

COUNTY OF SAN MATEO

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Inter-Departmental Correspondence

Date: April 5, 2001

Board Meeting Date: April 10, 2001

TO: Honorable Board of Supervisors
FROM: Neil R. Cullen, Director of Public Works
SUBJECT: Crystal Springs Trail Extension and Resurfacing Project
(Project No. ODO55, F-36 (335))

RECOMMENDATION

Adopt a resolution rejecting previous bids and calling for new bids for the Extension and Resurfacing of the Crystal Springs Trail.

Previous Board Action

Approved Plans and Specifications, determined prevailing wage scales and called for sealed proposals for the above-mentioned project.

Key Facts

Section 22038 of the Public Contract Code provides that a public agency may at its discretion reject all bids as presented and re-advertise the work for new bids.

We are recommending that your Board reject bids and re-advertise the work for new bids as the second low bidder has challenged the County's right to award a contract to the low bidder, and the second bidder's bid is greater than the Engineer's Estimate for the work.

Discussion

On April 3, 2001, bids were accepted for this project. The lowest bid received was from W R. Forde Associates at \$399,526 The engineer's estimate was \$500,000. A summary of bids received is as follows:

- 1. W R. Forde Associates \$ 399,526.00
2. Interstate Grading and Paving \$ 518,105.50
3. C F. Archibald Paving \$ 667,275.00

The second lowest bidder, Interstate Grading and Paving (Interstate), is contesting this bid under the premise that the bid from W.R. Forde Associates was not delivered to the County Manager/Clerk of the Board of Supervisors by the time required in the resolution calling for bids that was adopted by your Board. A copy of Interstate's letter and the letter from their attorney is attached.

Honorable Board of Supervisors

**Subject: Crystal Springs Trail Extension and Resurfacing Project
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We have discussed the circumstances with County Counsel and he concurs that rejecting all bids and re-advertising for the work as allowed by the Public Contract Code is a prudent course of action, as the possible arguments from either the low and second low bidder could unnecessarily delay this work, and inasmuch as the second bidder's price is greater than the Engineer's Estimate for the work.

We are also recommending if your Board decides to reject all the current bids, that you adopt a resolution calling for sealed proposals of the work which are proposed to be received no later than 2:00 p.m. on May 1, 2001.

Fiscal Impact

The staff time involved in re-bidding the project is estimated to be \$500 and would be paid for with Park Acquisition and Development Funds.

There is no impact to the General Fund.

A form of resolution has been approved by County Counsel, and the Director of Environmental Services and the Parks Director concurs in our recommendation.



Neil R. Cullen
Director of Public Works

NRC.BEK:JAL:sdd

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Attachments: Copy of Interstate's letter
Copy of Letter from Interstate's Attorney

cc: W. R. Forde Associates
Interstate Grading and Paving
C. F. Archibald Paving Contractor
Marcia Raines, Director of Environmental Services
Mary Burns, Parks
Gary Lockman, Parks
Milt Mares, County Counsel



INTERSTATE

GRADING & PAVING INC
Cont Lic No 366020

April 4, 2001

The Honorable Warren Slocum
County Clerk
County of San Mateo
401 Marshall Street
Redwood City, CA 94063

Re: Crystal Springs Trail Extension San Bruno Avenue to Hillcrest Boulevard

Sub: **PROTEST OF AWARD OF CONTRACT**

Dear Mr. Slocum:

Our firm submitted the lowest responsible and complete bid on the above-named project and as such has a substantial, economical, financial, and business interest in the proposed announced intention of awarding the contract on the Crystal Springs Trail Extension San Bruno Avenue to Hillcrest Boulevard contract to anyone other than Interstate Grading & Paving, Inc.

It has been brought to our attention that a bid from W. R. Forde Associates was submitted after the 2:00 p.m. deadline

W. R. Forde's bid was not "time-stamped" due to the fact that the time for receipt of bids had expired prior to the submission of their bid. This bid was delivered directly to the counsel chambers, not to the County Clerk's Office. Their bid was delivered after our bid had already been opened, read aloud and recorded. This incident occurred after the 2:00 p.m. bid time specified in the Notice to Contractors.

