COUNCIL AGENDA: 08-28-12
ITEM: 6.1

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Hans F. Larsen
David Sykes

SUBJECT: **2012 STREET RESURFACING PROJECT**

DATE: August 27, 2012

Approved

Date 8/26/12

REASON FOR SUPPLEMENTAL

The purpose of this memo is to provide the City Council with information concerning a bid protest for the 2012 Street Resurfacing Project.

BACKGROUND

On August 21, 2012, Synergy Project Management, Inc., submitted a bid protest for the 2012 Street Resurfacing Project. In consultation with the City Attorney's Office, the protest was deemed to have no merit and should be rejected. Attached are copies of staff's response letter dated August 24, 2012 and the protest letter dated August 21, 2012.

/s/
HANS F. LARSEN
Director of Transportation

/s/
DAVID SYKES
Director of Public Works

For questions please contact Rene Cordero, DOT Division Manager of Infrastructure Maintenance, at (408)794-1986.

Attachments

SYNERGY PROJECT MANAGEMENT, INC.

30 GRANT AVE., SUITE 300 • SAN FRANCISCO, CALIFORNIA • 94108
415.467.3000 • FAX 415.467.3001

Aug. 21, 2012

City of San Jose Department of Transportation
Mr. Ricardo Morales
1404 Mabury Road, 2nd floor
San Jose, Ca. 95133
408-794-1957
Ricardo.morales@sanjoseca.gov

Attention: Mr. Ricardo Morales

Reference: 7059-2012 Street Resurfacing Project

Subject: Bid Protest

Mr. Morales,

Synergy does hereby formally protest that San Jose Paving Project #7059 for the following reasons:

1. **O'Grady did not properly list its electric subcontractor.**

Pursuant to Public contract Code section 4104.

"Any officer, department, board or commission taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement or in the general conditions under which bids will be received for the doing of the work incident to the public work or improvement that any person making a bid or offer to perform the work, shall, in his or her bid or offer, set forth: (a) (1) The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid or, in the case of bids or offers for the construction of streets or highways, including bridges, in excess of one-half of 1 percent of the prime contractor's total bid or ten thousand dollars ($10,000), whichever is greater."

O'Grady listed "Lir. Inc." as its electric subcontractor. There is no contractor listed with the state of California with this name with a valid contractor license (see attached search results). Furthermore, if O'Grady improperly spelled or abbreviated the contractors name, it would allow O'Grady to pick and choose or shop for a subcontractor after the bid has closed. This gives O'Grady an unfair completive bid advantage in that it did not comply with public contracting code to list the full and complete name and location of the place of business of its subcontractor.

2. **O'Grady listed an unqualified subcontractor.**

The contract specifications require that Foamed Asphalt be used on the project. This requires a specific machine to be used that the O'Grady's subcontractor Western Pavement Solutions does not own according to the State of California's own CARB website. There are only a few machines that can perform Foamed Asphalt and according to Synergy Subcontractor, O'Grady's subcontractor does not have access to one and there are only a few machines in the state of California that are CARB compliant and these machines are not for rent. Synergy performed background checks on subcontractors that were bidding on this project and found that the only contractor that was qualified with the proper equipment that met

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State of California CARB standards was Pavement Recycling Systems who Synergy listed. If O'Grady uses a contractor who has illegal equipment it gives O'Grady an unfair advantage in that they do not have to comply with the law and Synergy does resulting in a higher bid. Furthermore, if O'Grady's Subcontractor does not own a machine that can do Foamed Asphalt, then they are not qualified to do the work in that they have not done this type of work before.

3. **O'Grady listed an out of State Contractor**
   O'Grady listed Western Pavement Solutions place of business as Las Vegas. This again violates public contracting code in that O'Grady did not list a contractor with a place of business that matches any company on the State of California's Contractors License Board.

4. **O'Grady has an Improperly signed Bond.**

   The Notary Acknowledgement for Craig E. Young has conflicting dates. The bid bonds, surety's notary acknowledgment and power of attorney are all dated August 31, 2012, however the acknowledgement for the contractor, Craig E. Young, is dated August 16, 2012. This discrepancy in the bid bond gives O'Grady an unfair bid advantage in that it can claim its bid is invalid.

In that O'Grady did not submit a responsive, responsible bid to the City of San Jose, Synergy requests that there bid be rejected and the project be awarded to Synergy Project Management. If you have any questions, please feel free to call my phone at 415-850-0826.

