



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Hans F. Larsen

SUBJECT: 2011 REMOVE AND REPLACE
PAVEMENT PROJECT

DATE: 04-25-11

Approved

Date

5/2/11

COUNCIL DISTRICT: Citywide

RECOMMENDATION

Report on bids and award of a construction contract for the 2011 Remove and Replace Asphalt Concrete Pavement Project to the low bidder, Top Grade Construction, Inc., in the amount of \$1,608,570, and approval of a five percent (5%) contingency in the amount of \$80,429.

OUTCOME

Approval of this construction contract to Top Grade Construction, Inc. will help maintain and preserve approximately 26 miles of the City's pavement network by preparing these streets for a surface seal. Preparing and sealing these streets will extend their useful life and defer more costly reconstruction expenses. Approval of a five percent (5%) contingency will provide funding for any unanticipated work necessary for the proper completion or construction of the project.

BACKGROUND

The Department of Transportation (DOT) annually schedules streets to be surface sealed as a preventive maintenance measure to extend their useful life and reduce long-term maintenance costs to the City. The process of surface sealing streets is typically performed through two separate projects: a Remove and Replace project and a Sealing Application project. Streets that are identified to receive a surface sealing treatment are surveyed for damage. If the survey indicates that a street has areas of pavement that have structurally failed, the street becomes part of the Remove and Replace project. The Remove and Replace project removes the structurally failed areas of pavement and replaces them with new asphalt concrete. The Sealing Application project then applies a new surface seal over the entire street.

Candidate streets for surface sealing are identified using information gathered from the City's pavement management system, the public, field investigations, and reviews of upcoming street

related projects. The final list of streets to receive sealing is established using the following criteria:

- Streets in suitable condition for sealing
- Streets due or past due for maintenance based on prescribed maintenance cycles
- Streets with numerous maintenance requests
- Streets not affected by current or future street related projects
- Relative location of street segments to create multiple, continuous segments, consistency within neighborhoods, and project efficiency
- Appropriate distribution of street maintenance throughout the City over a multi-year period

The 2011 Remove and Replace Asphalt Concrete Pavement Project will prepare approximately 26 miles of arterial streets throughout the City for final sealing application during the summer of 2011. Attachment A contains the list of streets designated to receive these treatments.

ANALYSIS

Bids were opened on March 10, 2011 with the following results:

Contractor	City	Bid Amount	Variance Amount	Over/Under Engineer's Estimate
Granite Rock Company DBA Pavex Construction Division	San Jose	\$2,108,825	\$243,202	13.0%
Project Engineer's Estimate		\$1,865,623	----	----
Wattis Construction Co., Inc.	San Jose	\$1,858,625	-\$6,998	-0.40%
MCK Services, Inc.	Concord	\$1,847,999	-\$17,624	-1.0%
C.F. Archibald Paving, Inc.	Redwood City	\$1,832,090	-\$33,533	-1.8%
Bay Cities Paving and Grading Inc.	Concord	\$1,818,530	-\$47,093	-2.5%
G. Bortolotto & Co., Inc.	San Carlos	\$1,766,574	-\$99,049	-5.3%
Granite Construction Company	Watsonville	\$1,719,610	-\$146,013	-7.8%
O'Grady Paving, Inc.	Mountain View	\$1,699,465	-\$166,158	-8.9%
Top Grade Construction, Inc.	Livermore	\$1,608,570	-\$257,053	-13.8%

The apparent low bid at \$1,608,570 was submitted by Top Grade Construction, Inc. (Top Grade). However, Top Grade failed to include a signed Addendum No. 1 in its bid proposal. Without considering whether Top Grade's failure to include signed Addendum No. 1 could be waived as a minor irregularity, staff decided that Top Grade's bid proposal was non-responsive. On March 14, 2011, staff issued a Notice of Intent to Award Contract stating that the Director of DOT intended to recommend award of the contract to, O'Grady Paving, Inc. (O'Grady), the apparent second lowest bidder.

