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CLERK OF THE BOARD
OF COUNTY COMMISSIONERS
MIAMI-DADE COUNTY, FLORIDA

Memorandum

MIAMI-DADE COUNTY

Date: June 30, 2009

To: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

Agenda Item No. 8(P)(1)(A)

Resolution No. R-836-09

From: George M. Burgess
County Manager

Subject: Recommendation for Award in the Amount of $4,258,613.60 between Intercounty Engineering, Inc. and Miami-Dade County for Project Entitled Midway Pump Station, Located within Commission District 6 (Project No. 20080069 ESP GOB; Contract No. 20080069)

Recommendation

It is recommended that the Board of County Commissioners (Board) approve the Contract Award Recommendation for the Midway Pump Station (Project No. 20080069 ESP GOB), in the amount of $4,258,613.60, between Intercounty Engineering, Inc. (Intercounty) and Miami-Dade County. This project was approved and executed by the Clerk of the Board on April 7, 2009 pursuant to Section 2-8.2.7 of the County Code which governs the ESP Ordinance. Although this project is listed in the ESP Ordinance, pursuant to Section 2-8.2.7(4)(d)(4) of the Miami Dade County Code, as a result of the Bid Protest the project is to be approved by the Board.

Scope

The Midway area is bounded by NW 10 Street to the north, NW 7 Street to the south, NW 78 Avenue to the east, and NW 84 Avenue to the west. This project requires drilling underneath SR 826 to allow the discharge of stormwater into the Northline canal located on the east side of SR 826.

The work under this contract consists of, but is not limited to, furnishing all supervision, labor, required materials, equipment, tools and performing all operations necessary for the construction and installation of a stormwater pump station, including emergency generator and associated drainage piping, to supplement the neighborhoods drainage system currently in place. Work also includes horizontal directional drilling, drainage structures, miscellaneous drainage improvements, grading, installation of sand cement riprap, sodding, and miscellaneous roadway restoration including construction of concrete curb and gutters, and sidewalks where needed in accordance with the construction plans and specifications contained herein. The contract period is stipulated at three hundred sixty-five (365) days and the contingency period is thirty-six (36) days. A standard payment and performance bond is required for this project.

Fiscal Impact/Funding Source

The fiscal impact will be approximately $4,258,613.60 and will be funded from the Building Better Communities General Obligation Bond (GOB) Program ($547,152.00) and Stormwater Utility Fund ($3,711,461.60). The base contract amount is $3,784,030.00, but the total allocated amount is $4,258,613.60, which is inclusive of the contingency

($378,403.00) and dedicated allowances ($96,180.60). The capital budget project no. is 554340, from book page no. 226, funding years: from prior years' funds through 2008-09 funds.

The estimated annual operations cost is approximately $2,535.71 and the annual maintenance cost is $41,611.00. The funding source to be utilized is from the Stormwater Utility. The life expectancy is approximately 30 years.

Track Record/Monitor

The contractor, Intercounty has not performed any work for Miami-Dade County since 1996. The Firm History Report as provided by the Department of Small Business Development (SBD) lists two (2) awarded contracts from the Water & Sewer Department (WASD) awarded in 1995 for project entitled Pump Station and with PWD awarded in 1996 for a Guardhouse Sanitary Sewer Connection. The Office of Capital Improvements (OCI) database has no records for this firm. PWD staff has contacted various agencies throughout the State regarding the company's performance, officials from the Seacoast Utility Authority, Town of Lantana, City of Pompano Beach and Palm Beach County all gave Intercounty high marks in their performance and quality of work.

Following PWD's standard operating procedures, after award of this contract, a pre-construction meeting will be scheduled. The project will be assigned to Mr. Otto Rojas, P.E., Project Coordinator, for day to day responsibilities.

According to the Florida Department of State, Division of Corporations, Intercounty's Company Principals are: Maurice A. Hynes, H.P. Hanes and Luis Cordova and the Company Qualifier is H.P. Hynes. The Company's address is listed as: 1925 N.W. 18 Street, Pompano Beach, Florida 33069 and they have been in business for fifteen years.

