



Legislation Text

File #: 22-1593, **Version:** 1

Department of Transportation recommending the Board:

- 1) Receive an update on the Caldor Fire road repairs;
- 2) Reject the bid protest filed on September 8, 2022 by George Reed, Inc.;
- 3) Find that A. Teichert & Son, Inc., dba Teichert Construction is the lowest, responsive, responsible bidder;
- 4) Award the construction contract to A. Teichert & Son, Inc., dba Teichert Construction, the lowest, responsive, responsible bidder;
- 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; and
- 6) Pursuant to Public Contract Code Section 22050, review the emergency action needed for Caldor Fire road repairs and determine that there is a need to continue the action (4/5th vote required).

FUNDING: General Fund. (100%)

DISCUSSION / BACKGROUND

After months of debris removal operations and other activity related to the Caldor Fire, the Department of Transportation (Transportation) must complete repairs to the roadway to ensure public safety before Winter 2022.

Transportation staff walked each impacted road and determined the areas that need to be repaired. Each area has been tracked by GPS coordinates, a photo has been captured, and the size of the repair has been documented. Transportation has identified approximately 970,000 square feet of County maintained roadway that needs to be repaired. Many repairs need to be completed prior to Winter 2022 snow removal operations.

Public Contract Code section 22050 authorizes the Board to delegate to the appropriate agency officer the authority to take any directly related and immediate action needed to respond to an emergency without giving notice for bids by adopting a resolution or ordinance. On July 26, 2022 (Legistar #22-1341), the Board adopted Resolution #116-2022, finding that an emergency existed due to the Caldor Fire debris removal efforts and authorized the Director of Transportation to take all necessary actions to approve the design and specifications and to authorize to advertise bids for the emergency repair project. Transportation proceeded to develop bid documents and collaborated with County Counsel on approval prior to advertising the project. On August 23, 2022 (Legistar #22-1418), the Board adopted Resolution 162-2022 that further delegated to the Director of Transportation the authority to take all necessary actions to approve and award a contract to the lowest and most responsible bidder for the emergency repair projects. Due to the immediate need for road repair prior to Winter weather conditions, the emergency will not permit a delay resulting from the standard process for bid award. The emergency action is necessary to respond to the emergency in order to complete the work within coming months.

The road repair competitive bid closed on August 31, 2022. Seven bids were received ranging from

\$3,606,592.40 to \$4,318,930.36. Transportation identified the apparent lowest, responsive, responsible bidder as Teichert Construction. The bid protest period concluded on September 8, 2022, at 4 pm, with one protest filed by the second low bidder George Reed, Inc. (George Reed). Transportation is bringing this item back to the Board to hear and decide the bid protest and to subsequently award the construction contract.

The protest filed by George Reed claimed the following:

- 1) George Reed claims that Teichert Construction's (Teichert) bid is non-responsive because they failed to list a cold plane/grinding subcontractor on their Subcontractor List in the Proposal. George Reed further claims that Teichert listed Anrak as a chosen subcontractor in their Disadvantaged Business Enterprise (DBE) Good Faith Effort Documentation showing them as a chosen subcontractor.
- 2) George Reed claims that Teichert listed the Bid Item Description for Austin Enterprise on the Subcontractor List as "5 - Crack Treatment for Geosynthetic Reinforcing Pavement Fabric (Grindable)", which is not the bid item description.
- 3) George Reed Claims that Teichert's bid is non-responsive because they did not check an option on the Iran Contracting Act Certification Form in the Proposal.

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

- 1) California Public Contract Code (PCC) Section 4106 states the following:
If a prime contractor fails to specify a subcontractor or if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself. If after award of contract, the prime contractor subcontracts, except as provided for in Sections 4107 or 4109, any such portion of the work, the prime contractor shall be subject to the penalties named in Section 4111.

A bidder must list all subcontractors in excess of one-half of 1 percent or \$10,000, whichever is greater in accordance with the Subletting and Subcontracting Fair Practices Act, commencing with Section 4100 on the Subcontractor Listing form in the Proposal. This form must be submitted at time of bid. This form was completed by Teichert showing Kent's Oil Service and Austin Enterprise as the only two subcontractor's that will be performing work on the project in excess of one-half of 1 percent or \$10,000, whichever is greater. The DBE documentation showing Anrak as an "operated grinder rental" was listed in the Good Faith Effort documentation and is not contractually binding use of a subcontractor for purposes of the Subletting and Subcontracting Fair Practices Act.

Teichert did not list a subcontractor for Bid Item 4 - Cold Plane Asphalt Concrete Pavement. In accordance with PCC 4106, Teichert must either self-perform this item or rent only the grinding equipment and provide their own operator to run the equipment. The fact that Teichert chose to self-perform this item does not render the bid non-responsive.

- 2) Bid Item 5 as shown in the Proposal Pay Items and Bid Price Schedule of the Proposal is titled "Geosynthetic Pavement Reinforcing Fabric (Grindable)." Crack seal (crack treatment) is an

item of work that is incorporated into bid item 5 per Sections 7.6.2 and 7.8 of Exhibit F. Teichert listed two separate subcontractors that will each be performing a portion of Bid Item 5. Adding additional written description in the "Bid Item Description" box is not grounds for finding a bid non-responsive.

