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Title: Community Development Services, Department of Transportation, recommending the Board take the following actions pertaining to the Pony Express Trail Slipout, Contract 2726, PW 18-31214, CIP 78718:

- 1) Approve an additional \$200,802 of Road Fund/Discretionary funding for the Base Bid Schedule A FEMA match and Schedule B portion of the Project construction and delivery phase that is not eligible for FEMA funding;
- 2) Reject the bid submitted by the lowest bidder, Schreder and Brandt MFG, Inc., as being non-responsive for failing to meet the Contract Disadvantaged Business Enterprise goal and failing to provide an adequate Good Faith Effort to meet the goal;
- 3) Award the Construction Contract to the second lowest bidder, Steelhead Constructors, Inc., for being the lowest responsive, responsible Bidder that provided all required forms, documentation, and exceeded the Contract Disadvantaged Business Enterprise goal;
- 4) Approve and authorize the Chair to sign the Construction Contract, subject to review and approval by County Counsel and Risk Management; and
- 5) Authorize the Director of Transportation to sign an Escrow Agreement, if requested by the Contractor and in accordance with Public Contract Code Section 22300, for the purpose of holding Contract retention funds. (Est. Time: 20 Min.)

FUNDING: Schedule A - Local and State discretionary funding initially (100%), with Department of Transportation staff working with the Federal Emergency Management Agency and the California Office of Emergency Services to obtain reimbursement. Schedule B - Road Fund / Discretionary funding (Local, State, and Federal)

Sponsors:

Indexes:

Code sections:

Attachments: 1. A - Bid Summary, 2. Staff Memo BOS Rcvd 7-24-18, 3. Executed Agreement 78718 Pony Express Trail Slipout

Date	Ver.	Action By	Action	Result
7/24/2018	1	Board of Supervisors	Approved	Pass

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DEPARTMENT RECOMMENDATION

Award and Sign Construction Contract with Lowest Responsive, Responsible Bidder:

On Thursday June 28, 2018, Community Development Services, Department of Transportation (Transportation) opened bids for the Pony Express Trail Slipout (Project), Capital Improvement Program (CIP 78718). Three bids were received ranging from \$1,018,668.78 to \$1,137,153.00.

Transportation issued the All Bidders Letter on July 6, 2018, notifying the bidders of the recommendation to the Board for award to Schreder and Brandt MFG, Inc. (S&B) and initiating the two-day bid protest period. The bid protest period ended at 5:00 p.m. on Tuesday, July 10, 2018 with one protest filed by Steelhead Constructors, Inc. (Steelhead).

The protest filed by Steelhead claimed the following:

- 1) S&B's Principal failed to sign their bidder's bond; therefore S&B's bidder's bond is non-binding.
- 2) S&B submitted their Disadvantaged Business Enterprise (DBE) commitment form 15-G that did not meet the Contract goal along with an inadequate Good Faith Efforts form 15-H at time of bid opening. Then S&B resubmitted the forms within 5 business days after bid opening with an added DBE trucking company, showing that they met the Contract goal. Steelhead contends that S&B cannot submit any corrections within the allowable 5 business days if the forms were submitted with the bid.
- 3) S&B's substitution of DBE information is a material deviation and referenced a competitive advantage by facilitating bid shopping.

Transportation, along with County Counsel determined Steelhead's protest had no merit because of the following reasons:

- 1) Case law has ruled that the surety is liable for the bond even if it is not signed by the principal (Pacific Mill & Timber Co. v. Massachusetts Bonding & Ins. Co. (1923) 192 Cal. 278, 284). As S&B's bidder bond was signed by the surety, the bond is an acceptable and binding document.
- 2) Nothing in the Contract states that a revision or correction to the DBE forms cannot be submitted within the 5 business days if the DBE forms were submitted at time of bid. In fact, Transportation has allowed revisions and/or requested additional information to the DBE forms submitted with bids in the past. S&B's verbal position was that they didn't realize that trucking companies needed to be listed on the DBE forms as they are not subcontractors. Once they realized that the DBE trucking company does need to be submitted, they provided the revision with a quote dated on the day of bid. This would have been acceptable if the quote was indeed received prior to bid.
- 3) The DBE trucking company quote received with the DBE form 15-G revision was dated on bid

day and would have been acceptable if received prior to bid.

