

BAY CITIES PAVING & GRADING INC.

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November 24, 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,

Bay Cities was the second-lowest bidder for the Project. Bay Cities protests the bid of the apparent low bidder, Ghilotti Bros/RM Harris JV ("GBH") as nonresponsive because GBH failed to submit its Subcontractor List as specified by the Contract Documents.

The Contract Documents Required That Each Item of Work for Each Subcontractor Be Listed Individually

Bidders "are required to follow the bidding instructions and to review the Notice to Bidders and Special Provisions" (Department letters of June 4, 2015 for Contract 02-4F3904 & June 9, 2015 for Contract 10-0X5404). Caltrans has modified its electronic bidding form in recent years and the procedure for listing subcontractors' items of work as well. In 2012, Caltrans instructed bidders to "Separate each bid item number or percentage by a comma, when entering multiple bid item list numbers or percentages." Caltrans Electronic Bidding Guide (11/2/2012). In 2014, Caltrans' Electronic Bidding Guide instructed bidders that:

Multiple bid item numbers and percentages can be entered on each line of the Subcontractor List. Separate each bid item number, or percentage by a space or a comma, when entering multiple bid item list number or percentages...If you would like to list a series of numbers, enter them individually or separated by a dash. (Ex. 2, 3, 4, 5, 6, 7, 8, 9, 10 or 2-10).

By 2015, Caltrans had again revised the Electronic Bidding form. The form instructs bidders to:

Enter Bid Item Number. (Item)

Enter percent of Bid Item Subcontracted. (%)

If the percentage of bid item work is less than 100 percent list the description of the work portion to be subcontracted.

Enter the description of the percentage of the work to be performed by subcontractor. (Description)

DO NOT USE SEMICOLONS (;) IN YOUR INPUT.

Caltrans 2015 electronic bid instructions do not allow a bidder to list a subcontractor for multiple items of work through the use of commas, hyphens or dashes as bidders were allowed to do with prior electronic versions. The Bid Form's requirement to submit a "Bid Item Number" instead of

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the plural "Bid Item Numbers" further emphasized that bidders were responsible for listing each item of a subcontractor's work on a line-by-line basis. Caltrans Bid Form provided an example of how a bidder should input subcontractor information:

Sample Data Entry

Item	%	Description
6	75	striping
42	15	reinforcement
54	100	

At the beginning of 2015, Caltrans also issued Addenda to bidders on some projects to advise them of changes to the Subcontractor List for electronic bids. On February 20, 2015, Caltrans issued Addendum No. 4 on this Contract and notified bidders that:

- The folders for Subcontractor List have been increased from 2 to 4 with the following changes:
- Each subcontractor has a field to enter the California Department of Industrial Relations' Registration Number.
 - Each bid item listed in the subcontractor list must have a description of work entered, and the corresponding percentage of work to be done by the subcontractor.
 - A total of 5 bid items can be entered; if more than 5 bid items are needed for a subcontractor use additional subcontractor lists.

The Addenda also notified bidders that the "revisions declared in this addendum are an essential part of the contract."

Caltrans' changes to the electrical bid submission noted in Addendum No. 4 made entering subcontractors' items of work far more time-consuming and cumbersome than prior requirements. Immediately following Caltrans' issuance of Addendum No. 4, bidders became concerned with the burdens posed with the new requirements. On February 23, 2015 (3 days after Caltrans issued Addendum No. 4), a bidder posed the following inquiry:

Inquiry #66: Caltrans' new subcontractor listing form only allows 5 bid items for a listed subcontractor which is insufficient for a majority of subs listed on this or any other bid. We request that you change your subcontractor listing form in time for this bid to allow a total of at least 15 bid items available for each subcontractor. Caltrans proposed solution of using additional subcontractor lists when more than 5 bid items are needed is cumbersome, can lead to mistakes and should only be needed for the minority of listings, not the majority. Providing 15 items would be sufficient to cover all bid items for most subcontractor's listings and this would greatly reduce the need to use additional subcontractor lists.

