

Board of Trustees Agenda Item

Board Meeting Date: March 8, 2010

Title of Item: Reject All Bids, Bid Document 1238-142, Soccer and Softball Complex, Foothill College

Background and Analysis:

The Foothill College Soccer and Softball Complex project includes the following work:

1. Demolition of existing multi use fields.
2. New Synthetic Turf for Softball Field including but not limited to dugouts, fencing, backstop, grandstand seating, bullpens, batting cages, retaining walls, flagpole and scoreboard.
3. Natural Turf Field for Soccer including but not limited to fencing, sidewalks, retaining walls, and scoreboards.
4. New Synthetic Turf for Soccer Practice Area including but not limited to fencing.
5. New Modular Building with Restrooms, Storage, and possible Office and Team Rooms.
6. Underground utilities associated with the Project as indicated.

Verde Design, Inc prepared the construction documents. A complete set of all bid documents are on file in the Purchasing Services Department.

At its November 2, 2009 meeting, the Board of Trustees approved a list of eight General Engineering Contractors as pre-qualified to bid on the project. Bid 1238-142 was legally advertised on January 13 and January 20, 2010. The "Invitation to Bid" was also sent to nine (9) builder's exchanges, and advertised in the Daily Pacific Builder, as well as posted on "BidNet" at www.govbids.com. Bids were publicly opened and read on February 16, 2010 at 2 p.m. in Purchasing Services. Six (6) of the eight (8) pre-qualified contractors submitted bids.

The bid documents provided that the contract would be awarded to the lowest responsive and responsible bidder and that lowest bid would be determined in accordance with Public Contract Code (PCC) 20103.8(c) which states:

The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that when taken in order from a specifically identified list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

The bid documents publicly disclosed that the construction estimate was \$3,404,000 and included a list of additive and deductive items.

On February 17, 2010, Purchasing Services received a bid protest letter from ValleyCrest Landscape Development, Inc. (ValleyCrest) that asserts they are the true responsible and responsive low bidder. ValleyCrest's bid protest asks the District to either award the contract to ValleyCrest or reject all bids and readvertise for new bids (see attached letter). ValleyCrest reasons that in determining the bid amounts, the District should not subtract the amounts for the "Deductive Alternates" given that the publicly disclosed funding amount was already sufficient to purchase the Base Bid plus the Additive Alternates.

As the table below shows, if the bid amount is computed based upon Base Bid plus only the Additive Alternates, then ValleyCrest has the lowest bid amount at \$2,777,200 compared to Bothman at \$2,785,940, a difference of \$8,740. However, if the bid amount is computed based upon Base Bid plus both the Additive Alternates and the Deductive Alternates, then Bothman has the lowest bid amount at \$2,707,780 compared to ValleyCrest at \$2,719,200.



PRELIMINARY RESULTS

Bid Recording Sheet		Recorded by																			
ITEM: FOOTHILL COLLEGE SOCCER & SOFTBALL COMPLEX BID DUE DATE/TIME: FEB. 16, 2010 2:00 P.M.				BID 1238-142		Robert A Bothman		ValleyCrest Land. Dev.		Interstate Grading/Paving		Jensen Corp.		OC Jones & Sons		Swinerton Builders					
Base Bid Amount					\$2,699,300.00			\$2,677,000.00			\$3,044,000.00			\$2,881,888.00			\$2,952,000.00			\$2,715,000.00	
Acknowledge Amendment 1					yes			yes													
Bid Bond					yes			yes													
SubContractors List					yes			yes													
PSA					yes			yes													
Bid plus Additive Alternates 1-4 only					\$2,785,940			\$2,777,200			\$3,116,000			\$2,955,888			\$3,056,770			\$2,804,000	
Bid Total per PCC 20103.8(c): Base Bid plus Additive Alternates 1-4 and Deductive Alternates 5-7					\$2,707,780.00			\$2,719,200.00			\$3,064,300.00			\$2,851,888.00			\$3,003,970.00			\$2,746,000.00	
ADD																					
1) Owl Logo					\$16,270			\$17,500			\$16,000			\$17,000			\$16,000			\$17,000	
2) ECO Nights for Sports & Batting Cages					\$23,000			\$15,000			\$21,000			\$10,000			\$25,800			\$21,000	
3) Concrete Paving in lieu of Asphalt Paving					\$36,600			\$55,200			\$25,000			\$33,000			\$49,330			\$41,000	
4) Stadium Seating in lieu of Bench Seating					\$10,770			\$12,500			\$10,000			\$14,000			\$13,640			\$10,000	
DEDUCT																					
5) PA Sound System					(\$54,000)			(\$45,000.00)			(\$40,000.00)			(\$52,000.00)			(\$42,900.00)			(\$42,000.00)	
6) Soccer Scoreboard					(\$9,560)			(\$7,000.00)			(\$6,700.00)			(\$27,000.00)			(\$5,600.00)			(\$10,000.00)	
7) Softball Scoreboard					(\$14,600)			(\$6,000.00)			(\$5,000.00)			(\$25,000.00)			(\$4,300.00)			(\$6,000.00)	



Ms. Gina M. Bailey & Carmen Redmond
Senior Buyer, Purchasing Services & Director of Purchasing Services
Foothill-De Anza Community College District
12345 El Monte Road
Los Altos Hills, CA 94022-4599

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www.valleycrest.com

RE: Bid 1238-142 Soccer and Softball Complex – Foothill College
Bid Protest Against Robert A. Bothman, Inc. Which has been
Erroneously Declared the Apparent Responsible and Responsive
Low Bidder for this Project as set forth in Notice of Intent to Award
Dated February 16, 2010

Dear Ms. Bailey & Ms. Redmond

ValleyCrest Landscape Development, Inc. (hereafter referred to as VCLD) believes we are the true responsible and responsive low bidder for this project, and therefore files this protest.

