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March 16, 2015

Via Email, U.S. Mail, and Facsimile –
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Mr. John McMillan
Deputy Division Chief
Office Engineer
Division of Engineering Services
Contracts Award Branch Chief
California Department of Transportation
P.O. Box 168041, MS-43
Sacramento, CA 95816-8041

RE: Construction on State Highway in the City and County of San Francisco and Alameda County from .08 Mile East of the Yerba Buena Tunnel to 0.8 Mile West of the Toll Plaza, in District 04 on Route 80, 04-SF, Ala-80-8.6/8.9, 0.0/1.2, Contract No. 04-13524

Date of Bid Opening: 03/04/2015

Response to Protest of Bid Submitted by Golden State Bridge, Inc./Obayashi Corporation, Joint Venture

Dear Mr. McMillan:

We are writing to respond to a second letter, dated March 13, 2015, from Rob Leslie, the attorney for Golden State Bridge, Inc./Obayashi Corporation ("GSBI/OC").

The Special Power of Attorney is Valid and Enforceable

As GSBI/OC concedes in its attorney's letter, California Engineering Contractors, Inc./Silverado Contractors, Inc., Joint Venture ("CEC/Silverado") did file a special power of attorney that the president of each joint venture partner had signed and dated.

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Changing arguments midstream, GSBI/OC now argues that the special power of attorney should have had an additional signature or an acknowledgment.¹

GSBI/OC's new argument is based on the erroneous assumption that the Probate Code provisions that it cites apply to the special power of attorney that CEC/Silverado had submitted. GSBI/OC's assumption is demonstrably incorrect.

The Probate Code sections relied upon by GSBI/OC only apply to: (1) durable powers of attorney; (2) statutory form powers of attorney, such as medical powers of attorney; and (3) other powers of attorney that incorporate or refer to the Probate Code's powers of attorney provisions. Probate Code § 4050(a). CEC/Silverado did not file either a durable power of attorney or statutory form power of attorney, and CEC/Silverado's power of attorney did not reference the Probate Code's provisions. The special power of attorney filed by CEC/Silverado therefore is not subject to the requirements of the Probate Code concerning authentication by witnesses or a notary public.

The Probate Code makes this indisputably clear. Probate Code section 4050(c) states that "this division is not intended to affect the validity of any instrument or arrangement that is not described in subdivision (a)." CEC/Silverado's special power of attorney is not one of the types described in Probate Code section 4050, subdivision (a), and therefore is valid and enforceable.

GSBI/OC Fails To Raise Any Legally Valid Challenge to the Special Power of Attorney or to CEC/Silverado Bid

GSBI/OC's March 13, 2015 letter is notable for what it does not say:

1. GSBI/OC has not provided any authority that precludes the president of the managing party of the joint venture from signing bids or contracts on behalf of the joint venture.
2. GSBI/OC does not rebut the legal principle that the president of a corporation that is part of a joint venture has legal authority to bind the joint venture.

¹ Interestingly, the copy of GSBI/OC's bid on the Department's website does not include a power of attorney. If GSBI/OC has not submitted its own power of attorney, then it lacks standing to contest the validity of the power of attorney that CEC/Silverado provided. See *Monterey Mech. Co. v. Sacramento Reg'l County Sanitation Dist.*, 44 Cal. App. 4th 1391, 1414 n.12 (1996); *Digital Biometrics v. Anthony*, 13 Cal. App. 4th 1145, 1162 (1993). If the Department for any reason cannot award the contract to CEC/Silverado, then this letter should be deemed to be a protest of GSBI/OC's bid.

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3. GSBI/OC does not deny that a bid bond executed by a surety, and acknowledged, is valid and binding under California law even if it is not signed at all by the principal.

4. GSBI/OC has not cited any authority that requires the Department to reject a valid and binding bid that would save the Department and the taxpayers more than \$11,358,255, particularly given that the bid documents themselves do not require that the bid be rejected.

5. With regard to DVBE participation, GSBI/OC has not cited any authority that required bidders to place an ad for DVBEs on a website.

