



Board of Supervisors Memorandum

October 1, 2013

**Briefing for Appeal on Pima County Solicitation No. 103853
Magee Road Improvements: La Canada Drive to Oracle Road (AZ77)**

Background

On August 22, 2013 the Pima County Procurement Department opened bids for Solicitation No. 103853 – Magee Road Improvements: La Canada Drive to Oracle Road (AZ77). This project is the third of three segments of Magee Road/Cortaro Road to be improved. The other two segments are complete or nearing completion.

Select Development and Construction, Inc. (Select) was the apparent low bidder with a bid of \$9,974,990.20. Borderland was second low with a bid of \$10,139,522.42. A notice for recommendation of award was issued on September 3, 2013. Borderland filed a timely protest the following day contending that Select's bid should be declared non-responsive for failure to submit a complete subcontractors list and asserting that the contract should therefore be awarded to Borderland as the second low bidder. In response, Select asserted informally they were licensed to perform all of the non-subcontracted work. The Procurement Director dismissed the protest for failure to raise a valid basis for protest on September 11, 2013, and Borderland filed this appeal on September 17, 2013.

The Federal Overlay

This project is funded in significant part by a grant from the Federal Highway Administration (FHWA) through the Arizona Department of Transportation (ADOT). As a consequence, it is subject to a broad array of federal requirements. Two in particular are especially relevant to this protest:

- Federal regulations stipulate that any determination that a low bid is nonresponsive (or the low bidder non-responsive) must obtain the concurrence of the FHWA Administrator for the Arizona Division before award may be made to the second low bidder. 23 C.F.R. § 634.114(f)(2013)
- This project is subject to the federal Disadvantaged Business Enterprise (DBE) program as implemented by ADOT. The program regulations, at 49 C.F.R. Part 26.11, require ADOT to create and maintain a bidders list of DBE and non-DBE firms seeking participation on Federal-aid highway construction projects. In support of this objective, we require on behalf of ADOT that all bidders, not just the low bidder, submit before 4:00 P.M. on the fourth day after bid opening a list of all subcontractors that provided bids or quotes to that bidder, even if they were not going to be used, that we then forward to ADOT on the following day. The ADOT

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documents state that failure to provide this information within the stated time "shall be cause for the bidder to be deemed nonresponsive."

The Subcontractor List Requirement

To deter bid shopping by prime contractors, County Invitations to Bid for construction require that a contractor submit with its bid a list of the subcontractors it intends to use in the performance of the work and state further that the County reserves the right to reject any bid based on submission of an incomplete list of subcontractors. This same section, however, also provides for additions or changes in subcontractors with the approval of the County, generally a matter for the administering department.

The Protest and Decision

Borderlands initial September 4, 2013, protest challenged the proposed award to Select on the basis that Select failed to submit a complete subcontractor list. Select's subcontractor list identified three subcontractors totaling roughly nine percent of their total bid. Borderland contended this was inadequate and would require we believe that Select would self-perform tack coat, concrete barrier placement, and several other aspects of the work and pointed to their own more extensive subcontractor list for comparison. Borderland contended we should declare Select's bid nonresponsive and linked it to the County's efforts to discourage bid-shopping. For their part, Select commented that they were licensed to do everything not covered by the subcontractor list submitted with their bid.

Responsiveness is a serious matter that should be determined only on the basis of fact-based evidence. In our review of this protest, we found that the available evidence provided little or no support for Borderland's allegations. In particular:

- As the chart below shows, there was a wide range of subcontracting levels among the seven bidders:

Contractor	Total Subcontract Amount	Total Bid	% Subcontract Amount	# Subcontractors Listed	# Trades Listed
Select	\$875,000.00	\$9,974,990.20	9%	3	3
Borderland	\$2,066,146.11	\$10,139,522.42	20%	14	18
Markham	\$4,574,363.95	\$10,192,712.61	45%	15	14
Achen Gardner	\$954,747.00	\$10,447,313.30	9%	6	6
Hunter	\$2,856,975.50	\$10,628,281.43	27%	12	12
Ashton	\$1,002,761.00	\$10,790,114.73	9%	8	8
Meridian	\$1,723,770.00	\$10,866,461.00	16%	11	11