Donovan Gilliland
Synergy Project Management

CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

Department of Transportation
HANS F. LARSEN, DIRECTOR

August 24, 2012

Synergy Project Management, Inc.
30 Grant Ave, Suite 300
San Francisco, CA 94108

Attention: Donovan Gilliland

Via fax 415.467.3001

Reference: Bid Protest 7059-2012 Street Resurfacing Project

Mr. Gilliland,

The City of San Jose has reviewed Synergy Project Management, Inc.'s (Synergy) protest letter regarding the bid for the 7059-2012 Street Resurfacing Project and has concluded that the protest has no merit and should be rejected for the following reasons:

1. **The electrical subcontractor is properly listed.**

Synergy argues that O'Grady violated the subcontractor listing law set forth in the California Public Contract Code by not providing the "full and complete name" of its electrical subcontractor. Synergy argues that, as a result, O'Grady can "shop" for a subcontractor after the contract is awarded. This argument is without merit.

The subcontracting listing law states that a general contractor must indicate in its bid "the name and location of the place of business" of each listed subcontractor. With limited exceptions not relevant here, the general contractor is required to use each listed subcontractor. The primary purpose of the subcontractor listing law is to prevent a general contractor from bid shopping subcontracts. The purpose of the subcontractor listing law is satisfied whenever a general contractor provides sufficient name and location information for the City to determine which subcontractor the general contractor intends to use.

From the information in O'Grady's bid, staff was able to determine that there is a subcontractor located in Granite Bay, California with the abbreviation provided by O'Grady on its bid. The subcontractor's name is Loop Installation and Repair, Inc. – or LIR, Inc. - and it is a California licensed contractor. The City has confirmed with O'Grady that this is the subcontractor it intended to list. O'Grady will therefore be required to use this subcontractor for the electrical work.

Contrary to Synergy's argument, the subcontractor listing law does not require identifying the "full and complete name" of the subcontractor. Accepting Synergy's argument would result in general contractors having to comply with technical requirements unrelated to the purpose of the subcontractor listing law. The subcontractor listing laws are intended to protect subcontractors, and not to provide a basis for one contractor to protest another contractors' bid.

2. There is No Basis for Determining that Western Pavement Solutions is Unqualified.

O'Grady listed Western Pavement Solutions as a subcontractor. Synergy argues that Western Pavement Solutions is unqualified, because it does not have access to a "special machine" needed to produce foamed asphalt. This argument is meritless.

The City is not in a position to determine whether Western Pavement Solutions might or might not have access to the "special machine." In any event, Specification 39-7, entitled "Cold-In-Place Recycled Asphalt," clearly states, in relevant part:

> The contractor may elect to use either an emulsion or a foam injection process.

Staff is aware that Western Pavement Solutions has extensive experience using the emulsion process. Accordingly, there is no basis for Synergy's argument that Western Pavement Solutions is unqualified.

3. Listing of Western Pavement Solutions did not Violate the Subcontractor Listing Law.

Synergy also takes issue with the fact that O'Grady identified "Las Vegas" as the location of Western Pavement Solutions. It argues that O'Grady therefore violated the subcontractor listing law by not listing a subcontractor with a place of business that matches any contractor listed on the State Contractor's License Board. This argument is meritless.

Western Pavement Solutions is a large, well-established contractor with a number of different business offices. On its contractor's license, Western Pavement Solutions uses a business address located in Brea, California. The fact that it lists a Brea address does not prevent it from having other business locations. Moreover, the subcontractor listing laws do not require O'Grady to list the business location provided on the subcontractor's license.

O'Grady's bid provides the City with sufficient information to identify Western Pavement as the Cold-In-Place Recycled Asphalt subcontractor. Accordingly, there is no violation of the subcontractor listing law.

4. The Bid Bond is Valid and Enforceable.

Finally, Synergy claims that O'Grady can withdraw its bid, because the bid bond has a different date than the notary acknowledgement of the contractor's signature. Synergy claims this gives O'Grady an unfair competitive advantage.

The different date on the notary acknowledgement does not render the bid bond invalid and therefore does not provide grounds for O'Grady to withdraw its bid. Accordingly, Synergy Project Management's argument is without merit.

For the reasons set out in this letter staff will recommend that Council reject Synergy's protest and award the contract for 7059-2012 Street Resurfacing Project to the apparent low bidder, O'Grady Const. at the August 28, 2012 San Jose City Council meeting. Please call Ricardo Morales (408.794.1957) or Heloisa Jones (408.794.1956) if you have any questions.

Sincerely,

Rene Isaac Cordero
Division Manager
Department of Transportation

c: O'Grady Construction