However, Transportation followed up with the DBE trucking company to assure that their quote was received prior to S&B's bid submittal. Unfortunately, the trucking company provided an email response to S&B showing that the bid was received by S&B on the day after bid opening. The reason given by the DBE trucking company for why the quote was dated on bid day was that it was a rate sheet that was put together and provided to all prime bidders on the plan holders list. The DBE trucking company erroneously sent the quote without updating the quote date. Per Caltrans Standard Specifications Section 2-1.12B(1), the prime contractor has the responsible to verify, at bid opening, the DBE firm is certified as a DBE by the California Unified Certification Program and possess the work codes applicable to the type of work the firm will perform on the Contract. This could not have occurred as the quote was received after bid. Furthermore, Public Contract Code Chapter 4, "Subletting and Subcontracting Fair Practices Act" section 4101 states, "The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils." If quotes received after the time of bid are accepted by Transportation, bid shopping may occur to the detriment of the public, the project, and all parties involved. Therefore, the revised DBE forms cannot be accepted.

Transportation also considered accepting S&B's bid with the DBE forms submitted at time of bid that did not meet the Contract DBE goal. However, the Good Faith Efforts form 15-H that was submitted did not contain any backup information and did not demonstrate that S&B took all necessary and reasonable steps to achieve the DBE goal in accordance with 49 CFR 26 Appendix A.

Therefore, Steelhead Constructors, Inc. submitted the lowest responsive, responsible bid in the amount of \$1,086,686.00 for both Base Bid Schedule A and Additive Bid Schedule B Work. Transportation recommends award of the Construction Contract for both Base Bid Schedule A and Additive Bid Schedule B Work to Steelhead Constructors, Inc. who submitted the lowest responsive, responsible bid.

Authorize the Director of Transportation (Director) to Sign Escrow Agreement:

Pursuant to Special Provisions Section 9-1.16F, "Retentions", Transportation will retain five percent (5%) of the value of work done from each Contractor payment (excluding mobilization payments) as security for the fulfillment of the Contract. Alternatively, Public Contract Code (PCC) Section 22300 provides that the Contractor may request that payment of retentions held be made directly to an Escrow Agent. The Contractor will receive the interest earned on the investment.

In accordance with these provisions, the Contractor may request in writing that the County make payment of retention funds directly into an escrow account, which would necessitate an Escrow Agreement. To help expedite this process, if requested by the Contractor, Transportation requests that the Board authorize the Director to execute the Escrow Agreement. Upon satisfactory completion of portions of the Contract and upon written notification from the Director, the Contractor will receive incremental releases from the Escrow Agent paid into the account and any interest earned thereon. A portion of the retention and interest will be retained in the escrow account until thirty-five (35) days after the recordation of the Notice of Acceptance of the Contract at which time, upon written notification, these funds will be released to the Contractor.

Contract Change Orders (CCOs):

In any contract there is a need to be able to make changes and the CCO process facilitates the ability to make necessary changes when needed within a contract.

Supplemental CCOs

Certain types of work are necessary to complete the Project which cannot be estimated accurately because they require a variable effort to complete. These items are referred to as supplemental items and are identified in the Contract Documents as CCO work to be performed and paid for on a time and material basis using California Department of Transportation (Caltrans) standard force account billing procedures. The work is authorized by issuance of a CCO, which also encumbers the funds anticipated for each of the planned supplemental items of work and is billed against as the work progresses. The amount of each CCO is based on an evaluation by Transportation staff of the Project components, area, and time frame. Supplemental items in this contract include Traffic Control and Water Pollution Control items totaling 5% of the original Contract value. Because this work is anticipated and budgeted for separately, supplemental CCOs are not included in the 10% cap normally associated with contingency CCOs.

Contingency CCOs

With construction contracts, there is an expectation that unanticipated changes will be encountered once construction begins. To prepare for this, a 10% contingency budget is set aside. PCC Section 20142 and Resolution 102-2012 authorize the Director to execute individual CCOs, the maximum value of which is based on the original contract amount with a not-to-exceed limit. This authority is also for a cumulative total of contingency CCOs not to exceed 10% of the original Contract value.

DISCUSSION / BACKGROUND

This Project is necessary to repair damage to Pony Express Trail roadway, subgrade, and embankment caused by the storms of 2017. The Project was bid as a Base Bid (Schedule A) and Additive Bid (Schedule B) in accordance with the Proposal and Special Provisions. Base Bid (Schedule A) work to be performed includes roadway repairs along Pony Express Trail from 'PE' line Station 10+50 to Station 14+45. Construction includes the repairs of the failed slope and section of the roadway that include roadway excavation with a geosynthetic reinforced embankment, HMA paving, HMA dike, cold planing, drainage system improvements, rock slope protection, and guardrail. The roadway will be closed for the duration of this Project.

Additive Bid (Schedule B) work to be performed includes roadway repairs along Pony Express Trail from 'PE' line Station 8+50 to Station 10+50 and Station 14+45 to station 15+50. Construction includes repairs to the failed slope and section of the roadway that include roadway excavation with a geosynthetic reinforced embankment, HMA paving, HMA dike, cold planing, and rock slope protection. The roadway will be closed for the duration of this Project. The failures within the Schedule B limits occurred during later storms that were not eligible for repair by FEMA funding.

