



# Board Agenda Item 38

DATE: January 10, 2017

TO: Board of Supervisors

SUBMITTED BY: Steven E. White, Director  
Department of Public Works and Planning

Dawan Utecht, Director  
Department of Behavioral Health

SUBJECT: Contract No. 16-S-05, Crisis Residential Treatment Facility

RECOMMENDED ACTION(S):

1. **Reject bid from Federal Solutions Group for Contract No. 16-S-05 as non-responsive.**
2. **Find that Zumwalt Construction is the lowest responsible bidder, and that the deviations in Zumwalt's bid from strict bidding requirements are immaterial and are hereby waived in the discretion of the Board.**
3. **Award Contract No. 16-S-05, Crisis Residential Treatment Facility, to Zumwalt Construction, 5520 East Lamona Avenue, Fresno, CA, who submitted the lowest responsive bid, in the total amount of \$4,568,229, including the base bid and additive bids 1 through 4.**
4. **Authorize the Director of Public Works and Planning or designee to execute Contract Change Orders up to \$210,000, which is approximately 4.6% of the total contract construction cost.**
5. **Adopt Budget Resolution increasing the FY 2016-17 appropriations and estimated revenues in the Adult Crisis Residential Treatment Facility Org 8851 in the amount of \$50,000 (4/5 vote).**
6. **Adopt Budget Resolution increasing the FY 2016-17 appropriations and estimated revenues in the Behavioral Health Org 5630 in the amount of \$50,000 (4/5 vote).**
7. **Adopt Budget Resolution increasing the FY 2016-17 appropriations in the Capital Facilities Org 1055 in the amount of \$50,000 (4/5 vote).**

The first recommended action would reject a bid deemed non-responsive due to various discrepancies between the words and figures on the proposal sheet, specifically: line 1 (Base Bid), line 3 (Additive Bid 2), and line 5 (Additive Bid 4).

The second recommended action would find that Zumwalt Construction (Zumwalt) is the lowest responsible bidder and would waive, in the reasonable exercise of the Board's discretion, the minor irregularities in the bid submitted by Zumwalt as immaterial deviations from bidding requirements listed in the project specifications. The third recommended action authorizes the award of a budgeted Capital Improvement project, the Adult

Crisis Residential Treatment Facility (CRT Facility), to Zumwalt as the bidder having submitted the lowest responsive bid. The fourth recommended action would allow the Director or his designee to execute change orders up to the statutory limit.

The recommended budget resolutions will increase appropriations and estimated revenues in FY 2016-17 in the Behavioral Health Org 5630 in the amount of \$50,000, in the Adult Crisis Residential Treatment Facility Org 8851 in the amount of \$50,000, and increase appropriations in FY 2016-17 in the Capital Facilities Org 1055 in the amount of \$50,000, to fund the remaining cost for the construction of the CRT Facility, with no increase in Net County Cost.

ALTERNATIVE ACTION(S):

The Board could choose not to approve the second recommended action, which is to waive the irregularities in Zumwalt's bid as an "immaterial" deviation from strict bidding requirements. However, such a decision would necessarily preclude the Board's approval of the third recommended action to award the contract to Zumwalt. In that event, staff would recommend rejecting all bids, as the third lowest bid is approximately \$300,000 higher than Zumwalt's and approximately \$1 million dollars higher than the engineer's estimate of \$3,864,300.

If the fourth recommended action is not approved, the Director's or designee's authority to approve contract change orders will be limited to \$68,182.

FISCAL IMPACT:

There is no increase in Net County Cost associated with the recommended actions. The total estimated Project Budget for the development and construction of the CRT Facility is approximately \$6,150,000, primarily funded with State grant funds. On January 30, 2015, the California Health Facilities Financing Authority (CHFFA) approved an investment in the Mental Health Wellness Grant (Grant) in the amount of \$3,100,714 for construction of the CRT Facility. The balance of the construction costs will be financed with a combination of MHSAs Capital Facilities funds and Mental Health Realignment funds.

