

**STAFF REPORT FOR CALENDAR ITEM NO.: 9
FOR THE MEETING OF: October 9, 2014**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Amending Contract No. 08-04-CMGC-000, authorizing Webcor/Obayashi Joint Venture (the CM/GC) to award a Trade Work Subcontract to Clayton Coatings, Inc., dba Clayton National (Clayton National) as the responsible bidder submitting the lowest responsive bid in the amount of \$8,594,839 for TG16.8: Fireproofing (TG16.8), thereby increasing authorized Direct Costs by \$8,594,839 and increasing the authorized Construction Services Fixed Fee by \$653,208, under and in accordance with Contract No. 08-04-CMGC-000, Section 00 05 20, ¶5.01B. The award amount includes a Fireproofing Base Bid of \$6,875,871 and an allowance of \$1,718,968 (25% of the Fireproofing Base Bid amount) for patching work.

EXPLANATION:

On May 15, 2014, the CM/GC issued a Request for Qualifications (RFQ) for TG16.8. On June 12, 2014, eight firms responded to the RFQ. On June 18, 2014, a Selection Committee consisting of representatives from the TJPA, CM/GC, Construction Management Oversight (CMO) consultant, and Program Management/Program Controls (PMPC) consultant reviewed and scored each firm's qualifications for technical merit. Based on its evaluation, the Selection Committee determined the following bidders to be qualified and free of conflicts of interest:

- Anning-Johnson Company
- Clayton National
- LVI Environmental Services Inc.
- Raymond Northern California, Inc.
- Performance Contracting, Inc.
- Rolling Plains Construction

On July 10, 2014, the TG16.8 package was issued for bid. A pre-bid conference was held on July 31, 2014. Seven addenda were issued during the bid period to provide clarifications, respond to bidders' questions, and provide updated specifications, drawings and sketches. Addenda #5 and #7 were specific to this trade package. Addenda #1, #2, #3, #4, and #6 were issued to all packages currently in the bidding phase for the purpose of providing the 100% issued for construction (IFC) set of drawings, related architect's supplemental instructions (ASI), and value engineering (VE) items to all bidders. The addenda are described below:

- Addendum #1 incorporated three ASIs to the IFC set as follows: ASI 120 (incorporation of changes to glazing packages and responses to bidders' questions), ASI 121 (moving the physical security information monitoring system from one bid package to another), and ASI 122 (incorporation of secondary mitigation value engineering items).
- Addendum #2 incorporated one ASI to the IFC set as follows: ASI 123 (incorporation of updated Civil and Utility drawings, and responses to bidders' questions).
- Addendum #3 incorporated revised Division 00 and 01 specification sections.

- Addendum #4 incorporated two ASIs to the IFC set as follows: ASI 124 (incorporation of secondary mitigation value engineering items), and ASI 125 (moving of the Emergency Communication System/Mass Notification System from one bid package to another).
- Addendum #5 extended the bid date, at the request of some bidders, from September 11, 2014, to September 18, 2014.
- Addendum #6 incorporated one ASI to the IFC set as follows: ASI 126 (incorporation of glazing package TG08.10 plans and specifications).
- Addendum #7 was an administrative addendum to officially incorporate into the Contract Documents all responses to bidders' questions during the bid period.

The scope of work under this package includes furnishing and installing all spray-applied fire resistive materials, and all intumescent fire resistive materials, including all associated primers, sealers, and other materials required by the Contract Documents and manufacturers for fully warrantable structural steel fireproofing systems.

The scope of work includes all labor, materials, equipment, tools, transportation, disposal fees, incidentals and any other costs/fees necessary to complete work in accordance with the Contract Documents. All necessary work from mobilization to handover to the next trade subcontractor is included in the scope of work.