Pursuant to Item 25 of the Instruction to Bidders on this project, document number 00 21 13, Instructions to Bidders.

Item 12 – Award of Contract, paragraph 12.2 states as follows:

“Award to Lowest Responsive Responsible Bidder. The award of the Contract, if made by the District through action of its Board of Trustees, will be to the responsible Bidder submitting the lowest responsive Bid Proposal. The lowest bid shall be the lowest total of the bid prices on the base contract and those items in the solicitation, and added to, or subtracted from the base contract, are less than or equal to a funding amount disclosed in Section 00 11 15 pursuant to Public Contract Code Section 20103.8(c).”

Therefore, it is clear that the calculation of the lowest bid is based upon the provisions of Public Contract Code Section 20103.8(c).

“(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that when taken in order from a specifically identified list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.”

This language is intended to permit an award limited to the available funds.



Gina M. Bailey
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It is clear that the bids from Robert A. Bothman, Inc. and VCLD are each less than the funding amount publicly disclosed by the local agency before the first bid is opened, under Section 12 of the Notice to Contractors, namely \$3,404,000.

Please note that Item 13 of the Notice lists VCLD as one of the eight pre-qualified contractors. Since VCLD's bid, including base bid plus all the additive alternates, is less than the disclosed amount, only the additive alternates need be considered in connection with the base bid item, because the total amount of the disclosed estimate has not been exceeded.

There would be no need for the district to consider the deductive alternates as a basis for award since the district's intent would be to contract for the scope of work in its entirety. The deducts would only need to be factored into the calculations for award if the bid prices exceeded the published estimate of cost. Since they do not then only the base bid plus alternates one through four need to be considered for award to give the district all the scope they wish to receive.

No where in the public code does it require that all the alternates listed both additive and deductive must be used at the same time to calculate the lowest bid. It only states that they are to be used in order they are listed numerically to gain the greatest value of scope but not to exceed the published budget.

On this basis, when considering these proposals, which are base bid plus alternates 1 through 4, VCLD's total bid for all the work advertised is \$2,777,207, whereas the total Robert A. Bothman bid on the same basis specified is \$2,785,940, for a difference of \$8,733. Therefore, clearly VCLD's bid is lower.

Making the award based on the base bid plus all the alternates, including the deductive alternates, comes out to a higher total purchase price if the intent is to go back and issue change orders for the deleted items at the alternate base prices that Robert A. Bothman, Inc. has in their bid.

Why would the school district want to make an award now that plainly is going to cost more money for the taxpayers later? The school board has a fiduciary obligation owed to the taxpayers to produce this project at the lowest total cost.



Gina M. Bailey
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The courts have consistently construed job specifications and code sections such as California PCC Section 20103.8 in the manner that is most beneficial to the taxpayers of the State of California. The description of the calculation process taken from the specifications that is most beneficial to the taxpayers of the State of California is the description contained in this letter of protest, which produces a lower total price by \$8,733. There is no valid reason for making a contract award for a bid which will require that the California taxpayers should pay a purchase price that is \$8,733 more.

Based on our protest set forth hereinabove, we request that Foothill-De Anza Community College District withdraw its letter of February 16, 2010 and issue a new, corrected Notice of Intent to Award Bid noting that the lowest responsible and responsive bidder is ValleyCrest Landscape Development, Inc. and proceed to make an award, or in the alternative reject all bids and readvertise for new bids.

Respectfully,

VALLEYCREST LANDSCAPE DEVELOPMENT, INC.



Jeffrey A. Colton, Senior Vice President

cc: William N. Cohen, Esq. (Corporate Counsel)
Thomas C. Donnelly
Jon Lopez
Andy Mandell
James Moore , Robert A. Bothman, Inc

ROBERT A. BOTHMAN, INC.

General Engineering and Building Contractors

CA License 440332 • NV License 0027271 • AZ License 150057 • HI License AC-026294

February 22, 2010

Ms. Gina M. Bailey & Carmon Edmond
Senior Buyer, Purchasing Services & Director of Purchasing Services
Foothill-De Anza Community College District
12345 El Monte Road
Los Altos Hills, CA 94022-4599

**RE: Bid 1234-142 Soccer and Softball Complex – Foothill College
Response to Bid Protest submitted by Valley Crest**

Dear Ms. Bailey & Ms. Redmond:

This letter is submitted in response to the bid protest submitted by Valley Crest Landscape Development, which we received on February 18, 2010.