Total costs for the CRT Facility is \$6,150,000 of which \$2,000,000 was budgeted in FY 2015-16 and \$4,100,000 was budgeted in FY 2016-17. Approval of the fifth recommended action will increase the FY 2016-17 appropriations and estimated revenues in the CRT Facility Org 8851 by \$50,000 funded by an Operating Transfer In from the Behavioral Health Org 5630 for the development and construction of the CRT Facility. Approval of the sixth recommended action will increase the FY 2016-17 appropriations and estimated revenues in the Behavioral Health Org 5630 to fund an Operating Transfer Out to the CRT Facility Org 8851 using funds received from an Operating Transfer In from the Capital Facilities Org 1055. Approval of the seventh recommended action will increase the FY 2016-17 appropriations in the Capital Facilities Org 1055 in the amount of \$50,000 to fund an Operating Transfer Out to the Behavioral Health Org 5630 using available Fund Balance of the Mental Health Services Act Special Revenue Fund 0040, Subclass 17105. Refer to Attachment B for the Updated Project Budget based upon the bid results.

DISCUSSION:

The work to be done consists of new construction of the CRT Facility, parking and associated site improvements. The project consists of a wood-framed, single-story building of approximately 11,700 square feet on a site of approximately 1.2 acres.

The Department received five bids for this project on November 18, 2016. The lowest responsive bid for the base bid plus all of the additive bids was \$4,568,229. This amount is \$703,929, or 18%, higher than the engineer's estimate of \$3,864,300.

The bidders and their respective bid amounts are shown below:

<u>Bidder</u>	<u>Base Bid and Additive Bids</u>
Zumwalt Construction	\$4,568,229
Marko Construction Group	\$4,856,500
Soltek Pacific Construction	\$5,022,700
Federal Solutions	Deemed Non-responsive
Hal Hays Construction	Deemed Non-responsive

Issues Relating to Bid Discrepancies

Although it appears that Federal Solutions submitted the lowest bid, it is unclear what the appropriate amount of any award to that firm should be. In consultation with County Counsel, the Department has determined that this discrepancy gives Federal Solutions an “unfair competitive advantage” over other bidders and thereby makes its bid non-responsive. The bid documents expressly state “[i]n case of a discrepancy between words and figures, the words shall prevail.” However, in addition to various discrepancies in Federal Solution’s bid between the amounts listed in words and figures for several bid items, there also were discrepancies between the bid amounts stated in words on the various lines of its bid. The sum total of the amounts set forth in words on lines 1 to 5 would equal a bid of \$4,133,435, which is \$344,765 less than the “Total Bid” amount written on line 6, which is listed as \$4,478,200. This discrepancy is not only significant in amount, but also is material because it is the type of bidding error that would have allowed Federal Solutions to request relief from its bid without risking forfeiture of its bid bond. Courts have held that this creates an “unfair competitive advantage” over other bidders, and therefore may not be waived as an “immaterial” deviation from bid requirements.

While the bid submitted by Zumwalt did not comply strictly with all bidding requirements, those discrepancies can be fairly characterized as “immaterial” and therefore may be waived in the discretion of the Board. The specifications required that the dollar amount or percentage of the total bid attributable to work to be performed by each listed subcontractor must be submitted within 24 hours of bid opening. However, none of the bidders fully complied with this requirement. Federal Solutions Group failed to list the percentage for one of its subcontractors in the list provided with its original bid submittal, and never submitted a supplemental list; while the second and third lowest bidders (Zumwalt and Marko, who are now deemed to be the two lowest responsive bidders) did not submit their supplemental subcontractor list with those percentages until three business days after the bid opening. This 24-hour requirement is mandated only by the specifications and not by statute, and therefore may be waived by the Board.