Upon further review by the Department, it was determined that the failure of Top Grade to submit a signed Addendum No. 1 was a minor irregularity that may be waived by the City. On April 6, 2011, staff issued a *Revised* Notice of Intent to Award Contract stating that the Director of DOT intended to recommend award of the contract to Top Grade. A copy of the Revised Notice of Intent to Award Contract is provided in Attachment B. Five days later, O'Grady sent a letter protesting the recommendation on the following grounds: (1) Top Grade failed to submit a signed Addendum No. 1 with its bid, and (2) City staff's decision to change its original recommendation to award the contract to O'Grady was "arbitrary, capricious, [and] unauthorized." A copy of the protest letter and the response letter from DOT staff is provided in Attachment C.

O'Grady's protest lacks merit. Staff's reconsideration of the initial intent to award was done in light of the well-established rule of competitive bidding that a public entity has the right to waive a minor irregularity in a bid proposal. An irregularity in a bid proposal is minor if it does not affect the amount of the bid or give a bidder an advantage or benefit not given to other bidders. A public entity may – but does not have to – waive a minor irregularity. Section 2-01.06 of the City's Standard Specifications state that, "the City may, in its sole discretion, waive any informalities or minor irregularities in the bid or proposal."

Based on a careful analysis of Addendum No. 1, staff concluded that Top Grade's failure to include a signed copy of the addendum in its bid proposal is a minor irregularity. Addendum No. 1 – which addressed the issue of providing San Jose Police Department reserve officers for traffic control – had no impact on the amount of the bids. When City staff issued the bid, the cost for providing reserve officers for traffic control was fixed at \$21,840 (\$52 per hour x 420 hours). City staff actually filled in this amount on item number 7 on the Schedule of Quantities. Thus, all bidders were required to bid \$21,840 for the work related to providing San Jose Police Department reserve officers for traffic control. Addendum No. 1 had absolutely no impact on the amount of this bid item.

Moreover, Addendum No. 1 clarified – but did not materially change – the scope of the work related to providing San Jose Police Department reserve officers for traffic. Addendum No. 1 deleted Sections 10-4.03 and 10.1-05 of the specifications, and added a new Section 10.1-05. The original language required the contractor to provide reserve officers for traffic control as directed by the Engineer. The new language maintains this requirement and simply clarifies various possible scenarios for the use of reserve officers for traffic control. The new language adds information about how to hire and pay reserve officers, makes reference to the \$52 rate of pay, and cross-references other sections of the specifications.

Staff's reconsideration of its initial recommendation was not "arbitrary," "capricious" or "unauthorized" as asserted by O'Grady in its protest letter. Although staff regrets any inconvenience that may have been caused by its initial recommendation, there is nothing that prohibits staff from reconsidering a recommendation based upon factors that it inadvertently overlooked in its initial analysis.

Additionally, the difference between Top Grade's bid and O'Grady's bid is \$90,985. Although DOT had already indicated that it intended to award the contract to O'Grady, City staff concluded that the most prudent course of action, especially during these fiscally difficult times, was to change its recommendation.

Therefore, it is the recommendation of the Director of DOT to waive Top Grade's failure to submit a signed copy of Addendum No. 1 as a minor irregularity and for City Council to award the contract to Top Grade.

Construction is scheduled to begin in June 2011 and will be completed in August 2011.

EVALUATION AND FOLLOW-UP

The project is currently within budget and projected to be completed in August 2011. No additional Council actions related to this project are expected at this time. DOT has solicited bids for the surface sealing application project and on May 17, 2011 will be bringing to City Council a recommendation for award of a contract to apply the final surface seal application to the same 26 miles of streets.

POLICY ALTERNATIVES

Alternative #1: Reject Top Grade's bid proposal and award the project to O'Grady Paving, Inc. in the amount of \$1,699,465 and approve a five percent (5%) contingency in the amount of \$84,973.

Pros: Adheres to the initial Notice of Intent to Award Contract to O'Grady.

Cons: Higher project costs based on O'Grady's bid price being \$90,895 more than Top Grade's bid price

Reason for not recommending: Staff's initial recommendation did not consider that Top Grade's failure to submit a signed Addendum No. 1 is a minor irregularity that can be waived by the City. The \$90,895 can be used for other critical pavement maintenance work.

Alternative #2: Reject all bids and re-bid the project.

Pros: Potential for lower bid prices.

Cons: Potential for higher bid prices; additional staff time and costs to re-bid the project; time needed to complete a new bid and award process would delay completion of the needed preparation work and not allow completion of the final surface sealing application on some or all of the streets until spring 2012.