Bidders had the option of submitting VE proposals prior to the bid date. On September 4, 2014, nine VE proposals were received; however, three were not submitted in accordance with proper VE proposal procedures and therefore could not be considered. On September 11, 2014, the VE evaluation team consisting of representatives from the TJPA, CM/GC, CMO and PMPC evaluated the following VE proposals, none of which were accepted:

- VE Proposal #1: Intumescent Fireproofing Material Substitution
 - Proposed Savings: \$220,988
 - Reason for Rejection: From the information provided, the design team could not determine that all required fireproofing conditions had acceptable Underwriters Laboratories (UL) certifications for this product.
- VE Proposal #2: Fixed Number of Mobilizations
 - Proposed Savings: \$75,000
 - Reason for Rejection: The bidding documents do not have a fixed number of mobilizations, but require the bidder to support the construction schedule provided to the bidders; accepting this proposal could impact work progress, cause delays, and expose the TJPA to additional costs.
- VE Proposal #3: Delete Intumescent Paint on Plywood Backing Panels
 - Proposed Cost: \$70,564
 - Reason for Rejection: This change is already included in the bidding documents.
- VE Proposal #4: Sprayed Fireproofing Material Substitution
 - Proposed Savings: \$1,086,015
 - Reason for Rejection: Currently specified sprayed fireproofing material is intended for use in open air environments, such as the Bus Deck, Bus Plaza

and Grand Hall. Proposed material is better suited for enclosed, air conditioned spaces.

- VE Proposal #5: Eliminate Climatic Condition Requirements
 - Proposed Savings: \$197,154
 - Reason for Rejection: This VE item proposed to shift site protection, site preparation, and other temporary measures to a separate contract for all trade subcontractors rather than making each trade subcontractor responsible for its own conditions, which is not practical as each trade package has different requirements for its respective work.
- VE Proposal #6: Work Schedule
 - Proposed Cost: \$355,491
 - Reason for Rejection: This VE item proposes a single mobilization and assumes that work can proceed unimpeded. This proposal is impractical given the number of trade subcontractors working simultaneously. This would transfer risk and additional costs to the TJPA.

One additive alternate, Additive Alternate No. 38, was included in the bid package to provide sprayed fireproofing material for non-structural column stiffeners, utilized to reduce vibration, which the Department of Building Inspection (DBI) thought might be required. DBI's concern has been resolved, and this additional fireproofing is not required because the steel stiffeners in question are non-structural.

On September 18, 2014, three bids were received, opened and evaluated. Below is a summary of the bid results:

Bidder Name	Clayton National	Performance Contracting, Inc.	Rolling Plains Construction
Fireproofing (Base Bid)	\$6,875,871	\$7,126,477	\$5,733,723
Touch-up of Fireproofing (25% of Fireproofing Amount)	\$1,718,968	\$1,781,619*	\$1,433,431
Total Base Bid	\$8,594,839	\$8,908,096*	\$7,253,160**
Additive Alternate No. 38: Additional Column Fireproofing (QBD 16.8-020)	\$139,466	\$380,650	\$51,321

* Corrected to account for 25% of Fireproofing amount per instructions in bid documents.

** Corrected to match written words of total bid price.

Rolling Plains' bid included qualifications and exceptions to the bidding documents, contrary to the instructions to bidders. As a result, the bid was determined to be non-responsive.

Performance Contracting, Inc., submitted a Total Base Bid (less the additive alternate) of \$8,511,736; however, its amount for Touch-up of Fireproofing was 19% of the Fireproofing (Base Bid) amount, not 25% as instructed by the bidding documents. The corrected amount made its Total Base Bid (less the additive alternate) \$8,908,096, which is higher than Clayton National's Total Base Bid.

Clayton National submitted the lowest responsive bid, based on the Total Base Bid amount utilized for bid selection. The recommended award amount is \$8,594,839, which includes a Base

Bid amount of \$6,875,871 and an allowance of \$1,718,968 (25% of the Fireproofing (Base Bid) amount) for patching work.

The allowance for patching work was included by the CM/GC as a result of input received during the fireproofing contractor outreach meetings. Under the current Project schedule, the fireproofing work will proceed following the completion of the concrete decks. As a result, follow-on trade subcontractors, such as the electrical, mechanical, plumbing, and glazing trade subcontractors, may be required to remove some previously installed fireproofing to complete their work. Areas where fireproofing is removed will require subsequent patching by the fireproofing trade subcontractor. The CM/GC and the Project team will work diligently to expedite the coordination of the fireproofing work with the work of other trade subcontractors to minimize patching and, therefore, use of the patching allowance.