In addition, Zumwalt’s bid contained a very slight mathematical discrepancy, in that the total sum of the amounts listed on lines 1 through 5 for the base bid and the four additive bids, both in words and in figures, was one dollar (\$1.00) more than the amount listed on line 6 for its “Total Bid.” Unlike the bid submitted by Federal Solutions Group (and by Hal Hays Construction), the words and figures on each line of Zumwalt’s bid matched, but based on the amounts listed on lines 1 through 5, the total sum should have been written in words and figures on line 6 as \$4,568,229 (rather than \$4,568,228). This irregularity may be waived because it did not make Zumwalt’s bid materially different. Zumwalt would not have been entitled to relief from its bid, nor would the County have considered such a request on the basis of such a miniscule mathematical error. Accordingly, it did not provide Zumwalt with any type of unfair competitive advantage over other bidders and may be waived in the Board’s discretion as immaterial.

Finally, some further issues were raised by Marko with regard to Zumwalt’s subcontractor listings. The first item brought to staff’s attention was that Zumwalt listed two concrete subcontractors on the original list submitted with its bid, while only one of those two firms appeared on its subsequently filed supplemental list. In a subsequent letter, Marko’s president additionally contended that Zumwalt had omitted entirely from its subcontractor list two items of work for which subcontractors were required to have been listed.

Each bidder was required by statute to submit with its bid a list of those subcontractors who would perform work on the project in excess of 0.5% of the total amount of the contractor’s bid. Although PCC Section 4104 sets

forth the general requirement that the prime contractor shall list only one subcontractor for each portion of the work listed in its bid, the listing of more than one concrete subcontractor did not automatically render Zumwalt's bid nonresponsive. This is because another section, PCC Section 4106, specifically addresses this precise situation. Section 4106 provides that when a contractor fails to specify a subcontractor, or specifies more than one subcontractor for the same portion of work, it is deemed a representation by the contractor that it is fully qualified to self-perform that work, and that it intends to do so. The County historically has relied upon Section 4106 in accepting that statutorily implied representation when awarding public construction contracts.

Section 4106 further provides that, "if after award of contract, the prime contractor subcontracts any such portion of the work" then it is generally subject to imposition of penalties. This may include assessment, in the Board's discretion, of a penalty not to exceed 10% of the amount of the subcontract involved.

Zumwalt has contended that the listing of JMA to do a portion of the concrete work was an "inadvertent clerical error," as to which its bidding estimator provided an explanation that was both cogent and logical. However, Zumwalt's claim of inadvertent clerical error was not provided within two business days, which is the time allotted by statute to make such a claim and initiate the process specified by Section 4107.5. Accordingly, it is staff's determination, in consultation with County Counsel, that Zumwalt's bid may be accepted by the Board based on the provisions of Section 4106, but that Zumwalt may be subject to a penalty if it subsequently subcontracts any of the concrete work on the project.

#### Director's Change Order Authority

For construction projects, PCC Section 20142 limits the extent to which the Director may be authorized to execute Contract Change Orders to 10 percent of the first \$250,000, plus five percent of the contract amount in excess of \$250,000, up to a maximum authorization of \$210,000. However, the Board's policy, last updated in 1991, limits the Director's authority to the amount 10 percent of the first \$250,000 plus one percent of the contract amount in excess of \$250,000, up to a maximum authorization of \$100,000. The Board's authorization for the Director to approve Contract Change Orders up to this statutory limit would prevent the Department from returning to the Board to approve change orders in excess of \$68,182. This will reduce the time required to process changes, reduce paperwork, help keep costs down, and reduce potential claims for additional cost and time due to administrative delays. This Change Order authorization would not apply to, nor allow, changes to the scope of the work.

Plans and Specifications were prepared by the Department's consultant, Dyson Siegrist Janzen Architects. It is anticipated that construction will begin in February, 2017, and be completed in November, 2017.

#### OTHER REVIEWING AGENCIES:

Reviewing Agencies for this Project include the Division of State Architect for accessibility compliance and the City of Fresno Fire Department for conformity with fire and life safety requirements.

#### REFERENCE MATERIAL:

BAI #30, October 18, 2016

#### ATTACHMENTS INCLUDED AND/OR ON FILE:

Exhibit A

Exhibit B

On File with the Clerk - Budget Resolution Org 8851

On File with the Clerk - Budget Resolution Org 5630

On File with the Clerk - Budget Resolution Org 1055

#### CAO ANALYST:

John Hays