Reason for not recommending: The bid prices received for this project are considered good and there is no certainty regarding the pricing of future bids. Rebidding the project and causing delays in implementation will result in an inefficient use of limited City resources in terms of staff time to perform another bid and award process and not being able to fully utilize the project delivery and inspection staffing as planned throughout the entire construction season. Not completing the final surface sealing on some or all of the streets would leave them exposed to the elements for another winter, resulting in additional deterioration and the potential need for additional preparation work.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater; **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This award memo will be posted on the City's website for the Council Agenda.

To solicit contractors, this project was advertised in the *San José Post Record* and bid packages for this construction project were provided to various contractor organizations and builder's exchanges. In addition, when the project commences, the contractor, as stated in the specifications will provide advance notification regarding working hours, duration of project, and any appropriate schedule and lane closures to affected businesses and residents.

COORDINATION

This project and memorandum have been coordinated with the City Attorney's Office, and the City Manager's Budget Office.

FISCAL/POLICY ALIGNMENT

This project supports the Transportation and Aviation Services City Service Area goal to *Preserve and Improve Transportation Assets and Facilities* and aligns with the recommended Pavement Maintenance Core Service goal of improving the City's street pavement conditions from a current network condition rating of fair (64 PCI) to a network condition rating of good (70 PCI). The project is also consistent with the Council-approved Budget Strategy General Principles section in that it protects vital core City services.

COST IMPLICATIONS

1. COST OF PROJECT:

Project Delivery/Development	\$160,857
Construction Contract	\$1,608,570
Contingency	<u>\$80,429</u>
TOTAL PROJECT COSTS:	\$1,849,856

2. COST ELEMENTS OF CONSTRUCTION CONTRACT:

Adjust Manhole, Valves, Monuments	\$78,940
Induction Traffic Loop Replace	\$41,400
Remove and Replace AC Pavement	\$1,357,840
Temporary Striping/Markings	\$38,550
Compensation Adjustment for Price Index	\$70,000
Fluctuation for Paving Asphalt	
Police Traffic Control and Misc. Items	<u>\$21,840</u>
TOTAL CONSTRUCTION CONTRACT COSTS	\$1,608,570

3. SOURCE OF FUNDING: 465 – Construction Excise Tax Fund

4. FISCAL IMPACT: This project will have no net operating and maintenance costs to the General Fund.

04-25-11

Subject: 2011 Remove And Replace Asphalt Concrete Pavement Project

Page 7

BUDGET REFERENCE

The table below identifies the fund and appropriation proposed to fund the contract recommended as part of this memorandum and project costs, including project delivery, construction, and contingency costs.

Fund #	Appn #	RC #	Appn. Name	Total Appn	Amt. for Contract	2010-2011 Adopted Capital Budget Page	Last Budget Action (Date, Ord. No.)
465	6174	160366	Prop.1B- Pavement Maintenance	\$6,226,000	\$1,608,570	V-876	10/19/2010 Ord. No. 28829
Total Current Funding Available				\$6,226,000	\$1,608,570		

CEQA

Exempt, File No. PP11-035.

/s/

HANS F. LARSEN
Director of Transportation

For questions please contact Kevin O'Connor, Deputy Director, at 277-3028.

