, abating, encapsulating, removing, remedying or neutralizing such Hazardous Materials, and for the costs thereof. Even if an appropriate change order has been entered into pursuant to Section 7.1 above, CABLE LINKS will continue to have the right to stop providing Services until the job site is free from Hazardous Materials. In such event, CABLE LINKS will receive an equitable extension of time to complete its Services, and compensation for delays caused by Hazardous Materials remediation. In no event shall CABLE LINKS be required or construed to take title, ownership or responsibility for such Oil or Hazardous Materials. CLIENT shall sign any required waste manifests in conformance with all government regulations, listing CLIENT as the generator of the waste.

7.3 CLIENT warrants that, prior to the execution of the Agreement, it has notified CABLE LINKS in writing of any and all Hazardous Materials present, potentially present or likely to become present at CLIENT's locations and has provided a copy of any jobsite safety policies, including but not limited to lock-out and tag procedures, laboratory procedures, chemical hygiene plan, material safety data sheets or other items covered or required to be disclosed or maintained by federal, state, or local laws, regulations or ordinances.

7.4 For separate consideration of \$10 and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledge, CLIENT shall indemnify, defend and hold CABLE LINKS harmless from and against any damages, losses, costs, liabilities or expenses (including attorneys' fees) arising out of any Oil or Hazardous Materials or from CLIENT's breach of, or failure to perform its obligations under, Sections 7.1, 7.2 or 7.3.



## TERMS AND CONDITIONS

These Terms and Conditions are incorporated by reference and form an integral part of each proposal or agreement between CABLE LINKS CONSTRUCTION GROUP, INC. ("CABLE LINKS") and the party for whom the Work is to be performed ("CLIENT"). The portions of each proposal or agreement relating to "Scope of Work" or "Proposed Solution" (in either case "Scope"), together with these Terms and Conditions, are collectively referred to as the "Agreement".

### Article 1: General

- 1.1 (a) The Agreement, when accepted in writing by CLIENT and approved by an authorized representative of CABLE LINKS, constitutes the entire, complete and exclusive agreement between the parties relating to the services ("Services") and the equipment ("Equipment") to be provided by CABLE LINKS as described in the Scope (such Services and Equipment collectively referred to as "Work") and shall supersede and cancel all prior agreements and understandings, written or oral, relating to the subject matter of the Agreement. The Agreement and any rights or obligations there under may not be assigned by either party without the prior written consent of the other, except that either party may assign this Agreement to its affiliates and CABLE LINKS may use subcontractors in the performance of the Work.
- (b) The terms and conditions of this Agreement shall not be modified or rescinded except in writing, signed by a corporate officer of CABLE LINKS. CABLE LINKS' performance under this Agreement is expressly conditioned on Client's assenting to all of the terms of this Agreement, notwithstanding any different or additional terms contained in any writing at any time submitted or to be submitted to CABLE LINKS by CLIENT relating to the Work.
- (c) The terms and conditions set forth herein shall supersede, govern and control any conflicting terms of the Proposed Solution or the Proposal.
- (d) Nothing contained in this Agreement shall be construed to give any rights or benefits to anyone other than the CLIENT and CABLE LINKS without the express written consent of both parties. All obligations arising prior to this Agreement and all provisions of this Agreement allocating responsibility or liability between the parties shall survive the completion of the Work and the termination of this Agreement.
- 1.2 This Agreement shall be governed by and enforced in accordance with the laws of the State of California. All claims or disputes arising under this Agreement shall be litigated in the State, Commonwealth, or Province in which Services are being provided to CLIENT hereunder.