Background

The project was initiated to provide flood relief for the area known as the "Midway Neighborhood." Roadways within this neighborhood flood severely during major storm events causing a potentially hazardous situation by rendering the roadways impassable to residents, business owner/customers, and emergency vehicles. The proposed project pump station and emergency generator was determined to be necessary after hydraulic modeling of the area indicated that a conventional drainage system would be limited in its ability to provide the required level of flood protection. The drainage area to be serviced by this pump station is approximately 32 acres.

PWD staff submitted the referenced project to the Department of Small Business Development's Review Committee. The Review Committee met on January 21, 2009, reviewed Project No. 20080069 and recommended an overall 5% ($208,121.65) Community Small Business Enterprise (CSBE) contract measure for this project. The Community Workforce Program (CWP) is not applicable for this project. Responsible Wages are required.

On December 22, 2009 the subject project was advertised. Twenty-eight (28) engineering contractor firms purchased contract documents and six (6) firms proffered a bid.

On February 11, 2009 the bids were opened and the three (3) lowest responsive, responsible bids were as follows: the lowest bidder, Intercounty Engineering, Inc., proffered a base bid of $3,784,030.00, 16% below the County's base cost estimate; the second lowest bidder, Central Florida Equipment Rentals, Inc., proffered a base bid of $4,072,248.52, 8% over the lowest bidder; the third lowest bidder, Solo Construction Corp., proffered a base bid of $4,073,444.00, .03% over the second lowest bidder.

On April 10, 2009, a bid protest was filed with the Clerk of the Board by Central Florida Equipment Rentals, Inc. (Central Florida) on the subject project. Central Florida, the second lowest bidder, argued that the lowest bidder's bid was not responsive because Intercounty's subcontractor (A.R.E. Utility Construction Inc.) is not properly licensed to perform the proposed horizontal boring and drilling work as required by the Invitation to Bid.

A bid protest hearing was held on May 1, 2009, with the Hearing Officer issuing a ruling on May 11, 2009. The Findings of Fact and Recommendations of the Hearing Examiner were filed with the Clerk of the Board on May 12, 2009 (attached). The Hearing Officer ruled in favor of the County, recommending to deny the bid protest of Central Florida and concur with the recommendation of the award to Intercounty. It was determined that Intercounty has the proper licensure and experience to self perform the work and was responsive in its bid submission.

Assistant County Manager

MEMORANDUM

(Revised)

TO: Honorable Chairman Dennis C. Moss and Members, Board of County Commissioners

DATE: June 30, 2009

FROM: R. A. Cuevas, Jr. County Attorney

SUBJECT: Agenda Item No. 8(P)(1)(A)

Please note any items checked.

_____ **"4-Day Rule" ("3-Day Rule" for committees) applicable if raised**

_____ **6 weeks required between first reading and public hearing**

_____ **4 weeks notification to municipal officials required prior to public hearing**

_____ **Decreases revenues or increases expenditures without balancing budget**

_____ **Budget required**

_____ **Statement of fiscal impact required**

_____ **Bid waiver requiring County Mayor's written recommendation**

_____ **Ordinance creating a new board requires detailed County Manager's report for public hearing**

✓ **Housekeeping item (no policy decision required)**

_____ **No committee review**

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 8(P)(1)(A)
6-30-09

RESOLUTION NO. **R-836-09**

RESOLUTION APPROVING A CONTRACT AWARD RECOMMENDATION IN THE AMOUNT OF $4,258,613.60 BETWEEN INTERCOUNTY ENGINEERING, INC. AND MIAMI-DADE COUNTY FOR PROJECT ENTITLED MIDWAY PUMP STATION, LOCATED WITHIN COMMISSION DISTRICT 6 (PROJECT NO. 20080069 ESP GOB; CONTRACT NO. 20080069)

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board approves the Contract Award Recommendation in the amount of $4,258,613.60 between Intercounty Engineering, Inc. and Miami-Dade County for Project Entitled Midway Pump Station, Located within Commission District 6 (Project No. 20080069 ESP GOB; Contract No. 20080069) in substantially the form attached hereto and made a part hereof.