Any use of the patching allowance to pay for costs caused by trade damage or lack of coordination by or between trade subcontractors will result in a back-charge against the responsible parties, offsetting in full any use of the patching allowance.

All patching work under the allowance shall be performed on a time-and-material basis, as directed in writing by the CM/GC with daily verification of person-hours, equipment and materials by the CM/GC and CMO. Any patching work that proceeds without written direction will not be reimbursed from the patching allowance. At the completion of the fireproofing work, any unused allowance will be deducted from the contract value and returned to the TJPA.

Additive Alternate No. 38 was not accepted because, as noted above, it is no longer necessary, as determined by DBI.

Clayton National's bid included 11% Small Business Enterprise (SBE) participation, exceeding the 10% SBE goal on TG16.8, with one SBE firm included.

TJPA's budget for TG16.8 is \$6,355,000 (which includes \$6,000 in design contingency and \$608,245 in escalation), and the CM/GC's estimate is \$6,200,000. Clayton National's Fireproofing Base Bid amount of \$6,875,871 is \$520,871 over the TJPA's budget. Consistent with the construction cost update mitigation plan presented to the Board at the May 9, 2014, Board meeting, the balance between the Fireproofing Base Bid amount and the current TG16.8 budget will be funded using Program Reserve. The current available Program Reserve funding is \$42,935,498. After the award of TG16.8, the remaining balance in the Program Reserve will be \$42,414,627.

The allowance of \$1,718,968 (25% of the Fireproofing Base Bid amount) included in the award amount for patching work will be funded from the construction contingency or the CM/GC contingency, depending on the cause of the patch work.

One bid protest was received on September 25, 2014, from Rolling Plains.

On September 25, 2014, the CM/GC notified Rolling Plains that Rolling Plains' bid had been disqualified as being non-responsive. On the same day, Rolling Plains filed a bid protest with the TJPA in which Rolling Plains claimed: (1) that they had not provided qualifications to their

bid but rather “clarifications to identify known and unknown particulars of the job and help inform the general contractor we are fully covered in our scope of work,” and (2) that SBE participation of using a “3rd party supplier . . . in order to have SBE credit” was “highly frowned upon during the Pre-bid meeting.” This latter issue was further explained that a “3rd party ‘Paper Swap’ would be acceptable.” Rolling Plains went on to say that: “If the ‘paper swap’ is now acceptable then all bidders can simply fund a 3rd party and provide SBE credit.”

Consistent with the TJPA’s Board Policy No. 2, Protest Procedures for the Bidding and Award of Federally Assisted Third Party Contracts, the Federal Transit Administration was notified of Rolling Plains’ bid protest on September 29, 2014. The TJPA also forwarded Rolling Plains’ protest and updated protest to the other two bidders for comment from both bidders. Clayton National’s response was received on October 1, 2014. Performance Contracting, Inc. had not responded prior to the drafting of this report. Bidders have 5 working days to respond, but they are not obligated to respond.

The TJPA Project Bidding Manual provides that “The Trade Subcontract, if awarded, will be awarded to the qualified and responsible Trade Subcontractor submitting the lowest responsive bid, as determined by Webcor/Obayashi Joint Venture and the TJPA” (emphasis added). Section III, Instructions to Bidders, D, Bidding Process and Procedures, 1 General Process Overview, subparagraph d. at p. 12 of 50; see also, Project Bidding Manual § III. F at p. 17 of 50.

In determining responsiveness, a bid is “responsive” if it promises to do what the bidding instructions demand. The concept of “responsiveness” is quite straight forward. A bidder must make an unequivocal offer in total conformance with the terms of the solicitation. Any bid which attempts to modify material terms of conditions of a solicitation is considered “nonresponsive.” A material deviation is one that modifies price, quality or quantity of goods offered. A bid which is nonresponsive on its face cannot be made responsive by past bid opening clarifications.