### Article 2: Work by CABLE LINKS

- 2.1 CABLE LINKS will perform the Work expressly described in this Agreement and in any work release documents or change orders that are issued under this Agreement and signed by the parties. The Work performed by CABLE LINKS shall be conducted in a manner consistent with the degree of care and skill ordinarily exercised by reputable firms performing the same or similar Work in the same locale acting under similar circumstances and conditions.
- 2.2 CABLE LINKS shall perform the Work during its normal working hours, Monday through Friday, excluding holidays, unless otherwise agreed herein.
- 2.3 CABLE LINKS is not required to conduct safety or other tests, install new devices or equipment or make modifications to any Equipment beyond the Scope set forth in this Agreement. Any CLIENT request to change the Scope or the nature of the Work must be in the form of a mutually agreed change order, effective only when executed by all parties hereto.
- 2.4 All reports and drawings specifically prepared for and deliverable to CLIENT pursuant to this Agreement ("Deliverables") shall become CLIENT's property upon full payment to CABLE LINKS. CABLE LINKS may retain file copies of such deliverables. All other reports, notes, calculations, data, drawings, estimates, specifications, manuals, other documents and all computer programs, codes and computerized materials prepared by or for CABLE LINKS are instruments of CABLE LINKS' work ("Instruments") and shall remain CABLE LINKS' property. To the extent specified in the Scope, CLIENT, its employees and agents ("Permitted Users") shall have a right to make and retain copies of Instruments except uncompiled code, and to use all Instruments, provided however, the Instruments shall not be used or relied upon by any parties other than Permitted Users, and such use shall be limited to the particular project and location for which the Instruments were provided. All Deliverables and Instruments provided to CLIENT are for Permitted Users' use only for the purposes disclosed to CABLE LINKS, and CLIENT shall not transfer them to others or use them or permit them to be used for any extension of the Work or any other project or purpose, without CABLE LINKS' express written consent. Any reuse of Deliverables or Instruments for other projects or locations without the written consent of CABLE LINKS, or use by any party other than Permitted Users will be at Permitted Users' risk and without liability to CABLE LINKS; and CLIENT shall indemnify, defend and hold CABLE LINKS harmless from any claims, losses or damages arising there from.
- 2.5 CABLE LINKS shall be responsible for any portion of the Work performed by any subcontractor of CABLE LINKS. CABLE LINKS shall not have any responsibility, duty or authority to direct, supervise or oversee any contractors of CLIENT or their work or to provide the means, methods or sequence of their work or to stop their work. CABLE LINKS' work and/or presence at a site shall not relieve others of their responsibility to CLIENT or to others. CABLE LINKS shall not be liable for the failure of CLIENT's contractors or others to fulfill their responsibilities, and CLIENT agrees to indemnify, hold harmless and defend CABLE LINKS against any claims arising out of such failures.

### Article 3: Responsibilities of CLIENT

- 3.1 CLIENT, without cost to CABLE LINKS, shall:
- (a) Designate a contact person with authority to make decisions for CLIENT regarding the Work and provide CABLE LINKS with information sufficient to contact such person in an emergency. If such representative cannot be reached, any request for work received from a person located at CLIENT's premises will be deemed authorized by CLIENT, and CABLE LINKS will, in its discretion, act accordingly;
- (b) Provide or arrange for reasonable access and make all provisions for CABLE LINKS to enter any site where Work is to be performed;
- (c) Permit CABLE LINKS to control and/or operate all facility controls, systems, apparatus, equipment and machinery necessary to perform the Work;
- (d) Furnish CABLE LINKS with all available information pertinent to the Work;
- (e) Furnish CABLE LINKS with all approvals, permits and consents from government authorities and others as may be required for performance of the Work except for those CABLE LINKS has expressly agreed in writing to obtain;
- (f) Notify CABLE LINKS promptly of any site conditions requiring special care, and provide CABLE LINKS with any available documents describing the quantity, nature, location and extent of such conditions;
- (g) Comply with all laws and provide any notices required to be given to any government authorities in connection with the Work, except such notices CABLE LINKS has expressly agreed in writing to give;
- (h) Provide CABLE LINKS with Material Safety Data Sheets that conform to OSHA requirements related to all Hazardous Materials located at the site;
- (i) Furnish to CABLE LINKS any contingency plans related to the site; and
- (j) Furnish the specified operating environment, including without limitation, suitable, clean, stable, properly conditioned electrical power to all Equipment; telephone lines, capacity and connectivity as required by such Equipment; and heat, light, air conditioning and other utilities in accordance with the specifications for the Equipment.
- 3.2 CLIENT acknowledges that the technical and pricing information contained in this Agreement is confidential and proprietary to CABLE LINKS and agrees not to disclose it or otherwise make it available to others without CABLE LINKS' express written consent.
- 3.3 CLIENT acknowledges that it is now and shall at all times remain in control of the project site. Except as expressly provided herein, CABLE LINKS shall not be responsible for the adequacy of the health or safety programs or precautions related to CLIENT's activities or operations, CLIENT's other contractors, the work of any other person or entity, or CLIENT's site conditions. CABLE LINKS is not responsible for inspecting, observing, reporting or correcting health or safety conditions or deficiencies of CLIENT or others at CLIENT's site. So as not to discourage CABLE LINKS from voluntarily addressing health or safety issues at CLIENT's site, in the event CABLE LINKS does address such issues by making observations, reports, suggestions or otherwise, CABLE LINKS shall not be liable or responsible on account thereof.
- 3.4 CLIENT is solely responsible for any removal, replacement or refinishing of the building structure or finishes that may be required to gain access to the Work.
- 3.5 CLIENT shall properly dispose of all ballasts, mercury bulb thermostats, used oil, contaminated filters, contaminated absorbents, refrigerant and any other Hazardous Materials that at any time are present at CLIENT's premises, in accordance with all applicable federal, state, and local laws, regulations, and ordinances.