The foregoing resolution was offered by Commissioner **Jose "Pepe" Diaz** , who moved its adoption. The motion was seconded by Commissioner **Rebeca Sosa** and upon being put to a vote, the vote was as follows:

Dennis C. Moss, Chairman **aye**
Jose "Pepe" Diaz, Vice-Chairman **aye**

Bruno A. Barreiro	**absent**	Audrey M. Edmonson	**aye**
Carlos A. Gimenez	**aye**	Sally A. Heyman	**aye**
Barbara J. Jordan	**aye**	Joe A. Martinez	**absent**
Dorrin D. Rolle	**aye**	Natacha Seijas	**aye**
Katy Sorenson	**aye**	Rebeca Sosa	**aye**
Sen. Javier D. Souto	**absent**		

The Chairperson thereupon declared the resolution duly passed and adopted this 30th day of June, 2009. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF COUNTY
COMMISSIONERS

HARVEY RUVIN, CLERK

By: **DIANE COLLINS**
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

Edward Z. Shafer

MEMORANDUM

TO: LISTED DISTRIBUTION

DATE: April 16, 2009

FROM: Kay M. Sullivan, Director
Clerk of the Board Division

SUBJECT: Bid Protest
Project No. 20080069 ESP GOB
Contract No. 20080069
Protester: Midway Pump Station

Pursuant to Section 2-8.4 of the Code and Implementing Order 3-21, Bid Protest Procedures, a bid protest was filed in the Clerk of the Board's Office on April 10, 2009, in connection with the foregoing Contract. The protest was filed by Andrew S. Douglas, attorney, representing Central Florida Equipment Rentals, Inc

A filing fee in the amount of $3,000.00 was submitted with the bid protest.

If you have any questions pertaining to this protest, please contact my assistant in charge of bid protest procedures Fara C. Diaz at Ext. 1293.

KMS/fcd
Attachments

RECEIVED
APR 16 2009
Contracts & Specifications
Public Works Department

DISTRIBUTION:
Board of County Commissioners
George Burgess, County Manager
Ysela Llort, Assistant County Manager
Hugo Benitez, Assistant County Attorney
Henry Gillman, Assistant County Attorney
Charles Anderson, Commission Auditor
Esther L. Calas, P.E., Director, Public Works Department
Johnny Martinez, P.E., Director, Office of Capital Improvements
Frank Aira, Contract Manager, Public Works Department
Otto Rojas, Project Manager, Public Works Department
Jennifer Glazer-Moon, Director, Office of Strategic Business Management
Miriam Singer, Director, Department of Procurement Management
Walter Fogarty, Department of Procurement Management

CLERK OF THE BOARD
2009 MAY 12 AM 8:07
CLERK, CIRCUIT & COUNTY COURTS
DADE COUNTY, FLA.

CLERK OF THE BOARD OF COUNTY COMMISSIONERS
MIAMI-DADE COUNTY, FLORIDA

IN RE: BID PROTEST OF CENTRAL FLORIDA EQUIPMENT RENTALS, INC.
PROJECT NO. 20080069 ESP GOB, Contract No. 20080069
MIDWAY PUMP STATION

FINDINGS OF FACT AND RECOMMENDATIONS OF HEARING EXAMINER

FINDINGS OF FACT

Pursuant to Section 2-8.4 Code of Miami-Dade County, the above-styled protest was referred to the undersigned Hearing Examiner. The undersigned reviewed the bid protest filed by the Petitioner Central Florida Equipment Rentals, Inc. (hereinafter "Central Florida") in response to a recommendation for award of Project No. 20080069 ESP GOB, Contract No. 20080069 commonly known as "Midway Pump Station" (hereinafter "the project") pursuant to an invitation to bid. The recommended bidder was InterCounty Engineering (hereinafter "InterCounty"). All parties were well represented by counsel of their own choosing and the County was represented by the County Attorney's Office. A hearing was conducted on May 1, 2009 before the undersigned Hearing Examiner. Sworn testimony was presented, exhibits were entered into evidence and, written arguments and proposed recommendations were submitted by all parties.