This Project is a thirty (30) working day Project. Pony Express Trail will be fully closed to traffic for forty (40) calendar days at the approximate Post Mile 6.1, approximately 450 linear feet of road closure in each direction of travel. Access for local residents and visitors, as well as emergency personnel and law enforcement will be via detour of Sunset Drive to Frontier Road per the attached Detour Plan. It should also be noted that the estimated Average Daily Traffic (ADT) for this area is less than 100 vehicles, and the total additional travel distance for impacted residents is projected to be less than 1 mile. Transportation has coordinated with the local fire department and developed plans to help ensure emergency response can be accommodated through the project in a timely

manner if needed. Transportation will notify the public of this road closure via the County website and press release, and PCMS boards at least one week in advance of starting work. The dates of the closure are anticipated to be approximately from August 2018 through September 2018. The actual dates will be confirmed with the above referenced notifications once the Contract is awarded, weather conditions suitable for the Project are verified, and the work dates are known. The Road Closure Authorization was signed by the Director on March 29, 2018.

Due to the potential for federal funding, both California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA) compliance are required. The CEQA Notice of Exemption was filed on April 7, 2018. Federal Emergency Management Agency (FEMA) has neither provided a Record of Environmental Consideration nor issued an email stating NEPA Categorical Exclusion is authorized; however, FEMA has advised that waiting for the written NEPA clearance is not required due to time constraints. FEMA has advised to make sure that permits and permit requirements are received and complied with as necessary.

The Project does not contain a jurisdictional waterway within the construction limits and does not appear to require coverage of the United States Army Corps of Engineers, California Department of Fish and Wildlife, or Regional Water Quality Control Board permits. Requirements from past projects with similar permitting conditions are included in the Contract Documents. Any additional or revised requirements resulting from the issuance of the 401 and 1600 permits will be added to the Contract either through addenda during advertisement or a contract change order.

No Right of Way was necessary for this Project.

No utility agreements or relocations are necessary for this Project.

The Contract Documents include all required federal provisions and incorporate the current Caltrans DBE requirements. The DBE goal is 9%.

The Project was approved for advertisement on June 5, 2018 (Item 30).

ALTERNATIVES

- 1) Award Base Bid Schedule A Work (FEMA reimbursable) only. Note: Due to the adjacent proximity of roadway embankment failure for the Schedule A and Schedule B locations, the quality of repair and lifespan of the Schedule A repairs will be reduced or jeopardized if Schedule B work is not completed.
- 2) Do not award the contract and direct Transportation to re-advertise for construction bids.
- 3) Cancel the Project. Note: The Board has previously approved the Project, the County would not be reimbursed with FEMA funds for the Project work completed to date, and the roadway will remain in it's current failed condition.

OTHER DEPARTMENT / AGENCY INVOLVEMENT

County Counsel and Risk Management reviewed and approved the Contract Documents on May 7, 2018.

CAO RECOMMENDATION

It is recommended that the Board approve this item.

FINANCIAL IMPACT

The estimate for the construction phase of both the Base Bid Schedule A and Additive Bid Schedule B Work for the Project is \$1,412,691.80, which includes the bid of \$1,086,686.00; construction management, survey, materials testing and design support during construction totaling \$163,002.90; supplemental items of work totaling \$54,334.30; and, contingency of \$108,668.60.

The schedule A portion of this Project is eligible for 75% reimbursement by FEMA and 18.75% reimbursement by California Office of Emergency Services. The remaining 6.25% is local and state discretionary funding. Transportation will continue working with these agencies to obtain the maximum allowable reimbursement.

Schedule B portion of this Project was not authorized for reimbursement by FEMA. The total estimated construction cost for Schedule B is \$223,476, the estimated local match on the FEMA portion of the design is \$16,000, and the estimated local match on the FEMA portion of the construction is \$74,326. The 2018 CIP Book amount of local funding (Road Fund/Discretionary) approved by the Board on June 26, 2018 is \$113,000. This leaves a shortage of \$200,802 in local funding. Transportation proposes the use of Road Fund/Discretionary funding for this shortage.

CLERK OF THE BOARD FOLLOW UP ACTIONS

- 1) Upon approval by County Counsel and Risk Management, Transportation will forward two (2) originals of the Construction Contract, together with the required bonds and insurance, and the approved Contract Routing Sheet to the Clerk for the Chair's signature.
- 2) The Clerk will forward one (1) fully executed Construction Contract to CDS Transportation, attention of Brian Franklin, Office Engineer, for further processing.

STRATEGIC PLAN COMPONENT

Infrastructure

CONTACT

Rafael Martinez, Director
Community Development Services, Department of Transportation