

Memorandum



Date: October 21, 2014
To: Honorable Chairwoman Rebeca Sosa
and Members, Board of County Commissioners
From: Carlos A. Gimenez
Mayor
Subject: Supplement to Contract Award Recommendation for Construction Contract No. S-869: Construction of an Industrial Waste Deep Injection Well System at the County's Central District Wastewater Treatment Plant

Supplement to:
Agenda Item No. 8(0)(2)

This supplement is presented to report that a bid protest was filed with the Clerk of the Board on August 13, 2014 by Layne Christensen Company. In accordance with the bid protest procedures, as set forth in Section 2-8.4 of the Code of Miami-Dade County and Implementing Order 3-21, a Hearing Examiner was appointed, and a hearing was conducted on August 28, 2014. The Hearing Examiner upheld the Mayor's contract award recommendation to Youngquist Brothers, Inc. as the lowest responsive and responsible bidder. As such, the bid bond issued for Contract No. S-869, which was set to expire on October 7, 2014, was extended for thirty (30) days. See Exhibit A.

Background

The main components of the scope of work for this construction contract consist of furnishing all materials, labor and equipment necessary to construct one exploratory and test injection well approximately 10,000 feet deep and a second (redundant) injection well to approximately 3,500 feet deep.

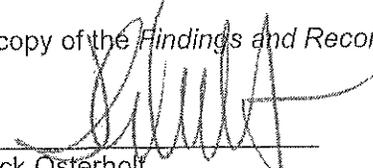
The solicitation was advertised on May 8, 2014. On June 9, 2014, WASD received two (2) bids for this project from Youngquist Brothers, Inc. and Layne Christensen Company. The recommendation to award is being made to the lowest responsible, responsive bidder, Youngquist Brothers, Inc. Youngquist Brothers, Inc.'s bid is \$19,887,887.00, over \$1.73 million less than Layne Christensen Company's bid.

In its bid protest, Layne Christensen Company argued that the bid submitted by Youngquist Brothers, Inc. was neither responsive nor responsible. Layne Christensen Company asserted that the County acted arbitrarily and capriciously in overlooking its own bid criteria when reviewing the bids submitted. Specifically, Layne Christensen Company argued that Youngquist Brothers, Inc. did not comply with certain requirements of the "Qualifications of Bidders" in the Advertisement to Bid because the bid submitted by Youngquist Brothers, Inc. 1) did not provide a list of the equipment to be used and/or lacked sufficient detail about the equipment to be used and 2) failed to meet the equipment performance requirements necessary to perform the terms of the contract.

The County opposed Layne Christensen Company's bid protest on several grounds. Among other things, the County argued that 1) the equipment to be used by Youngquist Brothers, Inc. was described sufficiently in the bid submitted and met the requirements of the Advertisement to Bid, and 2) the equipment Youngquist Brothers, Inc. intends to use for the project is adequate to complete the work. In addition, the County argued that it did not act dishonestly, arbitrarily or capriciously during its review of the bids. The review was performed in consultation with the design consultant, MWH Americas, Inc. and the County Attorney's Office.

The Hearing Examiner, Honorable Judge Jeffrey Rosinek, concluded that the award recommendation was appropriate and should be upheld. There was no evidence that the County acted illegally, arbitrarily, fraudulently or capriciously. Accordingly, he denied the bid protest filed by Layne Christensen Company.

A copy of the *Findings and Recommendations* filed by the Hearing Examiner is attached. See Exhibit B.


Jack Osterholt
Deputy Mayor



September 11, 2014

Mr. Isaac Smith
Manager, Construction Contracts Section
Miami-Dade County
P.O. Box 330316
3071 SW 38 Avenue
Miami, FL 33233-3016

Re: Bid Bond Extension Contract No. S-869
"Central District Wastewater Treatment Plant Industrial Waste Deep Injection
Well System"

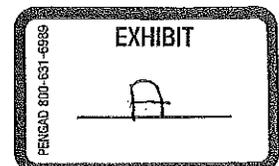
Dear Mr. Smith,

In light of the delays due to the bid protest, please accept this letter as a formal 30 day extension to the bid bond, set to expire 10/07/2014, provided on behalf of Youngquist Brothers, Inc. by Ironshore Indemnity Inc. Please direct any questions to my attention.

