



April 10, 2017

To: Members of the Board of Directors

From: Darrell Johnson, Chief Executive Officer

Subject: Appeal to the Board of Directors to Protest Proposed Award of Contract; Invitation for Bid 6-1521 and Award of Agreement for Construction of the Metrolink Parking Structure at the Orange Transportation Center

Overview

The Orange County Transportation Authority has adopted a protest process as part of its procurement policies and procedures, which allows a bidder to appeal a contract award decision. A protest in response to the award recommendation of the construction of the Metrolink Parking Structure at the Orange Transportation Center was filed by Bomel Construction Co., Inc., on February 9, 2017. The protest has been escalated to the Board of Directors and requires a determination. Board of Directors' approval is also requested on the agreement award.

Recommendations

- A. Find Bomel Construction Co., Inc., the apparent low bidder, as non-responsive for failure to submit written request for an "approved equal" substitution in accordance with invitation for bid instructions.
- B. Authorize the Chief Executive Officer to negotiate and execute Agreement No. C-6-1521 between the Orange County Transportation Authority and McCarthy Building Companies, Inc., the lowest responsive, responsible bidder, in the amount of \$18,433,400, for the construction of the Metrolink Parking Structure at the Orange Transportation Center.

Discussion

The City of Orange (City) completed the design and environmental phase of the shared-use Orange Transportation Center Parking Structure Project (Project), located at Lemon Street and Maple Avenue. The parking structure includes 611 parking stalls, of which 500 stalls, or 82 percent, will be for transit use. The remaining 111 stalls, or 18 percent, will be for the City's general use.

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Per the Orange County Transportation Authority (OCTA) Board of Directors (Board)-approved cooperative agreement, OCTA is the lead on the construction phase of the Project. The City will pay its fair share of 18 percent of the Project construction costs.

Procurement Approach

The procurement was handled in accordance with OCTA's Board-approved procedures for public works projects. These procedures, which conform to both federal and state requirements, require contracts to be awarded to the lowest responsive, responsible bidder after a sealed bidding process.

The solicitation Invitation for Bid (IFB) 6-1521 for the Project was released on November 17, 2016, through OCTA's CAMM NET system. The Project was advertised on November 16 and November 23, 2016, in a newspaper of general circulation, as well as with the Green Sheet on November 21, 2016. A pre-bid conference and job walk were held on December 6, 2016, and were attended by eight firms. Five addenda were issued to provide the pre-bid conference registration sheets and handle administrative issues related to the IFB. On January 12, 2017, four bids were received and publicly opened.

Bids were reviewed by staff from both the Contracts Administration and Materials Management (CAMM) Department and Rail Programs Department to ensure compliance with the contract terms and conditions, and technical specifications. The list of bidders and bid amounts are presented below:

<u>Firm and Location</u>	<u>Bid Amount</u>
Bomel Construction Co., Inc. (Bomel) Anaheim Hills, California	\$18,189,446
McCarthy Building Companies, Inc. (McCarthy) Newport Beach, California	\$18,433,400
Largo Concrete, Inc. Tustin, California	\$19,283,682
W.M. Klorman Construction Corporation Woodland Hills, California	\$19,740,998

The apparent low bidder, Bomel, was found non-responsive for failure to submit a written request for an "approved equal" to substitute the specified elevator in accordance with the IFB requirements.

The engineer's estimate for the Project was \$19,300,000. The second lowest responsive, responsible bidder, McCarthy's bid, is four and a half percent lower than the engineer's estimate and is considered by staff to be fair and reasonable.

State law requires award to the lowest responsive, responsible bidder. As such, staff recommends award to McCarthy, the lowest responsive, responsible bidder, in the amount of \$18,433,400, for construction of the Project.

Protest Discussion

OCTA has adopted, as part of its procurement policies and procedures, a written protest process for handling and resolving disputes relating to its procurements.

On February 9, 2017, Trachtman & Trachtman, LLP, on behalf of Bomel, submitted a letter to the CAMM Department protesting OCTA's Notice of Determination, issued February 3, 2017, for failure to submit a written request for an "approved equal" in accordance to the IFB requirements (Attachment A).

The IFB required bidders to submit a written request for an "approved equal," including required supporting information, by no later than 5:00 p.m., December 12, 2016, if the bidder intended to include an equal product in its bid.

OCTA determined Bomel's bid was not responsive to the IFB requirements as it failed to follow material procedures set forth in the IFB. The IFB was clear that OCTA, under applicable State law, was specifying a specific product or its "equal." OCTA is allowed, in the context of public works projects, to specify specific products by brand name and model as long as it allows for an "equal" product to be used. OCTA is the final authority in determining if an "equal" submitted is acceptable. As such, OCTA's IFB provided a process by which a bidder who wished to substitute a product could do so by submitting the required backup documentation in order to allow OCTA and its designer to make said determination and, if a substitute was approved, notify all bidders of the information.

Bomel failed to follow the process and committed to bidding an Excelsior elevator that had not been determined to be an "equal" product under the terms of the IFB. Bomel personnel confirmed the fact to OCTA staff after the submission of

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its bid. Bomel's listing of the elevator without a determination of "equal" being made by OCTA placed all other bidders at a disadvantage.

Accordingly, the protest was reviewed by the Director of the CAMM Department in conjunction with OCTA General Counsel, and no evidence was found to substantiate the protest. Therefore, it was denied on February 16, 2017 (Attachment B).

An appeal of the decision was filed by Trachtman & Trachtman, LLP, on behalf of Bomel, to the Chief Executive Officer (CEO) on February 24, 2017. The CEO affirmed the original decision of the Director of the CAMM Department, dated March 8, 2017 (Attachment C).

The final step in the protest procedures is an appeal to the Board. The letter requesting the appeal was submitted by Trachtman & Trachtman, LLP, on behalf of Bomel on March 17, 2017, addressed to the Board (Attachment D). The decision made by the Board on the appeal represents the final administrative step in the process.

Fiscal Impact

The Project was approved in OCTA's Fiscal Year 2016-17 Budget, Capital Programs Division, Account 0018-9084-T5422-P3F, and is funded through State Transportation Improvement Program funds, proceeds from the sale of the Santa Ana Transit Terminal, federal Congestion Mitigation and Air Quality Improvement funds, and City funds.

Summary

OCTA has received a protest by Bomel. To date, the protest has been processed in a timely manner and in strict adherence to OCTA's protest procedures. An appeal is being made to the Board as the final step in the protest procedure. Staff recommends that the decisions made by the CEO and the Director of the CAMM Department be upheld and deny the protest, and find Bomel non-responsive.

Based on the information provided, staff also recommends the Board authorize the CEO to negotiate and execute Agreement No. C-6-1521 between OCTA and McCarthy, the lowest responsive, responsible bidder, in the amount of \$18,433,400, for construction of the Project.

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Attachments

- A. February 9, 2017 Transmittal of Bomel Bid Protest and Reservation to Supplement
- B. Letter from Virginia Abadessa, Director, Contracts Administration and Materials Management, to Benjamin R. Trachtman, Trachtman and Trachtman, LLP, Dated February 16, 2017
- C. Letter from Darrell Johnson, Chief Executive Officer, to Bomel Construction Co., Dated March 8, 2017
- D. March 17, 2017 Transmittal of Bid Protest for Authority's Board of Directors Review

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