On February 26, 2015, Caltrans responded to this request by stating:

Response #2: Limitations with the electronic bid systems prevent changes being developed, tested, and implemented prior to the bid opening for this project.

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Notwithstanding the burden placed on the bidders from the change, the Department informed bidders that, for this Contract's bid requirements, Caltrans' requirements would not be revised.

Even after receiving Caltrans' response, bidders still sought a way to reduce the time and burden needed to input subcontractor information on a line-by-line basis. On March 2, 2015, a bidder posed Inquiry #71 No. 2:

2) The subcontractor list portal states the Semi-colons (;) cannot be used. **Can hyphens still be used as thread of items if the (sic) are all 100%— i.e. 75-90? Or, is the intent to only have one bid item per box?** [emphasis added].

On March 3, 2015, Caltrans responded as follows:

2) **One bid item per line** along with one percent and one description if less than 100%. All whole numbers should be used for Item and %. [emphasis added].

Despite the time burden placed on bidders from its new requirement and despite bidders' requests for changes, Caltrans held that bidders were to list subcontractor work with **one bid item per line** and use additional pages if a subcontractor had more than 5 items of work.

GBH FAILED TO COMPLY WITH ADDENDUM NO. 4

Rather than list Subcontractor bid items with one bid item per line as required by the Contract Documents, GBH used hyphens to list multiple subcontractor bid items per line. For instance, on Page 26 of its Bid, GBH listed Apex Fence, Inc. for 10 items of work as follows:

Item	%
37	100
42-43	100
186	100
188	100
191-195	100

If GBH had listed each bid item per line as required, then GBH would have had to submit an additional subcontractor list for Apex's work as Caltrans specified in Addendum No. 4. GBH would also have had to input each individual item number and each individual percentage of work so that instead of listing Apex for "191-195 100" on one line, GBH's listing should have been:

191	100%
192	100%
193	100%
194	100%
195	100%

GBH used hyphens to list Vanguard's work items (Bid Page 25, 5 items of work), Mike Brown Electric's work items (Bid Page 25, 8 items of work), All Steel Fence's work items (Bid Page 26,

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3 items of work), Apex Fence's work items (Bid Page 26, 10 items of work), Gerco Contractors' work items (Bid Page 27, 3 items of work), Green Growth Industries' work items (Bid Page 27, 6 items of work), and Chrisp Company's work items (Bid Page 28, 9 items of work and Bid Page 29, 7 items of work). By using hyphens for these subcontractors, GBH shortened the time it needed to fill-out the Bid Form and reduced the number of subcontractor lists it was required to submit. GBH's used the exact method of submitting subcontractor bid items that Caltrans had specifically rejected in its response to Bidder Inquiry #71.

**GBH'S BID MUST BE REJECTED BECAUSE GBH RECEIVED A MATERIAL
ADVANTAGE OVER OTHER BIDDERS**

A primary obligation for any bidder is to submit a bid which conforms to the call for bids. In rejecting Coffman Specialties' bid as nonresponsive, the Department 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."

(Caltrans Contract No. 11-288814, Letter dated July 3, 2015).

GBH's bid clearly failed to conform to Addendum No. 4, the electronic bid form instructions and Caltrans' responses to Bidder Inquiries No. 66 and 71. Moreover, GBH's variance is of a type that cannot be waived because it gave GBH a time advantage not allowed to other bidders who complied with the Contract. Unlike GBH, the second lowest bidder (Bay Cities), third lowest bidder (Ghilotti Construction), and fourth lowest bidder (O.C. Jones & Sons) all took the extra time needed to comply with the bid instructions by listing subcontractors items with one bid item per line.