Rolling Plains’ bid is, based on the information available at this date, non-responsive. Rolling Plains has a section of its bid which is entitled “Clarifications and Exceptions” which lists eight areas. At least five of Rolling Plains’ “clarifications and exceptions” have been determined by the CM/GC to conflict with stated requirements of the solicitation.

In addition to its “Clarifications and Exceptions” insert, Rolling Plains also included a document entitled “Standard Conditions For Spray Fireproofing, Intumescent and Spray Installation.” This document contained more than twenty different contractual, set design and changes in scope conditions that were, in Rolling Plains stated view, “critical to the integrity and performance of our trades” and were included to be “made part of any contract awarded on any bid.” Many, if not all, of these conditions varied terms from TG16.8. For example, Rolling Plains stated that “no back charges to the contract will be accepted with less than 48 hours written notice.” This provision contradicts clear provisions in the Long Form Subcontract, which permit back charges for defective work without the 48 notice requirement. Based on these multiple changes to the solicitation demanded by Rolling Plains, we believe the bid was properly declared non-responsive.

In addition to attempting to alter terms of the solicitation, Rolling Plains' bid also failed to comply with TJPA's SBE requirements. Rolling Plains has zero percent actual SBE participation and listed only one future potential effort to meet the good faith requirements. Under the TJPA Policy No. 15, SBE participation is an issue of responsiveness. Section XI of the Policy provides a bidder to request an "administrative reconsideration" of any decision regarding SBE good faith efforts. If that occurs, the bidder is entitled to provide written documentation showing that it met its good faith requirement and the bidder is entitled to meet in person with the reconsideration official who has to be a different person than anyone involved in deciding that the bidder had not met its good faith requirement. In light of the significant responsiveness issues described above unrelated to the SBE issue, we recommend that the SBE issues not be used to declare the bid nonresponsive to avoid an unnecessary meeting regarding Rolling Plains' good faith efforts.

The initial Notice to Proceed for this Trade Work Subcontract is anticipated to be funded by land sales proceeds.

RECOMMENDATION:

TJPA staff recommends that the TJPA Board authorize amending Contract No. 08-04-CMGC-000, authorizing the CM/GC to execute a Trade Work Subcontract with Clayton Coatings, Inc., dba Clayton National as the responsible bidder submitting the lowest responsive bid in the amount of \$8,594,839, for TG16.8: Fireproofing, thereby increasing the authorized Direct Costs by \$8,594,839 and increasing the authorized Construction Services Fixed Fee by \$653,208, under and in accordance with Contract No. 08-04-CMGC-000, Section 00 05 20, ¶5.01B.

ENCLOSURES:

1. Resolution
2. Contract Modification

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, On March 12, 2009, the Transbay Joint Powers Authority (TJPA) awarded a contract to Webcor/Obayashi Joint Venture as Construction Manager/General Contractor (the CM/GC) for the Transbay Transit Center Building and Related Structures (Contract No. 08-04-CMGC-000 or the Contract). Under the Contract, the CM/GC must competitively procure Trade Subcontractors. The Contract provides for the incorporation of Trade Packages by amendment to (a) authorize award of a Trade Work Subcontract; (b) authorize the associated increase in allowable Direct Costs under the Contract; and (c) authorize the CM/GC to charge a Construction Services Fixed Fee invoiced at a rate of 7.6% of Direct Costs (Contract, Section 00 05 20, ¶5.01); and

WHEREAS, On July 10, 2014, the CM/GC issued an Invitation for Bids for TG16.8: Fireproofing Package (TG16.8) for the Transbay Transit Center Program to construct the complete fireproofing systems in accordance with the Contract Documents; and

WHEREAS, Under TG16.8, the Trade Subcontractor will perform all fireproofing systems construction-related activities for the Transbay Transit Center Program; and

WHEREAS, On September 18, 2014, three bids were received and opened publicly; and

WHEREAS, CM/GC and TJPA have determined that Clayton Coatings, Inc., dba Clayton National (Clayton National) is the responsible bidder submitting the lowest responsive bid, with a bid of \$8,594,839; and