Please refer to the Caltrans Standard Specifications, Section 2-1.08 - "...Whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid will not be received after that time..." No exceptions may be taken to the Public Contract Code, Section 10168 - "Whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time." The actions the County Clerk's representatives were clearly in violation of these laws.

It is our contention that the County Clerk's representatives were incorrect in their decision to receive and open the late bid. This incident is particularly disturbing when one considers the fact that our bid had already become public record, prior to the submission of W. R. Forde's bid.

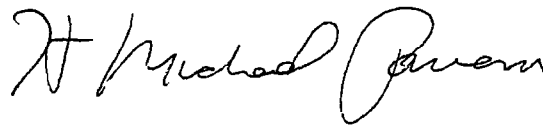
Now, therefore, we hereby protest any award to any firm other than Interstate Grading & Paving, Inc. and allege that our firm submitted the lowest responsive bid and request a hearing for determination as required by law. You are obligated by law to defer the contract award until a hearing for the resolution and determination of this protest.

Please be informed that this firm will be present at the hearing and request the opportunity to present further evidence and information.

Please send Interstate Grading & Paving, Inc. notice of time and place of the hearing.

Very truly yours,

Interstate Grading & Paving, Inc.



H. Michael Pariani
President

cc: Mr. Thomas F. Casey, County Counsel
✓ Mr. Neil Cullen, Director of Public Works
Mr. Brian Lee, Engineering Division Manager
The Honorable Michael D. Nevin, President, Fifth District
The Honorable Jerry Hill, Vice President, Second District
The Honorable Mark Church, First District
The Honorable Richard S. Gordon, Third District
The Honorable Rose Jacobs Gibson, Fourth District
Mr. A. Robert Rosin, Esquire

AHERNE, LEONIDOU & ROSIN
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FACSIMILE TRANSMISSION

DATE: April 4, 2001

TO: *NEIL CULLEN*

NAME	Fax#	Phone#
Thomas F. Casey III, Esq.	650/363-4034	650/363-4697
Clerk of the County of San Mateo	650/363-4843	650/363-4712

FROM: A Robert Rosin, Esq.

RE: Interstate Grading & Paving, Inc. - Crystal Springs Trail Extension

CLIENT/MATTER: 20145-1	Number of Pages, Including Cover 4
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MESSAGE:

THE INFORMATION CONTAINED IN THIS FACSIMILE IS CONFIDENTIAL AND MAY ALSO CONTAIN PRIVILEGED ATTORNEY-CLIENT INFORMATION OR WORK PRODUCT. THE INFORMATION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHOM IT IS ADDRESSED. IF YOU ARE NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY USE, DISSEMINATION DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THE FACSIMILE IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ADDRESS ABOVE VIA THE U.S. POSTAL SERVICE. THANK YOU.

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL US BACK AS SOON AS POSSIBLE.

AHERNE, LEONIDOU & ROSIN
 PROFESSIONAL CORPORATION
 ATTORNEYS AT LAW

PAUL A AHERNE
 JANETTE G LEONIDOU
 A ROBERT ROSIN

COLLEEN CHILD
 PATRICIA WALSH
 STEPHEN K ANDERSON
 LISA D WRIGHT

April 4, 2001

5 THOMAS MELLON CIRCLE
 SUITE 205
 SAN FRANCISCO CA 94134
 (415) 715-2860
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Via Facsimile & Federal Express

Clerk of the County of San Mateo
 555 County Center
 Redwood City, CA 94063

Thomas F. Casey III, Esq.,
 County Counsel
 Hall of Justice and Records, 3rd Floor
 400 County Center
 Redwood City, CA 94063-1662

Re: Crystal Springs Trail Extension San Bruno to Hillcrest Boulevard
 Protest of Award of Contract
 Date of Bid: 2:00 p.m. on April 3, 2001

Dear Sir or Madam,

This office represents Interstate Grading & Paving, Inc., the contractor submitting the lowest responsive, complete and timely bid in connection with the above project. By separate letter, Interstate has submitted a formal protest of the award of the project to any bidder other than Interstate. This letter provides legal authority demonstrating that an award to a bidder other than Interstate would be contrary to law and void. As discussed below, the County is barred by the California Constitution from making any disbursements under a contract issued in violation of competitive bidding laws.