### Article 4: Changes; Delays; Excused Performance

- 4.1 As the Work is performed, conditions may change or circumstances outside CABLE LINKS' reasonable control (including changes of law) may develop which would require CABLE LINKS to expend additional costs, effort or time to complete the Work, in which case CABLE LINKS will notify CLIENT and an equitable adjustment will be made to CABLE LINKS' compensation and time for performance. In the event conditions or circumstances require the Work to be suspended or terminated, CABLE LINKS shall be compensated for Work performed and for costs reasonable incurred in connection with the suspension or termination.
- 4.2 CABLE LINKS shall not be responsible for loss, delay, injury, damage or failure of performance that may be caused by circumstances beyond its control, including but not restricted to acts or omissions by CLIENT or its employees, agents or contractors, Acts of God, war, civil commotion, acts or omissions of government authorities, fire, theft, corrosion, flood, water damage, lightning, freeze-ups, strikes, lockouts, differences with workmen, riots, explosions, quarantine restrictions, delays in transportation, or shortage of vehicles, fuel, labor or materials. In the event of such delay or failure, the time for performance shall be extended by a period equal to the time lost plus a reasonable recovery period and the compensation shall be equitably adjusted for additional costs CABLE LINKS incurs due to such delay.

## EXHIBIT A

- Bond Premiums (add 1.2% if applicable)
- Network Equipment
- AV Equipment

For any questions regarding this proposal, please contact:

**Victor Yanovsky– Estimator (559) 277-8555**

Estimate is valid for 30 days from the date of this proposal



**SWORN AFFIDAVIT**  
(California Public Contract Code Section 41907.5)

I, Ed Bergreen, am President and General Manager of Atkins Bergreen Inc., and I swear and affirm that the following is true and correct to the best of my knowledge and belief:

1. Atkins Bergreen, Inc. is a duly licensed and qualified contractor located in Visalia, California. Atkins Bergreen, Inc. has been in business for approximately 16 years and has successfully completed approximately 3 prior County of Tulare construction projects plus one currently under construction. As President and General Manager, I oversee and approve all bids on public works projects, and reviewed and approved the February 7, 2019 bid for the County of Tulare Fire Station No. 1 project prior to its submission. Thus, I have personal knowledge of the facts set forth in this Affidavit, and if called as a witness at a hearing pursuant to California Public Contract Code Section 4107, I would testify competently to the matter set forth in this Affidavit.
2. Atkins Bergreen, Inc. prepared its bid estimate and received numerous quotes from subcontractors and suppliers for the Tulare County Fire Station No. 1 Project in the last few days prior to bid. At approximately 1:12p.m. on February 7, 2019, we received an e-mail quote from Cable Links Construction offering to perform the Division 26, 27 and 28, electrical work for the base bid for the sum of \$735,272.00. A true and correct copy of this quote is attached hereto as Exhibit A.
3. Since Cable Links Construction's bid was the lowest electrical quote which we received, it was incorporated into our \$3,855,000.00 base bid to the County, and at approximately 1:59 p.m. on February 7, 2019 we turned in our bid to the County of Tulare.
4. Unfortunately, we inadvertently forgot to add Cable Links Construction to the