WHEREAS, Funds for this Trade Work Subcontract are available from land sales; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the CM/GC to execute a Trade Work Subcontract for TG16.8 with Clayton National as the responsible bidder submitting the lowest responsive bid in the contract amount of \$8,594,839, which consists of a Fireproofing Base Bid amount of \$6,875,871 and an allowance of \$1,718,968 (25% of the Fireproofing Base Bid amount) for patching work (Additive Alternate No. 38 for \$139,466 was not accepted and is not part of the current award); and be it

FURTHER RESOLVED, That upon award of the Trade Work Subcontract to Clayton National, the Trade Work Subcontract shall be deemed part of the Contract Documents under Contract No. 08-04-CMGC-000; and be it

FURTHER RESOLVED, That Contract No. 08-04-CMGC-000 is hereby modified to incorporate the authorized amount of the Trade Work Subcontract awarded to Clayton National for TG16.8 by increasing the authorized Direct Costs by \$8,594,839, and increasing the authorized Construction Services Fixed Fee by \$653,208 (Direct Costs of \$8,594,839 multiplied

by the Construction Services Fee of 7.6%) under and in accordance with Contract No. 08-04-CMGC-000, Section 00 05 20, ¶5.01B.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of October 9, 2014.

Secretary, Transbay Joint Powers Authority

AGREEMENT
AMENDMENT NO. 40
BETWEEN
TRANSBAY JOINT POWERS AUTHORITY
AND
WEBCOR/OBAYASHI JOINT VENTURE

THIS AMENDMENT for AGREEMENT is entered into as of the _____ day of _____, 2014, by and between the TRANSBAY JOINT POWERS AUTHORITY (TJPA) and Webcor/Obayashi Joint Venture (CM/GC). By this Amendment No. 40, the TJPA and the CM/GC hereby modify the Agreement dated March 17, 2009 (Agreement), only to the extent expressly provided in this Amendment No. 40. All other terms and conditions of the Agreement shall remain in full force and effect.

Recitals

A. On March 12, 2009, the TJPA Board awarded the Agreement to the CM/GC to perform pre-construction and construction services for the Transbay Transit Center Building and Related Structures Project (Project).

B. As detailed in the Agreement, the CM/GC is required to procure construction services through the award of Trade Packages, at which time TJPA shall adjust the value of the Contract Sum to reflect the amount of the awarded Trade Work Subcontract plus the proportionate CM/GC's Construction Services Fixed Fee in accordance with Article 5.01 of the Agreement.

C. The CM/GC issued an Invitation for Bids for TG16.8 Fireproofing package on July 10, 2014, and received and publicly opened three bids on September 18, 2014.

D. Clayton Coatings, Inc., dba Clayton National (Clayton National) was the responsible bidder submitting the lowest responsive bid in the amount of \$8,594,839, which consists of a Fireproofing Base Bid amount of \$6,875,871 and an allowance of \$1,718,968 (25% of the Fireproofing Base Bid amount) for patching work to completed fireproofing damaged or disturbed by other trade subcontractors (Additive Alternate No. 38 for \$139,466 was not accepted and is not part of the current award).

Terms and Conditions

1. By this Amendment, TJPA authorizes an increase in the CM/GC scope of work and the value of the Contract Sum by \$9,248,047 (Trade Package Direct Costs of \$8,594,839 and CM/GC Fixed Fee, calculated at 7.6 percent of Direct Costs, of \$653,208) and the award of Trade Subcontract No. TG16.8 to Clayton National for performance of the construction of TG16.8 Fireproofing.

2. The detailed scope of work and schedule incorporated by this Amendment is provided in the Contract Documents dated March 31, 2014, and all associated Addenda.

IN WITNESS WHEREOF, the parties hereto have executed this contract Amendment No. 40 on the day first mentioned above.

TRANSBAY JOINT POWERS AUTHORITY

Maria Ayerdi-Kaplan
Executive Director

Transbay Joint Powers Authority
Board of Directors
Resolution No. _____
Adopted: _____
Attest:

Secretary, TJPA Board

Approved as to Form:

By: _____
TJPA Legal Counsel

WEBCOR/OBAYASHI, JOINT VENTURE

Authorized Signature

Printed Name

Title