Attachments

ATTACHMENT A List of Streets

CD	STREET NAME	FROM	TO	LENGTH
7	10TH ST S	NEEDLES DR	PHELAN AV	940
7	10TH ST S	PHELAN AV	ALMA AVE	1770
7	10TH ST S	ALMA AV	HUMBOLDT ST	1200
10	CAHALAN AV	BLOSSOM HILL RD	SANTA TERESA BL	4368
10	CAHALAN AV	COUNTY GATE	SANTA TERESA BL	1970
9	CHYNOWETH AV EB	PEARL AV	BIKE PATH	1452
9	CHYNOWETH AV EB	CHYNOWETH CT	1000' EAST OF CHYNOWETH CT	3058
10	CHYNOWETH AV WB	E END	CHYNOWETH CT	3105
10	CHYNOWETH AV WB	BIKE PATH	PEARL AV	1500
3	COLEMAN AV NB	HWY 880 BRIDGE	NEWHALL DR	1505
3	COLEMAN AV NB	MCKENDRIE ST	HWY 880 BRIDGE	690
3	COLEMAN AV SB	NEWHALL DR	HWY 880 BRIDGE	1471
3	COLEMAN AV SB	HWY 880 BRIDGE	MCKENDRIE ST	689
1	DE ANZA BL NB	PROSPECT RD	CORONADO DR	2239
2	HELLYER AV EB	DOVE ST	SILVER CREEK VALLEY RD	10962
2	HELLYER AV WB	SILVER CRK VLY RD	DOVE ST	9839
6	LEIGH AV	1650N/HAMILTON	DE ROSE	1370
6	LEIGH AV	HAMILTON AV	1650N/HAMILTON	1900
6	LEIGH AV	DE ROSE	SOUTHWEST EX	1115
8	NIEMAN BL	PLUMSTEAD WY	ABORN RD	1204
8	NIEMAN BL	PLUMSTEAD WY	CAPITOL EXP	900
6	PEARL AV	445' S/OF CAPITOL	BRANHAM LN	3200
6	PEARL AV	CAPITOL EX	445'S/CAPITOL	445
1	PROSPECT RD EB	500' E/OF LAWRENCE EX	LAWRENCE EX	500
1	PROSPECT RD WB	SARATOGA AV	LAWRENCE EX	1500
5	SAN ANTONIO ST E	JACKSON AV S	KING RD S	4003
5	SAN ANTONIO ST E	KING RD S	34TH ST S	740
5	SAN ANTONIO ST E	34TH ST S	33RD ST S	540
1	SAN TOMAS AQUINO RD	N PAYNE AV	E SARATOGA AV	1330
1	SAN TOMAS AQUINO RD	N HAMILTON AV	S PAYNE AV	2460
4	SUNCREST AV	PIEDMONT RD	BAY LAUREL LN	2405
4	SUNCREST AV	BAY LAUREL LN	BOULDER DR	5110
8	WHITE RD S	STUTZ WY	STEVENS LN	406
8	WHITE RD S	QUIMBY RD	STUTZ WY	1482
8	WHITE RD S	STEVENS LN	ABORN RD	2462

ATTACHMENT B



Department of Transportation

HANS F. LARSEN - DIRECTOR

REVISED
NOTICE OF INTENT TO AWARD CONTRACT
2011 REMOVE AND REPLACE ASPHALT CONCRETE PAVEMENT

April 6, 2011

CPMS Project ID: 6696

Dear Bidders,

On March 10, 2011, the Department of Transportation opened bids for the above-referenced project. Bid results for this project are available on the City's Bid Hotline at: <https://cpms.sanjoseca.gov/pub/bidhotline/contracts/bidresults.cfm>

On March 14, 2011, the Department of Transportation issued a Notice of Intent to Award based on the results of that bid. Because the apparent low bidder, Top Grade Construction, failed to sign and return Addendum No. 1 with its bid, the Notice indicated that the Department of Transportation would recommend rejecting the bid as non-responsive. The Notice stated that the Department of Transportation would recommend awarding the contract to the second lowest bidder O'Grady Paving, Inc.

Upon review of its initial decision, the Department of Transportation has decided to change its recommendation. The Department has concluded that the omission of the signed addendum is waiveable as a minor irregularity. Addendum No. 1 clarified some of the requirements regarding traffic control at signalized intersections. None of these clarifications affected the bid price for this item of work – which was fixed in the Schedule of Quantities – or otherwise made a material change to the fundamental obligations with regard to providing traffic control at signalized intersections. As it is in the City's best interest to take the lowest bidder, the City has decided to recommend waiving the omission as a minor irregularity and awarding the contract to Top Grade Construction.

This letter serves to revoke the previous Notice of Intent to Award Contract dated March 14, 2011, and to replace it with this Revised Notice of Intent to Award Contract. The Director of Transportation intends to recommend the award to the low bidder, Top Grade Construction on or about May 3, 2011.

A bidder who wishes to protest this Notice of Intent may file a written protest with the Project Manager listed below within five (5) business days following the date this notice is issued. Protests must be received before 5:00pm on the fifth business day, and must include the following information:

- a) The name, address and telephone number of the protestor;
- b) The signature of the protestor or the protestor's representative;
- c) The name of the City Project as listed on the Notice to Contractors;
- d) A detailed statement of the legal and factual grounds of the protest, including copies of relevant documents; and
- e) The form of relief requested.

The City of San Jose appreciates your interest and effort in preparing and submitting a bid for this project.