GSBI/OC studiously ignores the fact that the document CEC/Silverado submitted as a special power of attorney is effective to make Mr. Wahid Tadros' signature binding upon CEC/Silverado. Under California law, agency is created by an agreement. Civ. Code §§ 2296 & 2309; *Clifton Cattle Co. v. Thompson*, 43 Cal. App. 3d 11, 17 (1974). Here, there is a legal agreement signed by the presidents of each joint venture partner to appoint Mr. Tadros as an agent to execute bids for the joint venture. Mr. Tadros is president of California Engineering Contractors, Inc., the managing partner of the joint venture. A "president, as corporate representative, may execute contracts to bind the corporation. The executive officer of a corporation is more than an agent. He acts and speaks for the corporation in furthering its express objects." *Moore v. Phillips*, 176 Cal. App. 2d 702, 709 (1959). "In the absence of proof to the contrary," when a president of company signs a contract, he is presumed to have been done by authority of the corporation." *Grummet v. Fresno Glazed Cement Pipe Co.*, 181 Cal. 509, 513 (1919).

Thus, the special power of attorney created a valid agency relationship authorizing Mr. Tadros to sign bids, and Mr. Tadros' signature is binding and enforceable on CEC/Silverado. Civ. Code § 2330; *Madden v. Kaiser Foundation Hospitals* 50 Cal. App. 3d 786 (1975). The Department has worked with CEC/Silverado for two years on another project related to demolition and removal of the old San Francisco Bay Bridge. Significantly, the power of attorney that was submitted with the bid for that project is identical to the one that was submitted for the present contract. During the past two years, Mr. Tadros has signed many documents on behalf of the joint venture. The Department is aware through its own experience that Mr. Tadros has authority, as the president of the joint venture's managing partner, to sign bids and contract documents for CEC/Silverado.

Mr. Tadros has actual, ostensible, and apparent authority, which has been accepted by the Department. Civ. Code §§ 2316 & 2317. The right to act as an agent on behalf of another is created by an agreement, express or implied, between the principal and the agent. Civ. Code § 2296. GSBI/OC is not a party to that agreement, and it is a third-party beneficiary. As a stranger to any transactions between the Department and CEC/Silverado, GSBI/OC does not have standing to contest the legal effectiveness of the

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document that appointed Wahid Tadros as CEC/Silverado's agent to sign bids and contracts. *Cf. H.N. & Frances C. Berger Foundation v. Perez*, 218 Cal. App. 4th 37, 43-46 (2013) (third parties who are not beneficiaries of a contract lack standing to sue under that contract.)

In addition, GSB/OC's arguments regarding the special power of attorney are irrelevant because CEC/Silverado's bid would be valid and enforceable even if there were no power of attorney at all. The bid can be enforced because: (1) CEC/Silverado included a valid and enforceable bid bond with its bid; (2) the president of California Engineering Contractors, Inc., the managing member of CEC/Silverado, has actual, ostensible, and apparent authority to execute the bid documents for the joint venture; and (3) the Department's own bid documents do not require a bid to be rejected if a legally enforceable special power of attorney has not been submitted.

Under California law, a bid bond is enforceable if it is signed under oath by the surety. Civ. Proc. Code §§ 995.310 & 995.320. Defects in the substance of the bond will not release either the principal or the surety from liability. Civ. Proc. Code § 995.380.

The seminal decision in *Menefee v. County of Fresno*, 163 Cal. App. 3d 1175 (1985) is controlling precedent. In *Menefee*, 163 Cal. App. 3d 1175 (1985), the Court ruled that when a contractor fails to sign its bid where required, its bid nevertheless is valid and may be accepted by the awarding agency if there is an enforceable bid bond. CEC/Silverado, like the bidder in *Menefee*, cannot seek to withdraw its bid without forfeiting its bid security. Under *Menefee*, the Department has the right to accept CEC/Silverado's bid, and GSB/OC cannot contest the Department's decision. *Id.*; *MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal. App. 4th 359, 374 (1998).

As noted above, GSB/OC overlooks legal authorities that prove that Mr. Tadros' signature is legally binding on CEC/Silverado. The special power of attorney was signed by the presidents of both joint venture partners. Those individuals, by their position as president, had the authority to bind the joint venture partner for which they signed the special power of attorney. *Moore v. Phillips*, 176 Cal. App. 2d 702, 709 (1959). Mr. Tadros, the president of the corporation that is the managing joint venturer, signed the bid on behalf of CEC/Silverado. Even if the special power of attorney were somehow not enforceable, CEC/Silverado still would be bound by the bid that it submitted.