- 3) The Iran Contracting Act of 2010 (Public Contract Code section 2200 et seq) prohibits any person who is on a list developed by the Department of General Services of the State of California as engaging in investment activities in Iran or engages in investment activities in Iran from submitting a proposal for, or to enter into or renew, a contract with a public entity for goods or services in excess of one million dollars (\$1,000,000) or more. Public Contract Code section 2204 goes on to require that the County to "require a person that submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a public entity with respect to a contract for goods or services of one million dollars (\$1,000,000) or more to certify, at the time the bid is submitted or the contract is renewed, that the person is not identified on a list created pursuant to subdivision (b) of Section 2203 as a person engaging in investment activities in Iran described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5, as applicable." The County complied with this requirement by including the "Iran Contracting Act Certification" form.

The County agrees that Teichert did not check one of the three options on the "Iran Contracting Act Certification" form on page P-8 of the Proposal. The three options that could have been selected were (1) I'm not on the anti-contracting list; (2) this form isn't necessary because the contract value is less than \$1,000,000; or (3) the public agency has given Teichert a waiver. The only option Teichert could have selected was option 1 as this Contract is not less than \$1,000,000 and Teichert has not been granted a waiver by the County nor does the County have any record that they requested a waiver. Public Contract Code section 2203 authorizes the Department of General Services of the State of California maintains a List of Ineligible Businesses that it determines engage in investment activities in Iran for purposes of the Iran Contracting Act of 2010. Transportation verified that Teichert is not included on the Iran Contracting Act List. Teichert did sign the form, which shows they were aware of the form. Teichert also signed the Proposal on page P-18 which states "the Bidder's execution on the signature portion of this Proposal shall constitute an endorsement and execution of those affidavits, declarations and certifications which are part of this Proposal."

The Notice to Bidders and 48 CFR §14.405 allows Transportation to waive any irregularity found in a bid. It is well established law that a bid is responsive if it conforms to the public agency's specifications to the contract. It is also well established that a bid that a public agency may award a bid that substantially conforms to the call for bids and may waive any irregularities so long as the irregularities do not affect the amount of the bid or give the bidder an advantage or benefit not allowed other bidder. (See *DeSilva Gates Construction, LP v. Department of Transportation* (2015) 242 Cal.App.4th 1409, 1422-1423.) Teichert's failure to check an option on the "Iran Contracting Act Certification" form is an immaterial difference and does not "effect the price, quantity, quality, or delivery" of the Project. This irregularity in the bid also does not give Teichert an advantage offered to other bidders because Teichert did sign the Form and the County considers that in substantial compliance with the purpose of the intent of the Form. The County has no indication that Teichert is not in compliance with the Iran Contracting Act of 2010 and would enforce this certification against Teichert if the County subsequently learns that Teichert is not in compliance, just as the County would for any other

bidder.

Transportation recommends award of the Construction Contract to Teichert Construction, who submitted the lowest responsive, responsible bid.

Public Contract Code section 22050 requires that the Board review the emergency action and determine that there is a need to continue the action. The next step in this process is for Teichert to, within 5 days, submit signed versions of the Contract Documents and the insurance and bonds required by the Contract Documents for review by Transportation, Risk Management, and County Counsel. The Director of Transportation will then sign and fully execute the Contract Documents at the end of that review process, as authorized by Resolution 162-2022.

Transportation is hopeful to have a fully executed contract in place next week. Transportation staff intends to schedule a pre-construction meeting with the awarded contractor the week of September 12, 2022, who will then provide the exact timeline of the work to be completed. With the quick turnaround, Transportation anticipates repairs to begin prior to the end of September.

Public Contract Code section 22050(c)(2) authorizes the Director of Transportation to terminate the emergency action at the earliest date that conditions warrant. Following the full execution of the Contract, the Director of Transportation will determine that the emergency action is terminated.

CalOES, County staff, and FEMA continue to communicate about the project. Transportation provided FEMA with a list of all the repair locations, and FEMA performed site inspections in conjunction with Transportation and CalOES. FEMA will create a report, and then CRC will review and make a final determination.

Authorize the Transportation Director to Sign Escrow Agreement:

Pursuant to the Contract Documents, 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 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 of Transportation to execute the Escrow Agreement. Upon satisfactory completion of portions of the Contract and upon written notification from the Director of Transportation, 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.

ALTERNATIVES

N/A

PRIOR BOARD ACTION

#22-1341, 7/19/22, #23

#22-1418, 8/23/22, #23

OTHER DEPARTMENT / AGENCY INVOLVEMENT

N/A

CAO RECOMMENDATION / COMMENTS

Approve as recommended.

FINANCIAL IMPACT

Transportation has estimated the construction phase of the Project is \$4,508,240.50, which includes a bid of \$3,606,592.40, construction management totaling \$540,988.86 and contingency of \$360,659.24. Transportation is hopeful that a portion of eligible expenses related to the cost of the repairs will be reimbursed with Federal Emergency Management Agency (FEMA) funding (90%) and California Governor's Office of Emergency Services (CalOES) funding (7.5%). Total reimbursement amounts and the timing of reimbursements have not yet been determined, and any costs FEMA determines as ineligible will need to be covered by the County. Costs for this work will be funded by the amount set aside in the Caldor Designation for the County match amount (\$400,000), with the remainder of the cost paid initially with FY 2022-23 General Fund contingency. It is expected that approximately \$2.2 million in FEMA reimbursement funds will be received by the County for costs due to the Sheriff's Office emergency response efforts (\$1.7 million) and the Health and Human Services Agency emergency animal sheltering efforts (\$0.5 million). As these funds are received, they will replenish General Fund contingency. The remaining costs will be paid by the General Fund, using contingency funds that have been set aside in excess of Board policy.

CLERK OF THE BOARD FOLLOW UP ACTIONS

N/A

STRATEGIC PLAN COMPONENT

Public Safety, Infrastructure

CONTACT

Rafael Martinez, Director

Department of Transportation