Although all bids must conform to the specifications, it is further established that public entities have the discretion to waive inconsequential/immaterial variances if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders. Given this discretion, the Department has routinely waived minor variances that provided no advantage to the bidder. For instance, the Department has waived variances which Caltrans has deemed "immaterial" in situations such as:

- ◆ FBD Vanguard's mistaken error of listing a subcontractor for bid item "1391" rather than "139" (Contract No. 04-235624);
- ◆ Crosstown's error in the listing of two subcontractor's license numbers: Licence Number "332441A" instead of "332441" and "A7200016A" instead of "7200016" (Contract No. 07-293804); and
- ◆ Souza Construction, Inc.'s error in listing Safeguard to perform bid items "23-27" instead of "23, 27" on its DBE Commitment Form by using a hyphen instead of a comma.

In choosing to waive Pavement Coating Company's error, Caltrans stated:

"This is a deviation from the bidding instructions; however, the lack of the bidders signature on this form [the DBE Commitment Form], does not change the bid and no

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competitive advantage is provided." (Contract 08-0Q5004).

In all the situations in which Caltrans has elected to waive an error as "immaterial," it has done so only after first determining that the bidder who made the error enjoyed no competitive advantage over other bidders.

The variances in GBH's bid differ from the type of clerical errors that Caltrans has waived. In a situation in which a bidder makes a clerical error and inputs a wrong digit as a subcontractor item number or as a subcontractor license number, the bidder has not gained any advantage over other bidders. Here, however, GBH's decision to use hyphens provided it an advantage over all other bidders since it had more time to prepare its bid than any other bidder. If a bidder submits his bid even one second after the bid opening, Caltrans rejects the bid as nonresponsive since it would provide that bidder with a time advantage over other bidders. For instance, the Department rejected Gordon N. Ball's low electronic bid because it was submitted at 2:00:14 p.m. (CDOT Contract No. 04-4S0504). Although it could be argued that the submittal of a bid a mere 14 seconds late is immaterial, Caltrans recognized that a variance that provides a bidder with a time advantage over other bidders cannot be waived.

Bidders Inquiries No. 66 and 71 are some of the best indicators that bidders understood that the new requirement (listing subcontractor's work line-by-line) would consume more time and take more effort than prior listing requirements. In these inquiries, bidders asked Caltrans to either change its revise its form or to allow the use of hyphens and Caltrans denied these requests. It is impossible to know how much time that bidders who complied with Addendum No. 4 lost versus GBH who used hyphens to list multiple items for its subcontractors' work. But what is known is that Caltrans has held bidders to the same uniform time standards – a bid cannot even be one second late– so that there is a level playing field and no bidder has more time to prepare his bid than any other bidder. GBH tilted the field by listing multiple subcontractors items on one line so it had more time to prepare its bid than the second, third and fourth lowest bidders.

**EVEN IF GBH'S MATERIAL WAS IMMATERIAL, IT IS A VARIANCE THAT
CALTRANS SHOULD NOT WAIVE**

If a variance is immaterial, the Department has the discretion, but not the obligation, to waive the variance. Even if the Department should determine that the variance in GBH's bid was immaterial, it should still reject GBH's bid. In waiving insubstantial variances, the Department has stated that:

"This error does not materially affect the bid and can therefore be waived by Caltrans."
(Contracts No. 04-235624 & 04-152724).

In characterizing waivable variances (such as typing in the wrong digit for a license number, or listing a bid item as "1391" instead of "139") as "errors," Caltrans has recognized that bidders sometimes make harmless mistakes or blunders. These variances are recognized as being the

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result of an accident. GBH is a joint venture of two large companies with each partner having its own estimating team. On a complex project with an Engineer's Estimate in excess of \$50,000,000, there is no doubt that GBH's staff knew that it was responsible for listing subcontractors' work with 1 bid item per line. In fact, GBH's prior bids have listed subcontractor's work items with 1 bid item per line. (GBH's Bids for Contract 04-264H34 and 04-235624 for example). For instance, for Contract No. 04-264H34, GBH listed Marina Landscape for Items 39-69, Inclusive (See Attachment A). In order to list Marina's work with 1 bid item per line, GBH listed Marina's 31 items over 3 pages of the Subcontractor List. If GBH had listed Marina for Contract 04-264H34 as it did for this Project, it would have only had to input one line for Marina's items of work as:

39-69 100

It appears clear that GBH understood what it was required to submit on other Projects. It is possible that GBH was running out of time to make changes to its Subcontractor's List for this Contract so it decided to use hyphens so it could make last-minute changes to its subcontractor lists. But regardless of GBH's reasons, GBH had to know that Caltrans had disapproved the use of hyphens to list multiple subcontractor items. GBH chose to use hyphens so that it could avoid having to list thirty-three individual items of work and 5 additional subcontractor list. GBH's decision was not a one-time mistake or blunder due to accidentally typing in the wrong number. Instead, GBH's deviation was a knowing disregard of Caltrans' requirements. An award to GBH would result in GBH being rewarded for purposefully disregarding Caltrans' bid instructions when it should be rebuked.

CONCLUSION

At the beginning of 2015, Caltrans issued a new electronic bid form. For this Project, Caltrans issued Addendum No. 4 to specifically instruct bidders on how this form must be completed. The change increased the time and burden on bidders to fill-out their subcontractor lists. Bidders turned to Caltrans and asked that it revise its form or allow bidders to submit multiple subcontractors items through the use of hyphens as had been allowed on prior forms. Caltrans responded that there would be no changes and that bidders should list subcontractor items with one bid item per line. It is rare for Caltrans to issue addendum instructing bidders on how a bid form should be completed. It is even rarer for Caltrans to issue two responses to bidders inquiries specifying exactly what it demanded of bidders. Though it was more time-consuming to follow Caltrans' new requirements, bidders had one consolation: since all bidders had to comply, all bidders were similarly burdened. The second, third, and fourth lowest bidders took the extra time to comply with these requirements when preparing their bids. Contrary to Caltrans' explicit instructions, GBH used hyphens to save time and to gain an advantage over other bidders. In total, GBH used hyphens to avoid having to list 33 items of subcontractor work on a line-by-line basis. GBH's bid is 5 pages shorter than it would have been had GBH listed subcontractor's bid items with one item per line. In effect, GBH attempted to tilt a level playing field so that it favored GBH alone. The extra time that GBH gained by purposefully disregarding

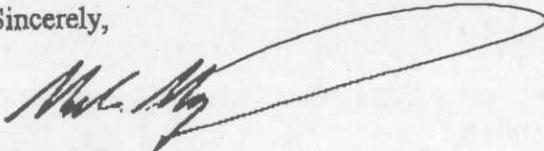
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Addendum No. 4 and Caltrans' Responses to Inquiries No. 66 and 77 is a material deviation that cannot be waived since the extra time that GBH had to prepare its bid is an advantage that other bidders did not have.

Even if GHB's deviation is of the type that Caltrans has the discretion to waive, Caltrans should not waive it in this instance. Every bidder who read Caltrans response to Inquiry No. 77 (asking whether hyphens could still be used to list multiple items) knew that Caltrans required the listing of one item per line. Although Caltrans has opted to waive inadvertent mistakes and blunders, GBH's variance was not an accidental blunder but a conscious decision to save time by using hyphens to list multiple items of subcontractor work on one line. Caltrans has never sought to penalize bidders who make accidental blunders when filling out a bid. By the same token, however, Caltrans should avoid rewarding a bidder who purposefully ignored Caltrans' bidding requirements to gain an advantage over other bidders.

For all the reasons stated above, GBH's bid must be rejected. Bay Cities respectfully requests that the Department rejects GBH's bid and award the Contract to Bay Cities. Should the Department have any questions concerning this matter, please call me.