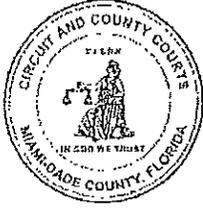
Regards,

A handwritten signature in black ink, appearing to read 'Brook T. Smith'.

Brook T. Smith
Attorney-in-Fact
Ironshore Indemnity Inc.



Harvey Ruvin
CLERK OF THE CIRCUIT AND COUNTY COURTS
Miami-Dade County, Florida



CLERK OF THE BOARD OF COUNTY COMMISSIONERS
STEPHEN P. CLARK CENTER
SUITE 17-202
111 N.W. 1st Street
Miami, FL 33128-1983
Telephone: (305) 375-5126

September 10, 2014

B. Michael Clark, Jr., Esq.
Siegfried, Rivera, Hyman, Lerner, De La Torre,
Mars & Sobel, P.A.
201 Alhambra Circle, 11th Floor
Coral Gables, Florida 33134

Re: Bid Protest – Contract S-869
Central District Wastewater Treatment Plant Industrial Waste Deep Injection Well System

Dear Mr. Clark:

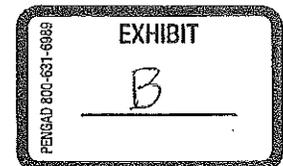
Pursuant to Section 2-8.4 of the Code and Implementing Order 3-21, forwarded for your information is a copy of the Findings and Recommendation filed by the Honorable Judge Jeffrey Rosinek, Hearing Examiner, in connection with the foregoing bid protest hearing which took place on August 28, 2014.

Should you have any questions regarding this matter, please do not hesitate to contact this office.

Sincerely,
HARVEY RUVIN, Clerk
Circuit and County Courts

By 
Christopher Agrippa, Director
Clerk of the Board Division

CA/fed
Attachment



B. Michael Clark, Jr., Esq.
Siegfried, Rivera, Hyman, Lerner, De La Torre,
Mars & Sobel, P.A.

Page Two

September 10, 2014

cc: Honorable Chairwoman Rebeca Sosa, and
Members, Miami-Dade County Board of County Commissioners (via email)
Carlos A. Gimenez, Mayor, Miami-Dade County (via email)
Alina Hudak, Deputy Mayor (via email)
R.A. Cuevas, County Attorney (via email)
Hugo Benítez, Assistant County Attorney (via email)
Henry Gillman, Assistant County Attorney (via email)
Jenelle Snyder, County Attorney's Office (via email)
Rita Gonzalez, County Attorney's Office (via email)
Cindy Paxton, County Attorney's Office (via email)
Shanika A. Graves, County Attorney's Office (via email)
Charles Anderson, Commission Auditor (via email)
Elizabeth Owens, BCC Legislative Analyst, Commission Auditor's Office (via email)
Bill Johnson, Director, Miami-Dade Water & Sewer Department (via email)
Isaac Smith, Manager, Construction Contract Section, WASD (via email)
Jean Marie Rodriguez, Construction Contract Section, WASD (via email)
mrk@komravlaw.com
mcubrama@srhl-law.com
ssobel@srhl-law.com
Layne Christensen Company
Youngquist Brothers, Inc.

Miami-Dade County Board of County Commissioners

2014 SEP 10 PM 2:20

Findings and Recommendations of Hearing Examiner

Pursuant to Section 2-8.4 Miami-Dade county Code and Implementing Order 3-21

In Re: Bid Protest of Contract S-869, Central District Wastewater Treatment Plant, Industrial Waste Deep Injection Well System.

Pursuant to Section 2-8.4 Miami-Dade County Code and Implementing Order 3-21, the above styled protest was referred to the undersigned Hearing Examiner. A hearing was conducted on August 29, 2014 at the Water and Sewer Headquarters Building in Miami Dade County (County). Having reviewed and considered all documents and evidence submitted prior to and at the hearing, submissions of all parties and argument of counsel and testimony by witnesses at the hearing, the undersigned hearing examiner makes the following findings of fact and recommendations:

BID HISTORY CONTRACT S-869

This matter concerns sealed bids for a project known as "Central District Wastewater Treatment Plant Industrial Waste Deep Injection Well System," Contract No. 5-869. On May 8, 2014, the County advertised its invitation to Bid for Contract S-869. Bids were to be turned in on June 9, 2014 in two separate envelopes. **Envelope ONE** of bids was to contain the bidders qualifications as required and found in the advertisements for bids, and **Envelope TWO** was to contain the bid/proposal.

