**BAY CITIES PAVING & GRADING INC.**
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December 15, 2015

Department of Transportation, MS 43
Attn: John McMillan, Deputy Division Chief
1727 30th Street
Sacramento, CA 95816

Project: 04-264094
Bid Opening: 11/03/15
Re: Protest of Bid of Ghilotti Bros/RM Harris JV

Dear Mr. McMillan,

On November 24, 2015, Bay Cities protested the bid of Ghilotti Bros/RM Harris JV ("GBH") as nonresponsive because GBH had failed to submit its Subcontractor List as specified by Addendum No. 4. The bidders who followed the bid instructions [Bay Cities, third lowest bidder (Ghilotti Construction), and fourth lowest bidder (O.C. Jones & Sons)] had less time to prepare their bids than GBH. Caltrans has always sought to protect the integrity of the bidding process so that no one bidder will be allowed an advantage over other bidders. In numerous letters, the Department has stated:

> "A basic rule of competitive bidding is that bids must conform to the specifications of the contract and if a bid fails to conform to the specifications, it may not be accepted."

By purposefully disregarding Addendum No. 4, GBH gained additional time to prepare its bid over other bidders. Most recently, in *DeSilva Gates Construction, L.P. v. Department of Transportation*, 2015 Cal. App. Lexis 1014, the Appellate Court re-stated the well-established ruled that a bid with a variance can only be accepted:

> "*if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders* or, in other words, if the variance is inconsequential."

The sole issue now before the Department is whether GBH's decision to disregard the Addendum No. 4's Bid Instructions gave GBH an advantage or benefit over other bidders.

The second, third and fourth bidders all followed the bid instructions and listed subcontractors with one bid item per line. GBH may have saved itself 10-15 minutes to prepare its bid by ignoring Addendum No. 4's requirements. In ruling against the Department's award to Papich in *DeSilva* cited above, the Appellate Court found that Caltrans failed to engage in a finding of fact before it decided that Papich's bid was responsive. Since Caltrans must determine whether GBH's variance provided GBH with an advantage not allowed by other bidders, Caltrans should investigate whether the 10-15 minute time advantage that GBH gained over other bidders may have affected the bid prices submitted by the bidders. For instance, if GBH submitted its final

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bid at 1:55 p.m., Caltrans should investigate whether GBH's bid price at 1:40 or 1:45 p.m. was higher than GBH's final bid price. If GBH's bid price was higher, then the additional time that GBH took by disregarding Addendum No. 4 allowed it extra time to adjust its bid price. Secondly, if bidders No. 2, 3 and 4 were lowering their bid prices between 1:45 p.m. and 2:00 p.m., Caltrans can deduce that they would have lowered their prices further if they had additional time to prepare their bid like GBH by ignoring Addendum No. 4. Only by conducting a finding of fact can the Department determine whether GBH's failure to follow Addendum No. 4 gave GBH an advantage or benefit not allowed to other bidders.

To determine the extent of GBH's advantage, Bay Cities makes a public records request pursuant to Government Code sections 6250 et seq. ("Request"), for access to all of the bids submitted by the four lowest bidders (GBH, Bay Cities, Ghilotti Construction, and O.C. Jones). Bay Cities wishes to examine not only the final bids submitted by each of the four lowest bidders but also all prior bid submissions by the four lowest bidders in the time period between 1:30 p.m. to the bid opening. We expect that the low bidders were all lowering their bid prices in the time leading up to the bid opening. If this is true, then GBH's failure to follow the bid instructions provided it with the advantage over other bidders of having additional time to prepare its bid, to evaluate subcontractor's quotes and to lower its bid price.

Addendum No. 4 and the Responses to Bidder Inquiries specifically instructed bidders to list subcontractor items with **one bid item per line**. The Department's staff may be unaware of the bedlam that exists in the final minutes leading up to bid closure as subcontractors' bids and suppliers' quotes are received and evaluated. In this tight time-line, with quotes being faxed, telephoned and e-mailed to prime contractors at the very last minute, seconds and minutes are priceless and substantial. Given a choice, no bidder would willingly list each subcontractor item with one bid item per line because this procedure consumes time better served evaluating subcontractor and supplier sub-quotes. Though it was more time-consuming to follow Caltrans' bid instructions, the integrity of Caltrans bidding process meant that all bidders would have to spend the additional time to comply with Addendum No. 4. GBH, however, did not comply. The extra time that GBH gained by disregarding Addendum No. 4 and Caltrans' Responses to Inquiries No. 66 and 77 is a material deviation that cannot be waived since it provided GBH an advantage of extra time to prepare its bid. Bay Cities respectfully requests that the Department rejects GBH's bid and award the Contract to Bay Cities.

Sincerely,

Marlo Manqueros
Vice-President

cc: File

# facsimile
## TRANSMITTAL

**to:** John McMillan/ Deputy Division Chief, Caltrans

**fax #:** (916) 227-6282

**re:** CDOT Contract 04-264094, Protest of Ghilotti Bros/Harris JV Bid

**date:** December 15, 2015

**pages:** 3, including cover sheet.

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From the desk of...

**Mario Manqueros**
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