Subcontractor Listing Form as our proposed electrical subcontractor. This error was inadvertent since we used and incorporated Cable Links Construction's quote into our bid, and we should have listed but simply forgot to list Cable Links Construction as our intended electrical subcontractor. This error occurred during the last few minutes prior to completing and submitting our bid documents.

5. The first time that we were aware that we committed this error was when we reviewed our subcontractor list at approximately 10:00 a.m. on Friday, April 8, 2019. Upon discovery, I promptly contacted the County's Capital Projects Coordinator, Kyle Taylor via phone to inform him of the error, and provided an email with updated subcontractor information.

6. It is apparent from review of the other bids that Cable Links Construction also quoted other contractors and was listed by at least Micham, Inc. as its intended electrical subcontractor. Atkins Bergreen has not engaged in any "bid shopping" or solicited bids from any other electrical subcontractors after the bid opening, and if awarded the project, intends to use the Cable Links Construction quote which was incorporated within its bid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 12, 2019 in Visalia, California.

  
Ed Bergreen



**ATKINS BERGREEN, INC.**  
**GENERAL CONTRACTOR**

Po Box 967  
Visalia, CA 93291  
Phone: 559-733-0123  
Fax: 559-733-4182  
Lic. #831784

Transmitted by E-Mail ([KMTaylor@co.tulare.ca.us](mailto:KMTaylor@co.tulare.ca.us)),  
Fax (559-624-1022) and U.S. Mail

February 18, 2019

Kyle Taylor, County Capital Projects Coordinator III  
TULARE COUNTY CAPITAL PROJECTS  
2637 W. Burrel Ave., Suite 200  
Visalia, CA 93291

Re: County of Tulare Fire Station I Bid

Dear Mr. Taylor:

We are in receipt of Forcum/Mackey Construction, Inc.'s February 13, 2019 Reply to our Response to their February 8, 2019 bid protest. We also presume that the County has now received the Sworn Affidavit of Cable Links Construction confirming that it forwarded its quote to Atkins Bergreen prior to bid and that Atkins Bergreen has not been engaged in bid shopping. A second copy is also attached. Despite Forcum/Mackey's unsupported assertion that there was a "potential of bid shopping," Cable Links Construction's Affidavit proves that there was in fact no bid shopping.

Forcum/Mackey Construction's assertion that California Public Contract Code Section 41907.5 only allows "substitution" of listed subcontractors but not addition of an omitted subcontractor is not supported by either the statutory language nor the case law. It is noted that Forcum/Mackey fails to list any cases which support this assertion. The Section is called "*Claim of Inadvertent Clerical Error in Listing Subcontractors*," not "substitution of listed subcontractors" as Forcum/Mackey implies. The very first sentence which starts off with "[T]he prime contractor as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor," makes it clear that any "inadvertent clerical error" in the listing of subcontractors falls within the scope of the section. This Section further specifies that the determination shall be based on the facts contained within the declarations and supported by testimony under oath and subject to cross-examination. The awarding authority shall, after a public hearing as provided in Section 4107, and in the absence of compelling reasons to the contrary, consent to the substitution of the intended subcontractor. Having established that Atkins Bergreen committed an inadvertent clerical error in failing to list Cable Links Construction and that no bid shopping has occurred, no compelling reason exists and the County should grant Atkins Bergreen's request to add Cable Links as its electrical subcontractor and award the contract to Atkins Bergreen.