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- Three of the seven bidders, including Select, proposed subcontracting that amounted to nine percent of their bid. There was nothing to indicate this was unusual.
- Select has completed two jobs for Pima County (SE Shooting Range for Public Works, and Valencia Street Lighting for DOT), are in the midst of two additional jobs (La Canada/River to Ina for DOT, and Homer Davis Elementary School Transportation Enhancements for DOT) and are the low bidder for this project. Despite this recent activity, the Procurement Department has received no subcontractor complaints that Select is bid shopping. We confirmed with the Manager of the Department of Transportation's Field Engineering Division that he also has heard none.
- Due to the complex nature of construction projects of this size and the varying capabilities/-available capacities for a project, a contractor makes decisions on structuring their bid to meet the requirements for the solicitation and completing the project. As the chart above illustrates, there can be a high level of variability with regard to subcontractor utilization on any given project that also can vary from project to project for an individual contractor. Borderland's own proposed subcontractor utilization on recent projects, for example, has ranged from a low of six subcontractors for the Camino de Oeste: Los Reales to Valencia project to a high of twenty-seven for the more complex La Cholla: Magee to Overton project.
- Borderland does not challenge that Select, in fact, did comply with the solicitation's requirement for submission of a subcontractor list. Instead, Borderland alleges that Select's list is not "complete", e.g., that there should be more subcontractors on the list, with no fact-based evidence in support.
- Select did respond in time to ADOT's more comprehensive subcontractor listing requirement. We are aware of no ADOT objections or concerns regarding Select's submission.

As the foregoing suggests, because of the wide variability in subcontracting between and among contractors, answering the question whether a subcontractor list is "complete" for a particular contractor on a particular project can be very complex. For this reason, we typically will not question the adequacy of a subcontractor list absent other indicators of bid shopping -- subcontractor complaints for instance, or fact-based evidence.

In this particular instance, there was virtually no evidence supporting Borderland's allegations. Consequently, any determination that Select's bid was nonresponsive for failure to submit a "complete" subcontractor list would have had to be improperly based on conjecture rather than fact-based evidence. For this reason, the Procurement Director

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concluded that Borderland had not stated a valid basis for protest and dismissed its protest.

Additionally, although we have no experience seeking the approval of the FHWA Administrator for the Arizona Division for a determination that the low bidder is nonresponsive, it seems logical that it would be difficult if the only basis for the determination were the unsupported and self-serving allegations of the second-low bidder, particularly where the low bidder satisfied federal requirements.

Borderland's Appeal

On September 17th, Borderland timely filed an appeal with the Clerk of the Board challenging the Procurement Director's decision. The appeal contests the following two specific aspects of the decision:

First, Borderland challenges a paragraph in the decision that acknowledged federal funding and observed that there were federal requirements to which the County must defer and which, in some respects, restrict the County's ability to reject a bid. Borderland mischaracterizes this as "a convenient way . . . to address the protest and not a responsible way to deal with potential bid shopping and what we believe is a nonresponsive bid." It appears that Borderland simply missed that this was a reference to 23 C.F.R. § 635.114(f)(2013), which requires the concurrence of the FHWA Administrator for the Arizona Division in any determination that the low bidder is nonresponsive on an FHWA-funded project.

Second, Borderland complains of the observation in the decision that Select advised informally that it was licensed to do all of the work that was not covered by its subcontractor list. Borderland believes "it should require more than a General Contractor simply stating they are licensed to do the work for the County to accept that they will actually perform the work as verbally asserted." This assertion incorrectly assumes this conclusion was reached. Neither Borderland nor Select provided the fact-based evidence that would have supported their respective positions under a protest. As a consequence, there is no valid basis for this protest.

The Procurement Department regards bid shopping as a serious matter and stresses it at contractor and subcontractor meetings, as Borderland acknowledges. However, Borderland contrasts this with the assertion that when the time came to act on it, the Procurement Department "[has] simply deferred to ADOT or taken a contractor's unsubstantiated word for it." This is again a mischaracterization of the Procurement Director's decision. The Procurement Department neither deferred to ADOT nor accepted the unsubstantiated word of any contractor, either Select or Borderland.

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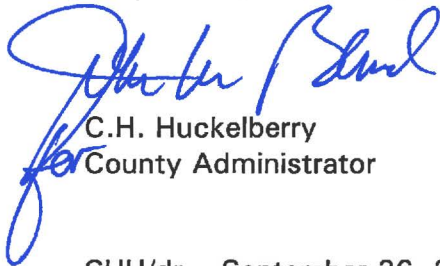
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Recommendation

The Procurement Department continues to actively discourage bid shopping and believes that the lowest, responsive bid in this solicitation was that of Select. Each apparent low bid is reviewed for compliance with the solicitation requirements, including the subcontractor list, proper license(s) and compliance with federal requirements, if any. It is recommended that the appeal be denied consistent with the facts of the matter.

Respectfully submitted,



C.H. Huckelberry
County Administrator

CHH/dr – September 26, 2013

c: George Widugiris, Director, Procurement Department
Priscilla Cornelio, Director, Transportation Department