The advertisement for bids stated, "(T)he project consists of furnishing all materials, labor and equipment necessary to construct one exploratory and test injection well approximately 10,000 feet deep and a second (redundant) injection well to approximately 3,500 feet deep. The project also includes, but not limited to, constructing drilling pilot holes, monitoring wells, furnishing and installing all well casing, performing well development, environmental monitoring, all required testing, start-up and all other appurtenant and miscellaneous items and work for a complete, functional and satisfactory installation."¹

¹ Advertisement for bids, Miami-Dade County, Florida, page 2.

The bid request listed general requirements for the bid proposal which included:

"2.b. That the bidder will have available to do the work at the proper time or times, adequate equipment and facilities , listing such equipment and facilities in such detail that they could be quickly and accurately checked."²

There were many other requirements of concern in the bid protest which included: that the bidder **shall** (emphasis added) submit evidence that the drill rig used in digging the well was required to meet additional requirements, such as :

- a. API rated to meet hook load requirements;
- b. Able to set up Class III Blow Out Preventer stack;
- d. Lifting devices suitable for all construction and testing activities.

Additional explanation of requirements were presented in Contract No. S-869, PCTS No. 12661, Addendum No. 1, May 29, 2014., on Page 5, under the heading of general Requirements, is found the same admonition as above:

"2.b ... the bidder will have available to do the work at the proper time or times, adequate equipment and facilities , listing such equipment and facilities in such detail that they could be quickly and accurately checked."

Between May 29, 2014 and June 3, 2014, the County issued three Addenda for the project. As a result, two questions that were submitted had relevance to the bid:

1. Will Miami-Dade Water And Sewer Department (MDWASD) still require a P.E. seal if drilling is certified? (Seal not required if Rig is certified.)
2. And a request for information about the BOP and sequence of construction.

Finally, any issues not raised prior to the opening of bids are deemed waived (Miami-Dade Implementing Order 3-21.)

Two bids were received by MDWASD on June 9, 2014, one from Layne Christensen Company (Layne) and the other Youngquist Brothers, Inc. (YBI). YBI's bid was \$1,730,000.00 lower than Layne's.

On June 13, 2014 Layne submitted a letter challenging YBI's bid as **non-responsive and not responsible** (emphasis added.) The letter was written by Edward McCullers, General

² Advertisement for bids, Miami-Dade County, Florida, page 2.

Manager, Injection Wells, Layne Company. The letter stated that there were four grounds for Layne's challenge:

1. Lance claimed that YBI failed to submit evidence that the drill was API rated to meet hook load requirements (including setback and potential wind load.)
2. Lance claimed that YBI failed to submit evidence that the Drill Rig was capable of setting up over a Class III Blow Out Preventer Stack.
3. Lance claimed that YBI failed to submit evidence that its lifting devices were suitable for the construction and testing activities.
4. Lane claimed that YBI sequence of work was not consistent with the contract's requirements.³

Mr. Isaac Smith, County's Contracting Officer for the project, evaluated the assertions raised by Layne with assistance of the County's engineering project consultant – MWH Americas, Inc., and Virginia Walsh, Chief of MDWASD's Hydrogeology Section and Mr. Ed Rectenwald, P.G. from the MWH Team, and determined that YBI was indeed responsible and its bid was responsive. (Affidavit of Isaac Smith, p.2)

On June 19, 2014, MWH issued its memorandum that both Layne and YBI were both responsive and that the County should select the lowest bidder, YBI. As a result of the decision, on August 8, 2014, the County recommended that Contract S-869 to be awarded to YBI.

STANDARD OF REVIEW

The County's contracting decision may be overturned **only** if the county's decision is arbitrary or capricious, or if it is a result of dishonesty, fraud, illegality, oppression or misconduct. See, Liberty County v Baxter Asphalt & Concrete, Inc., 421 So.2d 505,507 (Fla.1982); City of Cape Coral v Water Services of America, Inc., 567 So.2d 510 (Fla 2d DCA 1990.)

"A public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on honest exercise of the discretion, will not be overturned by a court even if it may appear erroneous or if reasonable persons may disagree." ⁴

³ Affidavit of Isaac Smith, page 2.