Having reviewed and considered the documents, evidence and testimony presented at the hearing, the written protest and submissions of the parties and

May 11 09 09:37p p.3

argument of counsel, the undersigned Hearing Examiner makes the following findings and recommendation:

1. The County issued an Invitation to Bid for the project known as the Midway Pump Station Project located at N.W. 7th Street and N.W. 78th Avenue, Miami, Florida.

2. Six bids were received by the County. Central Florida and InterCounty each submitted bids for the project.

3. Five of the six bids were deemed responsive by the County and on February 9, 2009 the bids were opened. At the time of the bid opening it was announced that InterCounty was the lowest bidder followed by Central Florida as the second lowest bidder.

4. The project manual provides that the failure to submit the appropriate licensure and qualifications for the work may render a bid non-responsive.

5. Section A-4 requires that contractors list its proposed subcontractors to the County at the time of bidding. Specifically, it states that "[f]ailure to include the required listing shall render the bid or proposal non-responsive."

6. At page 11 of 12 of the Instructions to Prospective Contractor Section 16A requires:

The Contractor must hold at the time his proposal is submitted:

> A. An active, current valid certificate, as listed below, qualifying the Contractor to perform the work, contemplated by these Contract Documents. Failure to hold the appropriate certificate at the time of award shall render the submittal package non-responsive.

7. Addendum No. 5 required that all bidders provide evidence of prior experience with projects of a similar nature to the project's scope of work. "Failure to provide adequate proof of the required certifications and details of experience and capacity listed below may result in declaring the bid non-responsive." It goes on further and states that if the bidding firm intends to subcontract the horizontal directional boring portion of the work, they must meet the submittal requirements already set forth, including experience and license information.

8. These same addendum required that at the time of the bid, the bidder must hold a valid, current and active General Contractor's certification. InterCounty was at the time of its bid a certified General Contractor.

9. All bidders were required at the time of submission to list all potential subcontractors with the appropriate experience and licensure for the horizontal boring and drilling portion of the work to be performed. InterCounty listed A.R.E. as a potential subcontractor, but did not include any proof of licensure.

10. InterCounty's bid was timely filed, signed and contained all required affidavits and all forms were properly and completely filled out. The bid bond was submitted and InterCounty took no exceptions to the requirements in the ITB.

11. It is undisputed that A.R.E., the listed subcontractor of InterCounty is not properly licensed to perform the proposed horizontal boring and drilling work as required by the bid.

CONCLUSIONS OF LAW

Under the provisions of 49 C.F.R. Section 26.53, the Invitation to Bid and Addendum documents, there is an abundance of support to conclude that the proof of licensure was intended as a matter of responsiveness. The failure to list any subcontractors that the General Contractor intends to use to complete the job is a matter of responsiveness. The sole issue here is whether InterCounty's bid was responsive. Central Florida argues that the bid was not responsive solely because InterCounty's subcontractor is not properly licensed.

A bid is responsive as submitted when it offers to perform the exact thing called for in the ITB and acceptance of the bid will bind the contractor to perform in accordance with the ITB's material terms and conditions, unless something on the face of the bid either limits, reduces or modifies the obligation to perform in accordance with the terms of the ITB.

Addressing the issue of whether InterCounty was responsive when submitting their bid we must look to the bid on its face to determine responsiveness. The bid was timely filed, signed and contained the necessary information regarding the General Contractor and its experience and licensure, and the bid submitted took no exception to any terms or conditions of the ITB. The bid did include a list of subcontractors which included A.R.E. However it is undisputed and concluded that A.R.E. is not properly licensed to do the horizontal boring and drilling work as required by the ITB.