Sincerely,



Marlo Manqueros
Vice-President

cc: File

Attachment A
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STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION
Contract No.: 04-264H34 Project ID: 0414000221
Bidder Name: Ghilotti Bros/RM Harris JV
DBS-OE-0102.2C (REV 03/2015)

Bidder ID: VC0000108255

Bidding Firm: Ghilotti Bros/RM Harris JV

List this sub? Yes

7) Business Name TEAM EES
Location City Alameda State CA
California Contractor License Number 386026
Public Works Contractor Registration Number 1000005623
Portion of Work Subcontracted:

Item #	Description
70 100	
71 100	
72 100	
73 100	
74 100	

List this sub? Yes

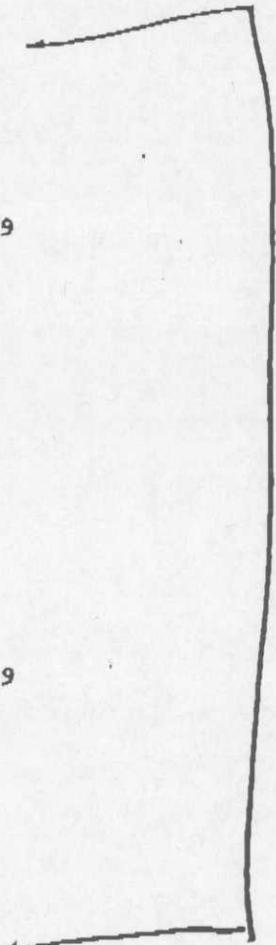
8) Business Name Marina Landscape
Location City Anaheim State CA
California Contractor License Number 492862
Public Works Contractor Registration Number 1000000079
Portion of Work Subcontracted:

Item #	Description
39 100	
40 100	
41 100	
42 100	
43 100	

List this sub? Yes

9) Business Name Marina Landscape
Location City Anaheim State CA
California Contractor License Number 492862
Public Works Contractor Registration Number 1000000079
Portion of Work Subcontracted:

Item #	Description
44 100	
45 100	
46 100	
47 100	
48 100	



Marina
Bid
Items
39-69

Attachment 4
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STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION
Contract No.: 04-264H34 Project ID: 0414000221
Bidder Name: Ghilotti Bros/RM Harris JV
DES-OE-0102.2C (REV 03/2015)

Bidder ID: VC0000108255

Bidding Firm: Ghilotti Bros/RM Harris JV

List this sub? Yes

10) Business Name Marina Landscape
Location City Anaheim State CA
California Contractor License Number 492862
Public Works Contractor Registration Number 1000000079
Portion of Work Subcontracted:

Item #	Description
49 100	
50 100	
51 100	
52 100	
53 100	

List this sub? Yes

11) Business Name Marina Landscape
Location City Anaheim State CA
California Contractor License Number 492862
Public Works Contractor Registration Number 1000000079
Portion of Work Subcontracted:

Item #	Description
54 100	
55 100	
56 100	
57 100	
58 100	

List this sub? Yes

12) Business Name Marina Landscape
Location City Anaheim State CA
California Contractor License Number 492862
Public Works Contractor Registration Number 1000000079
Portion of Work Subcontracted:

Item #	Description
59 100	
60 100	
61 100	
62 100	
63 100	

Marina
Bid
Items
39-69

Attachment A
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STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION
Contract No.: 04-264H34 Project ID: 0414000221
Bidder Name: Ghilotti Bros/RM Harris JV
DES-OB-0102.2C (REV 03/2015)

Bidder ID: VC0000108255

Bidding Firm: Ghilotti Bros/RM Harris JV

List this sub? Yes

13) Business Name Marina Landscape
Location City Anaheim State CA
California Contractor License Number 492862
Public Works Contractor Registration Number 1000000079
Portion of Work Subcontracted:

Item #	Description
64 100	
65 100	
66 100	
67 100	
68 100	

List this sub? Yes

14) Business Name Marina Landscape
Location City Anaheim State CA
California Contractor License Number 492862
Public Works Contractor Registration Number 1000000079
Portion of Work Subcontracted:

Item #	Description
69 100	

List this sub? Yes

15) Business Name john jackson mason
Location City sacramento State CA
California Contractor License Number 255203
Public Works Contractor Registration Number 1000000334
Portion of Work Subcontracted:

Item #	Description
89 96	MASONRY
90 96	MASONRY



Marina
Bid
Items

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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: November 24, 2015
pages: 11, including cover sheet.

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From the desk of...

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