⁴ Liberty County v. Baxter Asphalt & Concrete, Inc., 421 So.2d at 507 (Fla. 1982); See Miami -- Dade County v Church and Tower Inc., 715 So.2d 1084,1089 (Fla. 3rd DCA. 1998) (...where bid award decision is based on facts reasonably tending to support it , courts should not interfere, even if decision may appear incorrect.)

An arbitrary decision is one not supported by facts or logic. A capricious action is one taken without thought or reason or irrationally. ⁵

A Bid must be responsive and responsible according the Miami-Dade county Ordinance. "Responsiveness deals with a bidder or proposer's unequivocal promise, as shown on the face of the response to the solicitation, to provide the items or services called for by the material terms of the solicitation Responsiveness deals with whether the effect of a deviation from a solicitation would deprive the County of its assurance that a contract will be entered into, performed and guaranteed according to the County's specified requirements and whether a deviation would adversely affect the competitive process by placing a bidder or proposer in a position of advantage over other bidders or proposers or by otherwise undermining the necessary common standard of competition. Examples of issues involving responsiveness include ... whether a bidder or proposer qualified a response by stating that it would provide something less than what was called for. Responsiveness issues are generally not curable after bid or proposal submission as the bidder or proposer could opt in or out of the process at its will, depriving the County of a valid offer and placing that bidder or proposer at a material advantage over other responders who have made firm offers."⁶

Section 2-8.4(a) of Code of Miami-Dade County provides that before the Board or any committee hears any protests of a competitive bid or request for proposal, or request for qualifications, administrative staff shall request the County Attorney to determine whether the bid or proposal in question is responsive. Sec. 2-8.4(a) further provides that the Board and any committee shall be bound by the determination of the County attorney with regard to the issue of responsiveness.

Whether a bid is responsive concerns a bidder's unequivocal promise, as shown on the face of its bid, to provide the items or services called for by the material terms of the bid. In the Matter of Red John's Stone, Inc., 1998 WL 869550 (Comp. Gen. 1998)

⁵ See Agrice Chemical Co. v Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978.)

⁶ Section 1.01 and 5.03(D) of the Miami-Dade County Home Rule Charter and Section 2-8.4 of the Code of Miami-Dade County.

“Responsibility deals with whether the bidder or proposer can perform as provided in the solicitation. In general, solicitation requirements for information relating to a bidder or proposer’s financial condition, capability, experience and past performance pertain to responsibility. The term responsible is not limited in its meaning to financial resources and capabilities but include a bidder or proposer’s honesty and integrity, skill and business judgment, experience and capacity for carrying out the proposed work, previous conduct under other contracts and the quality of previous work performed. The terms of a solicitation document cannot ordinarily change an issue of responsibility into one of responsiveness. A bidder or proposer need not demonstrate compliance with solicitation requirements pertaining to its responsibility in order for its bid or proposal to be deemed responsive and evaluated. Information regarding a bidder or proposer’s responsibility may be furnished up to the time of award.”⁷

How should the above be considered by the Hearing Examiner? A Hearing Examiner’s role, under the County Code, is well established. “A Hearing Examiner cannot ... replace (his or her) discretion for that of the County, regardless of whether or not the hearing officer thinks the County Staff, the County Manager, or the Board reached a wrong result.”⁸

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

This Hearing Examiner read, reviewed and examined all or in part of the following:

- (1) Layne’s bid protest with supporting affidavits and authorities;
- (2) the County’s Memorandum in Opposition to Layne’s bid protest with supporting affidavits and authorities;
- (3) the Memorandum submitted by YBI; and the exhibits, including all bid documents, produced at the hearing, and
- (4) Heard examination and arguments by counsel and the live testimony on August 28, 2014 at 9:30 a.m. at the Miami-Dade Water & Sewer Department, 3071 S.W. 38th Avenue, Miami, Florida, of the following individuals at the hearing: Ed Rectenwald, Isaac Smith, Dr. Virginia Walsh, Philip Waller, P.E., Edward McCullers, Harvey Youngquist, Jr., Bill Musselwhite and Dr. Lee Guice, P.E..
- (5) Bid Protest Hearing Transcript Contract S-869

⁷ Section 1.01 and 5.03(D) of the Miami-Dade County Home Rule Charter and Section 2-8.4 of the Code of Miami-Dade County.