Ricardo Morales
Department of Transportation
Infrastructure Maintenance Division
1404 Mabury Road
San Jose, CA 95133
Tel. Number: (408) 277-8149
Email Address: ricardo.morales@sanjoseca.gov

ATTACHMENT C



April 11, 2011

City of San Jose
Mr. Ricardo Morales
Dept. of Transportation
Infrastructure Maintenance Division
1404 Mabury Rd.
San Jose, CA 95133

RE: 2011 Remove and Replace Asphalt Concrete Pavement
Notice of Intent to Award

Dear Mr. Morales,

The purpose of this letter is to lodge a formal protest on behalf of O'Grady Paving, Inc. with the City of San Jose regarding the Revised Notice of Intent Issued on or about April 6, 2011, as referenced above.

On or about March 14, 2011, after a duly processed bidding procedure, the City of San Jose determined O'Grady Paving to be the successful bidder and issued a Notice of Intent to Award the contract to O'Grady Paving, Inc.

After issuing its Initial Notice of Intent to Award the contract, the City of San Jose engaged in an arbitrary, capricious and unauthorized process of reconsideration of the matter and has attempted to unlawfully deprive O'Grady Paving of the contract.

The bidding process has been designed and adopted to insure a fair and equitable process to provide all parties with an open and reliable system for awarding contracts. This process cannot be based on an arbitrary, capricious and unauthorized selection process. The specific requirements for bid submissions is and was based on sound well reasoned practices. In this matter, the City initially and properly determined the O'Grady bid to be the most complete and the bid which conformed to the required bid submissions requirements. Based on established guidelines, the Notice of Intent in favor of O'Grady was issued by the City of San Jose.

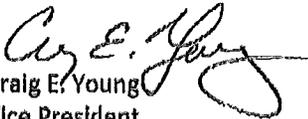


ASPHALT PAVING • GRADING

Now, after issuing its original Notice of Intent to Award the contract to O'Grady Paving, the City attempts to unlawfully depart from the standard bidding process procedures and attempts to deprive O'Grady Paving of its lawful right to the award of the contract.

The public contract code has been violated by the City. We expect the Notice of Intent to Award to Topgrade Const. be rescinded and the project be again awarded to O'Grady Paving, Inc.

Very truly yours,


Craig E. Young
Vice President

April 29, 2011

Mr. Craig E. Young
O'Grady Paving, Inc.
2513 Wyandotte Street
Mountain View, CA 94043

Re: 2011 Remove and Replace Asphalt Concrete Pavement Revised Notice of Intent to Award

Dear Mr. Young,

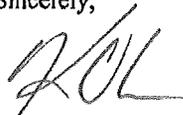
The purpose of this letter is to inform you of the decision made by the Department of Transportation (DOT) to reject the formal protest lodged by you on behalf of O'Grady Paving, Inc. in your April 11, 2011 letter and to proceed with the recommendation stated in the April 6, 2011 Revised Notice of Intent to Award Contract. In making this decision, please know that DOT has thoroughly considered all of the information, concerns, and requests expressed by O'Grady Paving in your protest letter and during our meeting on April 19, 2011.

Your protest is based on the following: (1) Top Grade Construction, Inc. failed to submit a signed Addendum No. 1 with its bid, and (2) DOT's decision to change its original recommendation to award the contract to O'Grady Paving was "arbitrary, capricious, [and] unauthorized." It is your opinion that Top Grade's failure to submit a signed Addendum No. 1 should not be waived as a minor bid irregularity and O'Grady Paving should be awarded the project or the project should be rebid.

Based on DOT's careful analysis of Addendum No. 1, it was concluded that Top Grade's failure to include a signed copy of the addendum in its bid proposal is a minor irregularity. It is a well established rule of competitive bidding that a public entity has the right to waive a minor irregularity in a bid proposal. Therefore, DOT's reconsideration of the original recommendation to award the contract to O'Grady Paving was not "arbitrary," "capricious" or "unauthorized."

DOT sincerely regrets any inconvenience that this may have caused O'Grady Paving and truly hopes that it will not affect any future interactions or work that may occur between the City and O'Grady Paving.

Sincerely,



KEVIN O'CONNOR
Deputy Director of Transportation

cc: Hans Larsen
Jim Ortbal
Ricardo Morales