In a nutshell Valley Crest confuses low bidder selection criteria and award criteria in authoring its bid protest. Valley Crest requests that the District cherry-pick alternates after bid opening in order to award the project to Valley Crest. Valley Crest asks the District to disregard the deductive alternates and only consider the additive alternates, contrary to the "Award of Contract" specification section 12.5 published by the District pre-bid. This is impermissible under California Public Contract Code and California Case Law. The District is bound to follow the published method of determining the lowest responsible bidder.

However, once the low bidder is determined according to the published award criteria, the District can award any combination of base and alternates to the lowest responsible bidder in its contract. This award discretion still allows the District to fulfill its "fiduciary obligation owed to the taxpayers to produce this project at the lowest total cost", as pointed out by Valley Crest.

Public Contract Code Section 20103.8 requires transparency in the bidding process by requiring the Public Entity to disclose, prior to bid, how the determination of the lowest responsible bid will be determined.

The intent of the Public Contract Code is to: (a) To clarify the law with respect to competitive bidding requirements; (b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds. (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices. d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts. (See Public Contract Code Section 100).

Here, the District informed all bidders prior to bid that, "The lowest bid shall be the lowest total of the bid prices on the base contract and those items in the solicitation, and added to or subtracted from the base contract, are less than or equal to a funding amount disclosed in Section 00 11 15 pursuant to Public Contract Code Section 20103.8(c)". This is clear and

complete disclosure for all of the bidders. The base bid and all of the alternates are to be considered in determining the lowest responsible bidder.

The California Legislature has found and declared that, "Selective use of additive and deductive bid items to determine the lowest responsible bidder can violate the public policies described in subdivisions (c) and (d) of Section 100 of the Public Contract Code." (Pub.Cont.Code Section 20103.8, "Historical and Statutory Notes" section (b)).

"Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside." *MCM Construction, Inc. vs. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 369.

Now, after the bid, Valley Crest would have the District cherry-pick only the additive alternates as a basis to determine that Valley Crest is the lowest responsible bidder, contrary to the information published with the bid. This is legally impermissible. The District determined pre-bid how the lowest bidder was to be determined, the District published that information, and bids were submitted in reliance on that information. The District cannot, after-the-fact change the method for determining the low bidder without violating the Public Contract Code and California case law.


However, the District can, after the lowest responsible bidder is determined, then decide which alternates to award to the low bidder in its contract.

The 2nd to last paragraph of Public Contract Code section 20103.8 reads:

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

Therefore, Robert A. Bothman, Inc. is the true low bidder based on the District's published criteria for selection of the low bidder. Subsequent to this determination, the District may chose which alternates to award in the contract to Robert A. Bothman, Inc. in order to "produce this project at the lowest total cost."

Respectfully submitted,


For:
James C. Moore
Vice President

	Robert A. Bothman, Inc.	Base Bid plus Alternates 1-4 only	ValleyCrest Landscape Development, Inc.	Base Bid plus Alternates 1-4 only
BASE BID	\$2,699,300.00		\$2,677,000.00	
Additive Alternate 1	\$16,270.00		\$17,500.00	
Additive Alternate 2	\$23,000.00		\$15,000.00	
Additive Alternate 3	\$36,600.00		\$55,200.00	
Additive Alternate 4	\$10,770.00	\$2,785,940.00	\$12,500.00	\$2,777,200.00
Deductive Alternate 5	(\$54,000.00)		(\$45,000.00)	
Deductive Alternate 6	(\$9,560.00)		(\$7,000.00)	
Deductive Alternate 7	(\$14,600.00)		(\$6,000.00)	
TOTAL	\$2,707,780.00		\$2,719,200.00	

Purchasing Services has reviewed the bid protest letter with legal counsel, Mr. Phillip Jaret. It is Mr. Jaret's opinion that Public Contract Code 20103.8(c) can be interpreted more than one way. Based upon one interpretation, Bothman has submitted the lowest bid. Based upon the other interpretation, ValleyCrest has submitted the lowest bid. A decision either way is likely to result in a bid protest from one of the two lowest bidders.

Mr. Jaret recommends that the best course for the District is to reject all bids and re-bid. Public Contract Code section 20651 and the bid documents provide that the Board of Trustees may choose to either award the contract to the lowest responsible bidder or to reject all bids.

The re-bid will not be based upon the complicated Public Contract Code 20103.8(c) method of determining the low bidder. District staff initially chose this method because of a belief that there were insufficient funds to purchase the entire project, but as it turns out there are sufficient funds to purchase the entire project. Therefore, only the additive alternates will be included in the re-bid, and the lowest bid will be determined pursuant to Public Contract Code section 20103.8(b) which states the following:

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

Recommendation:

Accept the bid protest submitted by ValleyCrest Landscape Development, Inc. and reject all bids in accordance with Public Contract Code 20651 and the bid documents.

Submitted by:	Carmen Redmond, Director of Purchasing Services
Additional contact names:	Charles Allen, Art Heinrich, Gina Bailey
Back-up:	Yes