1. The County Cannot Accept A Late Bid

Although there appears to be no California case concerning disqualification of a bidder for failure to submit a bid on time, there is substantial authority from other jurisdictions demonstrating that an agency cannot accept a late bid. See, e.g., Rexton Inc v Minnesota, 521 N.W.2d 51 (Minn. App 1994) (agency could not accept bid that was one minute late); Holly's Inc. v. County of Greensville, 250 Va. 12, 458 S.E.2d 454 (1995) (bid received two minutes late could not be accepted, failure to submit timely bid is not an irregularity which can be waived); Wilton Coach Co., Inc. v. Central High School District No 3 Misc 2d 637, 232 N.Y.S.2d 876 (1962) (district could not accept bid that was two to three minutes late); William F Wilke, Inc. v. Dept. of Army, 357 F. Supp. 88 (D. Ma. 1973) (bid submitted four minutes late could not legally be accepted),

County of San Mateo

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see also 10 E. McQuillin, Law of Municipal Corporations, § 29.70 at 34 (3rd ed. 1981) (late bids cannot be accepted even other bids have not yet been opened).

The bid solicitation on its face required that bids be submitted by 2:00 p.m. The County does not have discretion to waive this requirement and accept W.R. Forde's late bid.

An agency is bound to follow the terms of its solicitation and may be ordered by writ of mandate to do so Pozar v. Dept. of Transportation, 144 C.A.3d 269, 272 (1983), Valley Crest Landscape, Inc. v. Davis, 41 C.A.4th 1432 (1996). To allow solicitation provisions to be disregarded would open the door for fraud, favoritism and undue influence in public contracting, the evils that competitive bidding is intended to prevent. Konica Business Machines USA, Inc. v. Regents of the Univ. of Calif., 206 C.A.3d 449, 456-57 (1988).

The County does not have discretion to waive the lack of a timely bid because such an irregularity has the potential to confer a competitive advantage. Menefee v. County of Fresno, 163 C.A.3d 1175 (1985). Interstate's bid already had been opened and read aloud by the time that W.R. Forde submitted its bid. W.R. Forde therefore had the opportunity to learn the prices of the other bidders; it also had the opportunity, not shared by other bidders, to analyze subcontractor and supplier bids at greater length, and to utilize sub-bids that arrived too late for other contractors to consider.

It is irrelevant whether W.R. Forde actually benefited from having submitted a late bid. So long as the possibility exists that W.R. Forde *might* have benefited, the irregularities in submitting a late bid cannot be waived. Valley Crest Landscape, Inc. v. Davis, 41 C.A.4th 1432 (1996); Konica Business Machines USA, Inc. v. Regents of the Univ. of Calif., 206 C.A.3d at 454. There is a particular danger to the competitive bidding process, as here, where W.R. Forde's noncompliance gave it the ability to compare its bid to those of other contractors, who did not enjoy a similar advantage.

Waiving requirements in favor of some bidders, and not others, would introduce an improper and unfair element of subjectivity into the bid process. City of Inglewood-LA County Civic Center v Superior Court, 7 C.3d 861, 867 (1972) To fail to enforce the 2:00 p.m. deadline be arbitrary and capricious, grounds for setting aside any award to a bidder who did not strictly comply with the deadline. Id.

2. Consequences of An Award to A Bidder Other Than Interstate

A contract awarded to a contractor other than Interstate would be illegal and void. Valley Crest Landscape, Inc. v. Davis, 41 C.A. 4th 1432 (1996); Monterey Mechanical v Sacramento Regional County Sanitation District, 44 C.A.4th 1391 (1996).