InterCounty was the lowest bidder. On its face the bid submitted by InterCounty was responsive. The General Contractor is properly licensed and is

ready and able to perform the work as promised in its bid, notwithstanding its inability to use its listed subcontractor A.R.E. Responsiveness deals with the bidder's unequivocal promise, as shown on the face of the bid, to provide the services and items called for by the material terms of the ITB, whereas the issue of a bidder's responsibility concerns its ability to perform as promised in its bid. Whether or not a bidder has the experience, knowledge, skills, judgment and facilities to carry out the work is a question of bidder responsibility. See *Engineering Contractors Association of South Florida v. Broward County,* 789 So.2d 445 (Fla. 3d DCA 2001).

Central Florida argues that InterCounty was not responsive because its subcontractor is not properly licensed to perform the work for which it was listed. Section A-4 required the inclusion of all **proposed** subcontractors the bidder **may** use to complete the work set forth in the ITB (emphasis added). InterCounty did just that. Addendum No. 5 went further by requiring adequate proof of the certifications, details of experience and capacity to be included or the bid **may** be considered non-responsive. It was not until later, after submission of the bids, that it was determined that the listed subcontractor did not hold the proper licensure to perform the work for which it was listed. So long as InterCounty, as the General Contractor can perform the work set forth in the ITB at the price provided in the bid, the bid is responsive. Nothing required InterCounty to use the subcontractor, but only to list and include any proposed subcontractors it might use.

Central Florida argues that we should rely in part on the finding in *Harry Pepper & Assocs. v. City of Cape Coral,* 352 so.2d 1190 (Fla. 2nd DCA 1977). The entire scheme of bidding on public projects is to insure the sanctity of the competitive atmosphere prior to and after the actual letting of the contract. In order to insure this desired competitiveness, a bidder cannot be permitted to change his bid after the bids have been opened, except to cure minor irregularities. In *Pepper* it was determined that the brand of pumps would not be acceptable to the City. The Court went on to state that "the test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders. *Supra,* 352 So.2d at 1193.

Central Florida also relies on the findings in *E. M. Watkins & Company, Inc. v. Board of Regents*, 414 So.2d 583 (Fla. 1st DCA 1982). In that case, the act of "not listing subcontractors as required" was shown to create a competitive advantage by the non-compliant bidder. In *Watkins*, the Court points out that the unfair bidding advantage one contractor derives from the failure to list required subcontractors is generally threefold. Clearly the failure to list required DBE in a timely fashion could create an unfair advantage in that, it would allow for additional opportunity to shop price, permit a successful bidder to accept additional subcontractors and more. That is not the case here. Here, the subcontractor was listed, though later determined not to be properly licensed.

Notwithstanding, InterCounty stands ready and able to perform the work at the price stated under its own licensure.

Watkins deserves further discussion here because it involves a contract bid pursuant to state law. The ITB in dispute is a local government bid issued pursuant to Miami-Dade County Code Provisions Sections 2-8.1(f) and 10-34. The Miami-Dade Code provisions allow for a substitution of subcontractors or suppliers upon written approval of the County. It does not however, provide for a renegotiation of the bid price or terms.

There is no evidence that InterCounty's proposed use of A.R.E. as a subcontractor provided an unfair or competitive advantage over others. InterCounty must demonstrate its ability to perform the horizontal boring and drilling work itself, no matter the cost. As an alternative, pursuant to the Miami-Dade County Code Provisions, it may submit and request a substitute subcontractor, but cannot change the bid for that portion of the work. In either case, InterCounty is bound by its original bid amount and must now be evaluated to determine whether it is competent to complete the work as set forth in the ITB, a matter of responsibility.

The prevailing policy is again set forth by the Third District Court in *Robinson Electrical co., Inc. v. Dade County,* 417 So.2d 1032 (Fla. 3d DCA 1982). The Court stated:

> [2] Although a bid containing a material variance is unacceptable, *Gladstein v. City of Miami,* 399 So.2d 1005 (Fla. 3d DCA), *rev. denied,* 407 So.2d 1102 (Fla. 1981), not every deviation from the invitation is material.