⁸ In re: Bid protest of Metropolitan Life Insurance Co., RFP No 673, Findings of Fact and Conclusions of Law (December 22, 2008) (The one thing a hearing examiner cannot do ... is replace its discretion for that of the County Manager regardless of whether or not the hearing officer thinks the County Manager, the staff or the Board got it wrong.) Taken from: Miami-Dade County’s Memorandum in Opposition of Layne Christensen Company’s Bid Protest, August 26, 2014, at page 5.

- (6) County's Findings and Recommendations of Hearing Examiner
- (7) Intervenor Youngquist Brothers Inc.,s Hearing Brief
- (8) Layne Christensen Company's Proposed Written Findings and Recommendations Pertaining to the Protest of Layne Christensen Company To The Notice of Intent To Award Contract S-869 to Youngquist Brothers, Inc.
- (9) Index of Authorities from Miami-Dade County's Memorandum in Opposition to Layne Christensen Company's Bid Protest S-869
- (10) Layne Christensen Company's Legal Authority

The Key question for review is "whether the County acted in an illegal, dishonest, fraudulent, oppressive, arbitrary or capricious manner in recommending to award Contract S-869 to YBI as the lowest responsive and responsible bidder. In reaching that determination, the Hearing Examiner must evaluate two issues upon which Layne based its bid protest: (1) whether the failure to include a formal equipment list with its bid made YBI's bid non-responsive, and (2) whether the rig YBI proposes to use is adequate to do the work required by Contract S-869 and capable of setting up over a Class III Blow Out Preventer ("BOP") stack."⁹

Layne argued that, "although YBI's bid made reference to an 'attached ... Firm Equipment sheet' (YBI Bid at page 74) and 'a listing and description of all major owned equipment' (YBI Bid at page 101), no list was actually attached. MDWASD's witness, Isaac Smith, the MDWASD Contracts Manager responsible for the Contract, testified live and by affidavit. His June 13, 2014 contemporaneous notes of his review of bidders' qualifications¹⁰ indicate that MDWASD did not find YBI's referenced Firm Equipment Sheet. At the Hearing, Mr. Smith, as well as other witnesses, identified equipment described in YBI's bid, and concluded that the inclusion, even though not in listing form, complied with the requirements of the Advertisement for Bid."¹¹

Layne further argued that despite identifying the major equipment needed for the project, the five identical electronic rigs, nowhere in YBI's bid did it demonstrate that the equipment was adequate for YBI to perform the terms of the bid contract.

⁹ Layne's original bid protest included four items; however, at the start of the hearing, the parties agreed to narrow the hearing to only the two issues set forth here, thereby eliminating any need to discuss the issue of whether Youngquist's rig is properly rated under the American Petroleum Institute standards and whether Youngquist has suitable lifting devices for all construction activities and testing. (as taken from County's Findings and Recommendations submission.) The original four (4) issues can be found previously in this Findings and recommendations on page 3, footnote 6.)

¹⁰ Exhibit B to Mr. Smith's Affidavit.

¹¹ Layne's proposed written findings and recommendations, page3.

Contract S-869 requires, among other things, to drill two wells. One was to be an exploratory and test injection well which was to reach a depth of approximately 10,000 feet. Layne stated that they were capable of performing the terms of the contract but questioned whether YBI's equipment could perform such a task. Layne's witness, Mr. Edward McCullers (McCuller) testified at the hearing to Mr. Sobel's question, "So the Layne Rig was sufficient to drill 10,000 feet deep, with 7 inch drill pipe which weighs 35 pounds per foot. (after objections) McCuller responded 'Correct'¹²" As to YBI rigs, McCuller stated that according to YBI's own DSL document, referenced in the Guice placard, the YBI's rigs would drill only to 6,174 feet, not the 10,000 required. (Page 118, Transcript).

Layne also stated that YBI presented no evidence that their rigs were "capable of setting up over a minimum of a Class III Blow Preventer (BOP) stack ...". Layne argued that all YBI presented in their bid was a conclusory statement that their, "E-Rig is a state of the art drilling platform capable of setting up over any configuration of class of BOP stack."¹³

Layne concluded, that "YBI's bid was not responsible as YBI did not show its 'capacity for carrying out the proposed work'. Layne further argues, nor was YBI's bid responsive because, as in *Twehous*, the list of equipment required by the Advertisement, while 'intended to reflect on the bidder's responsibility may nonetheless render a bid nonresponsive when it indicates that the bidder does not intend to comply with a material requirement.'¹⁴