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Payment of any funds to another bidder also would violate the California Constitution. Section 10 of Article XI of the Constitution provides that 'a local government body may not ... pay a claim under an agreement made without authority of law.'

A concerned taxpayer, as well as Interstate, may bring an action to enjoin payments on a contract awarded to another bidder and to require the return to the County of any such payments. Rubino v. Lolli, 10 C.A.3d 1059 (1970); Miller v. McKinnon, 20 C.2d 83 (1942)

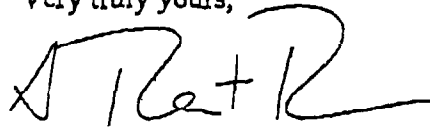
The public policy underlying competitive bidding is so strong that a court is required, on its own initiative, to order the return of payments even if the parties to a lawsuit do not request such an order. Greer v. Hitchcock, 271 C.A.2d 334 (1969). Section 17203 of the Business & Professions Code provides additional authority for orders compelling the disgorgement of payments received under a void contract.

Conclusion

Interstate has years of experience with projects like the Crystal Springs Trail Extension. Interstate has a strong record of successful completion of difficult projects and looks forward to working with the County.

It is our expectation that the County will examine the facts and issues carefully and make an award to Interstate, the contractor that submitted the lowest responsive bid. If the County were to consider an award to another bidder, however, we would ask that the County hold a full and open hearing on all relevant issues. Under applicable law, Interstate would be entitled to the opportunity to present the County with evidence and argument. Please let us know if we can provide you with any additional information.

Very truly yours,



A. Robert Rosin

Resolution No. _____

Board of Supervisors, County of San Mateo, State of California

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**Resolution Rejecting Bids and Adopting Plans and Specifications,
Determining Prevailing Wage Scales and Calling for Sealed Proposals for the
Crystal Springs Trail Extension from San Bruno Avenue to Hillcrest Boulevard**

RESOLVED, by the Board of Supervisors of the County of San Mateo, State of California, that

WHEREAS, this Board of Supervisors did, on **March 13, 2001**, adopt Resolution No **64300**, said Resolution adopted the Plans and approved the Specifications, determined the prevailing wage scales and called for sealed proposals for the resurfacing and extension of Crystal Springs Trail, and

WHEREAS, the Clerk of this Board of Supervisors did, in public on April 3, 2001, open and examine all sealed proposals that were received for the doing of the work referred to in said Resolution No. **64300**, and

WHEREAS, the second lowest bidder has contested the low bidders bid based on the alleged time when said bid was received; and

WHEREAS, the bid of the second low bidder is greater than the Engineer's Estimate for the work, and

WHEREAS, Section 22038 of the Public Contract Code provides that a public agency may at its discretion reject all bids as presented and re-advertise the same work for bids, and

WHEREAS, the Director of Public Works with the concurrence of County Counsel has recommended that all bids originally received for said work be rejected and the work be re-advertised for bids as provided by the Public Contract Code; and

WHEREAS, this Board has considered the recommendation of the Director of Public Works.

NOW, THEREFORE, IT IS HEREBY DETERMINED AND ORDERED that

1. the bids received on April 3, 2001, for said work are hereby rejected; and
2. the Department of Public Works is authorized to issue a call for sealed proposals to be received by the County Manager/Clerk of the Board of Supervisors, Hall of Justice and Records, 400 County Center (formerly 401 Marshall Street), Redwood City, California, San Mateo County, on or before 2:00 p.m., Tuesday, May 1, 2001, in said office in the Hall of Justice and Records, Redwood City, California. Said bids will then be publicly opened and declared in the County Manager/Clerk of the Board of Supervisors offices
3. The Department of Public Works is further directed to cause the Notice inviting sealed proposals to be published for two (2) times in the San Mateo County Times, a newspaper printed and published in this County, and to obtain an affidavit of said publication, a copy of which shall be placed on file with the Clerk of the Board of Supervisors.

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