> In determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity, the courts have applied two criteria-first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. *Robinson* at 1033 and 1034.

RECOMMENDATION

On the basis of the Findings of Fact and Conclusions of Law, it is the recommendation of this Hearing Officer to deny the bid protest of Central Florida Equipment Rentals, Inc. and concur with the recommendation of the award of the Midway Pump Station, Project No. 20080069 ESP to InterCounty Engineering. Notwithstanding the inability of the listed subcontractor, A.R.E. to be properly licensed, InterCounty was responsive in its bid submission. Central Florida's bid protest fails here because InterCounty was the lowest responsive bidder.

LOREE SCHWARTZ FEILER
HEARING EXAMINER

cc via e-mail and facsimile:
Edward Z. Shafer, Asst. County Attorney
Vincent F. Vaccarella, P.A., Attorney for Central Florida
Clerk of the Court, Miami-Dade County

LAW OFFICES OF

VINCENT F. VACCARELLA, P.A.

A PROFESSIONAL ASSOCIATION

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Thursday, April 09, 2009

VIA FEDERAL EXPRESS

Clerk of the Board of County
Commissioners (Hand Delivery)
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111 NW First Street, Suite #17-202
Miami, Florida 33128

Intercounty Engineering, Inc.
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Pompano Beach, Florida 33069

County Attorney's Office
111 Northwest First Street, Suite 2810
Miami, Florida 33128
Fax: (305) 375-5634

CLERK OF THE BOARD
2009 APR 10 AM 10: 51

****NOTICE OF INTENT OF BID PROTEST****

Bidder: CENTRAL FLORIDA EQUIPMENT RENTALS, INC.
Project: MIDWAY PUMP STATION, Project No. 20080069 ESP ("Project")

Dear Clerk of the Board of County Commissioners.:

The undersigned counsel represents Central Florida Equipment Rentals, Inc. ("Central Florida"). Please accept this letter to be Central Florida's formal written protest of the County's award of the Project to Intercounty Engineering, Inc. ("Intercounty")

Our initial review of the bid submissions indicates that Central Florida was the lowest responsive and responsible bidder for the Project and is therefore the only entity entitled to the award of the Project. Pursuant to the Miami-Dade's Procurement Code at 2-8.1(f) which requires that bidding contractors list its proposed subcontractors to the County at the time of bidding, Intercounty has listed A.R.E. Utility Construction, Inc. to perform the directional drilling portion of the work beneath the Palmetto Expressway. However, a review of A.R.E.'s licensure indicates that A.R.E. does not maintain an active

license in Florida and accordingly is unqualified and unlicenced to perform such work pursuant to Fla. Stat. 489.128.

Accordingly, Intercounty's bid must be deemed nonresponsive for failing to provide the County with proper assurances that its work will be performed by qualified and licensed contractors.

Submitted with this Notice of Intent of Bid Protest is Central Florida's public records request for relevant information relating to the merits of this protest. At this time, Central Florida does not possess a list or other knowledge of the identities of the participants in the competitive bidding process for this Project. Accordingly, we are hereby requesting that the County provide an extension of time for Central Florida both to serve copies of this notice on the competitive bidding participants, and for it to submit supporting documents to the County until 3 days after Central Florida receives a complete response to its public records request.

For these reasons, Central Florida is requesting that the County uphold this protest and properly award it the Contract for the Project. Lastly, Central Florida hereby reserves its rights to modify the grounds for this protest until such time after Central Florida has had an opportunity to completely review all the bid documents with respect to this Project. Further, we ask that the County respond in writing acknowledging receipt of this intent to bid protest, and further indicating that the County has stayed the award of this contract to Intercounty until Central Florida has completed this bid protest.

We look forward to meeting with you to resolve this matter.

Sincerely,

ANDREW S. DOUGLAS

LAW OFFICES OF
VINCENT F. VACCARELLA, P.A.

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