"Each joint venturer has authority to bind the others in making contracts reasonably necessary to carry out the enterprise." *Smalley v. Baker*, 262 Cal. App. 2d 824, 837 (1968); *Orlopp v. Willardson Co.*, 232 Cal. App. 2d 750, 754 (1965). The president of California Engineering Contractors, Inc., therefore has authority to bind his company, which is the managing member of CEC/Silverado, and hence CEC/Silverado as well.

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As a consequence, even if CEC/Silverado's power of attorney were missing an additional signature or notary acknowledgement, CEC/Silverado is still bound to enter into a contract, and CEC/Silverado does not enjoy any competitive advantage. The Department therefore has the power and discretion to enter into a contract with CEC/Silverado, the lowest competitive bidder. *Id.*; *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, 224 Cal. App. 4th 1181 (2014). GSBI/OC does not have any legal basis to challenge the Department's exercise of its right to accept CEC/Silverado's bid.

Finally, under the terms of the Department's own bidding documents, the Department is not required to reject a bid from a joint venture even if no special power of attorney was provided. The bidding documents state that a bid "may" be rejected, not that the bid "must" be rejected. Courts "ordinarily construe the word "may" as permissive. *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara*, 224 Cal. App. 4th 1016, 1036 (2014). "Accordingly, the Department has authority and discretion to accept CEC/Silverado's bid, particularly as that bid is valid and binding.

Finally, with regard to the DVBE issue, GSBI/OC's counsel in his second letter fails to cite any contract provision or law that required bidders to place an ad on the Department's website. The fact that GSBI/OC cannot cite any legal authority requiring such actions is an admission that, in fact, there is no such requirement.

CEC/Silverado took reasonable steps to provide opportunities to DVBE bidders. CEC/Silverado representatives attended the Mandatory Pre-bid meeting on August 21, 2014, and manned a table for DVBEs to come by and talk to them about bidding opportunities. CEC/Silverado actively solicited quotes from DVBE firms for the abrasive blasting work, the only work that CEC/Silverado subcontracted, and they also asked DVBE truckers to provide them with quotes. These active and directed steps satisfied both the letter and the spirit of the DVBE provisions in the Department's bidding documents.

Conclusion

In *Ghilotti Construction Co. v. City of Richmond*, 45 Cal. App. 4th 897 (1996), the Court ruled that it would:

amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of a low bidder after the fact, and cancel the low bid on minor technicalities, with the hope of securing acceptance of his, higher bid. Such a construction would be adverse to the best interests of the public and contrary to public policy.

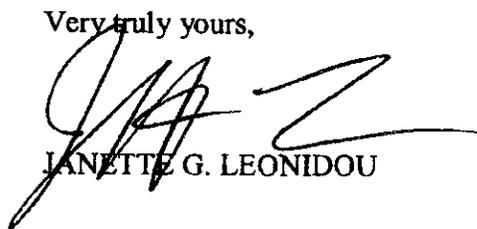
The Court's ruling in *Ghilotti Construction* is directly applicable here. CEC/Silverado submitted a fully enforceable bid that included a fully valid and

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enforceable special power of attorney and that is backed by a valid and enforceable bid bond. CEC/Silverado complied with all requirements concerning opportunities for DVBE participation. GSGI/OC lacks any legal basis to contest the Department's decision to award to CEC/Silverado. *See Menefee v. County of Fresno*, 163 Cal. App. 3d 1175 (1985).

We therefore respectfully request that GSGI/OC's protest be overruled and the project be awarded to CEC/Silverado, at a savings to the Department and California taxpayers of \$11,358,255.

Very truly yours,



JANETTE G. LEONIDOU

cc: Client

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FACSIMILE TRANSMISSION

DATE: March 16, 2015

TO:

NAME	Fax#	Phone#
Mr. John McMillan	916/227-6282	916/227-6299

FROM: Janette G. Leonidou, Esq.

RE: Response to Protest of Bid by Golden State Bridge, Inc./Obayashi Corporation, JV

CLIENT/MATTER: 30404-1	Number of Pages, Including Cover:
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MESSAGE:

Please see our letter of today's date.

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