Layne further opined that YBI's bid was not responsible (and non-responsive). Layne also believed that MDWASD acted arbitrarily and capriciously in overlooking its own bid criteria (that bidders show that they had available equipment adequate to perform the work). *Emerald Contracting Management v. Bay County Board of County Commissioners*, 955 So. 2d 647 (Fla. 1DCA 2007); *Academy Express, LLC. v. Broward County*, 53 So.3d 1188 (Fla. 4DCA 2011).¹⁵ In its final argument, Layne stated, "Based on the foregoing, YBI's bid was neither responsible nor responsive and afforded a competitive advantage over (LCC) Layne. The Notice of Intent to Award was arbitrary and capricious and the protest must be SUSTAINED."

¹² Transcript of Hearing August 28, 2014 at pages 109 and 110.

¹³ YBI Bid at page 73 as taken from Layne Christensen Company's proposed written findings and recommendations ... pages 5 and 6.

¹⁴ Taken from Layne Christensen Company's proposed written findings and recommendations ... page 8, citing the Comptroller General Opinion in the *Matter of Twehous Excavating Company, Inc.* B-208189 (1983):

¹⁵ Taken from Layne Christensen Company's proposed written findings and recommendations ... page 8-9.

YBI responded to the Bid Protest by Layne by stating that they, “complied with the instructions and requirements mandated by the County, and thus the YBI Bid is ‘responsive.’ The County appropriately reviewed all relevant facts and criteria and found YBI is ‘responsible.’ YBI’s Bid was ...the ‘lowest bid.’ All three of these determinations were reached by the County in the exercise of its broad discretion and only after conducting deliberate, good faith and reasonable analysis of all pertinent requirements imposed under the Invitation for Bid...”¹⁶

The County’s Contracting Officer Isaac Smith reviewed YBI’s bid and, with the assistance of the County’s engineering consultant MWH Americas, Inc. (“MWH”) and County employee Dr. Virginia Walsh, determined that YBI’s bid was responsive. They found it contained all required executed forms and affidavits; obligated YBI to perform the Contract S-869 requirements; and contained sufficient written evidence of the equipment that YBI intended to utilize to perform the work, including “cut sheets” and various statements about its equipment on pages 30, 66-72 and 101 of its bid.¹⁷

Specifically, Contract S-869 required the drilling of an exploratory well 10,000 feet deep though the contract required the bidder to have drilled only three wells of 2,500 feet with a minimum of 24 inches outside diameter. Philip Waller, Professional Engineer with MWH Americas, Inc., the engineer of record for the county, confirmed the YBI’s five rigs were identical with API ratings signed and sealed by Guice Engineering Sciences (Guice). Waller found that as a result of this information YBI’s E-Rigs would be acceptable for job under Contract S-869. Additionally Waller states, “It is also my opinion that YBI will be able to meet the hook load requirements with the box on box structure in place.”¹⁸

Virginia M. Walsh, Ph.D, P.G., the Senior Professional Geologist and Chief of Hydrogeology Section at MDWASD, supervises the professional staff of geologists and engineers, also stated that the electric five rigs would be, which are API rated as per Guice, acceptable to perform all the work under Contract S-869. That the contract required API rated, not certified rigs. In Florida, there is no regulation requiring that drill rigs are to be API Certified. Dr. Walsh further clarified in her affidavit, “(A)lthough I have not seen a YIB E-Rig set up over a Class III Blow Out Preventer (BOP) stack, I am confident that YBI’s E-Rig will be able to set up over such a BOP for this job....Based on the seismic data and my experience as a hydrogeologist, I do not expect the Class III BOP to be needed for this

¹⁶ Intervenor Youngquist Brothers Inc.’s Hearing Brief, at page 2

¹⁷ County’s Findings and Recommendations of Hearing Examiner, at page 2

¹⁸ Affidavit of Philip Waller, PE, August 25, 2014, at page 2.

project.... Additionally, there is no concern that the BOP will be needed until drilling through the Florida Aquifer at a 4,000 foot depth has been completed.”¹⁹

CONCLUSIONS OF LAW

Based on the information submitted with its bid, YBI’s bid was responsive. It contained the necessary executed affidavits and forms and constituted a promise to perform the Contract at the set bid price. While it did not contain a single-spaced list of equipment, YBI’s bid contained sufficient written evidence, including “cut sheets” to allow the County to quickly and accurately check the equipment to be used. Moreover, the lack of a formal exhibit list did not provide YIB with any type of competitive advantage because it is required to perform the Contract for the price it bid.