Forcum/Mackey's next assertion that Atkins Bergreen failed to provide timely notice of its error within two working days is simply untrue. As noted in its initial response, Atkins Bergreen contacted you on Friday, February 8, 2019 to inform you of the error and provided a copy of the updated sublist with Cable Links Construction's information and other DIR and License numbers. However, failure to provide two working day notice of the error does not divest the County of its jurisdiction or lawful authority to entertain an inadvertent bid claim if the notice that was provided satisfies all statutory objectives of preventing improper bid shopping. Cal-Air Conditioning, Inc. v. Auburn Union School Dist. (1993) 21 Cal.App.4th



**ATKINS BERGREEN, INC.**  
**GENERAL CONTRACTOR**

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655. Since Atkins Bergreen has proven that it made an inadvertent clerical error and has not been engaged in bid shopping, the notice issue is irrelevant.

Finally, Forcum/Mackey's assertion that Atkins Bergreen does not possess the necessary contractor's license to self-perform the electrical work is simply untrue. Atkins Bergreen possesses a Class B Contractor's License. Pursuant to Business and Professions Code Section 7057, a Class B contractor is allowed to perform various trades of work with the exception of C-16, Fire Protection, and C-57, Well Drilling. A Class B general building contractor is licensed to perform electrical work and, therefore, it would be permissible for Atkins Bergreen to self-perform the electrical/low voltage work on this project.

For the foregoing reasons, Atkins Bergreen requests that the County allow it to add Cable Links as its listed electrical subcontractor and award the contract to Atkins Bergreen.

Sincerely

  
Ed Bergreen

cc: Forcum/Mackey Construction, Inc.  
Cable Links Construction, Inc.

Enclosure





**SWORN AFFIDAVIT**

(California Public Contract Code Section 41907.5)

I, Daniel Payne, am Chief Executive Officer of Cable Links Construction located at 5940 East Shields Ave, Fresno California. I swear and affirm that the following is true and correct to the best of my knowledge and belief.

1. Cable Links Construction is a general, electrical and low voltage contractor, and possesses all the necessary licenses to perform these categories of work. On February 7, 2019 prior to the 2:00 p.m. bid opening, our office prepared and submitted a written quote to six (6) bidders, including Atkins Bergreen, Inc. on the County of Tulare Fire Station No. 1 project offering the perform the Division 26, 27 and 28 electrical and low voltage work. Attached to this affidavit is a true and correct copy of the quote given to Atkins Bergreen, Inc.
2. I understand that Atkins Bergreen, Inc. utilized our quote in the preparation of their bid to the County but omitted to list our company as the proposed electrical subcontractor.
3. At no time, has Atkins Bergreen, Inc. ask us to reduce and/or modify the quote which we provided on February 7, 2019.
4. We are fully prepared to perform the electrical and low voltage work for the County of Tulare Fire Station No. 1 upon notice of award and execution of a written subcontract agreement.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 15, 2019 in Fresno, California.

Respectfully,

**Daniel Payne**  
CEO  
dpayne@cablelinks.us  
Cable Links Construction Group, Inc.  
5940 E. Shields Ave., #101 Fresno, CA 93727



---

**SWORN AFFIDAVIT**

(California Public Contract Code Section 41907.5)

I, Daniel Payne, am Chief Executive Officer of Cable Links Construction located at 5940 East Shields Ave, Fresno California. I swear and affirm that the following is true and correct to the best of my knowledge and belief.

1. Cable Links Construction is a general, electrical and low voltage contractor, and possesses all the necessary licenses to perform these categories of work. On February 7, 2019 prior to the 2:00 p.m. bid opening, our office prepared and submitted a written quote to six (6) bidders, including Atkins Bergreen, Inc. on the County of Tulare Fire Station No. 1 project offering the perform the Division 26, 27 and 28 electrical and low voltage work. Attached to this affidavit is a true and correct copy of the quote given to Atkins Bergreen, Inc.
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4. We are fully prepared to perform the electrical and low voltage work for the County of Tulare Fire Station No. 1 upon notice of award and execution of a written subcontract agreement.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 15, 2019 in Fresno, California.

Respectfully,

**Daniel Payne**

**CEO**

**dpayne@cablelinks.us**

**Cable Links Construction Group, Inc.**

**5940 E. Shields Ave., #101 Fresno, CA 93727**