I find that the lack of a formal equipment list in the bid is really a question of bidder responsibility, see Bean Dredging Corp. v. U.S., 22 Cl. Ct. 519 (1991), and materials provided in the bid may be supplemented with additional information, including past history with the bidder, prior to award of the Contract. Although I believe there was sufficient evidence regarding the equipment provided by YBI at the time the bid was submitted, the additional information provided in response to this bid protest has cemented the fact that YBI has the equipment necessary to perform Contract S-869 and is a responsible bidder. In fact, the County’s consulting engineer opined that YBI is capable of performing the work based on a review of its submission and its past performance. I conclude, with regard to the issue raised by Layne about YBI’s equipment list, that the County was not arbitrary and capricious in recommending that YBI be awarded Contract S-869.

I find credible evidence, based on the record, including the testimony of the County’s representatives and consultants as well as the representatives from YBI, that YBI’s E-Rigs are adequate to perform the Contract. As part of the submittal process required in Contract S-869’s technical specifications, prior to the rigs being used for the project, YBI will be required to provide a signed and sealed certification from a Florida P.E. that its rigs are adequate to perform the work, in addition to what they have submitted and that which was testified at the hearing on August 29, 2014. I also find that the set-back issue raised by Layne is a “diversion” because YIB has discretion as to the means and methods it intends to employ to complete this Contract and has testified that it will use multiple trips, as opposed to stacking, to bring the pipe onto the rig so that the weight limitations of the rig will not be exceeded. With regard to these issues raised by Layne, the County

¹⁹ Affidavit of Virginia M Walsh, Ph.D., P.G., August 26, 2014, at pages 2-3.

was not arbitrary or capricious in finding that YBI is a responsible bidder and submitted a responsive bid.

Finally, although the evidence submitted by YBI regarding the capability of its rig to set up over a Class III BOP was not extensive, I find that this is a question of responsibility, not responsiveness. The County had sufficient evidence based on what was submitted with YBI's bid and its past history with YBI's rigs to determine that the YBI rigs will be able to accommodate the Class III BOP required for the Contract. Further, neither Layne nor YBI currently owns the "box on box" substructure as this is the first project of this kind and, therefore, this type of equipment has never before been needed by an injection well driller in Florida. The County will review and verify the "box on box" substructure once it has been built and rated. Again, I do not find that the County acted arbitrarily or capriciously in recommending YBI for the award of Contract S-869.

This is a low price bid award, which required the successful bidder to meet certain minimum qualifications that the County would verify through due diligence in order to be deemed responsible. Based on the record, the County relied on YBI's low price bid and its own due diligence, which confirmed YBI to be in compliance with the bid requirements. Layne has failed to establish any illegal conduct or arbitrary or capricious decisions on the part of the County in recommending award to YBI whose bid is \$1.7 million less than Layne's. To the extent YBI had a technical irregularity in its bid submission, it did not limit or modify YBI's obligation to perform the terms of the Contract nor did it provide YBI with an economic advantage over Layne.²⁰

Based upon careful consideration of reviewing all exhibits, law, carefully listening to witnesses, hearing argument of counsel and reviewing foregoing findings, I find the County did not act arbitrarily or capriciously in (1) finding YBI to be a responsive and responsible bidder and (2) recommending that it be awarded Contract S-869.

²⁰ See Intercontinental Properties Inc. v State of Florida Department of Health and Rehabilitative Services, 606 So.2d 380 (3d DCA) at 387 (finding there is "a strong public policy in favor of awarding contracts to the low bidder, and an equally strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another.")

RECOMMENDATION

Based on the foregoing finding of fact and conclusions, this Hearing Examiner finds the record demonstrates that the County acted in good faith and had a rational basis in recommending YBI for award of Contract S-869. Therefore, I recommend a denial of Layne's bid protest.

SUBMITTED THIS 10th Day of September, 2014.



JEFFREY ROSINEK,
Hearing Examiner

This report of Findings and Recommendations of Hearing Examiner is being filed with the Clerk of the Board on the 12th day September, 2014, with directions to forward a copy of these findings to the County Attorney's Office, Youngquist Brothers Inc., and Layne Christensen Company and any other interested party.