

The Board of Trustees of the Village of Westhampton Beach held a Special Meeting on Tuesday August 6, 2019 at 5 p.m. in the Municipal Building, 165 Mill Road, Westhampton Beach.

PRESENT: Mayor Maria Z. Moore
Deputy Mayor Ralph Urban
Trustee Stephen Frano
Trustee Rob Rubio
Trustee Brian Tymann

Village Attorney – Stephen Angel
Clerk-Treasurer Elizabeth Lindvit

RESOLUTIONS

RESOLUTION AWARDING CONTRACT FOR MAIN STREET IMPROVEMENT PROJECT

Motion made by Trustee Tymann:

WHEREAS, on June 6, 2019, the Village of Westhampton Beach adopted a resolution directing the posting of a Notice to Bidders for the Main Street Improvement Project; and

WHEREAS, the Main Street Improvement Project includes, in general, the demolition of the existing roadway and sidewalks between Potunk Lane on the west Beach Lane on the east, placement of all underground utilities and drainage, construction of new roadway and sidewalk and landscaping; and

WHEREAS, the Village requested bids on three (3) alternatives ("Options"):

Option A (Two Off Seasons): Complete roadwork Fall 2019 to Spring 2020 and complete sidewalk and the balance of the work Fall 2020 to Spring 2021,

Option B (One Off Season starting 2019): Complete all the work during Fall 2019 to Spring 2020, and

Option C (One Off Season starting 2020): Complete all the work during Fall 2020 to Spring 2021; and

WHEREAS, the bid specifications described Option A, as the "Base Bid," with the work being completed in two off seasons, described Option B as being an "add to the Base Bid" that would require completion of the work in one off season starting 2019, and Option C as being an "add to the Base Bid" that would also require completion of the work in one off season but starting in 2020; and

WHEREAS, the bid specification package notified the bidders that Option B was the Village's preferred option; and

WHEREAS, the original bid opening time and date was 2:00 p.m. on July 12, 2019, but the time and date was extended to 2:00 p.m. July 19, 2019; all bidders were given written notice of this extension; and

WHEREAS, the bids were opened on July 19, 2019; the Village received three (3) bids:

1. from Laser Industries, Inc. ("Laser") which only submitted a bid for Option A;
2. from Bove Industries, Inc. ("Bove") and Pioneer Landscaping & Asphalt Paving, Inc. ("Pioneer"), both of which submitted bids for Option A and Option B; and

WHEREAS, the Village Board of Trustees has determined to go forward with Option B, leaving only the bids from Bove and Pioneer to consider; and

WHEREAS, the bid form received from Bove, on its face, showed Bove's bid for Option A as being in the amount of \$9,151,000.00 and the amount of Option B as being \$11,164,588.00, which, if added to Option A would bring the total to \$20,315,588.00; and

WHEREAS, the other bid received on Option B from Pioneer, which showed its bid for Option A as being in the amount of \$8,364,106 and the amount of Option B as being \$7,273,136, which, if added to Option A would bring the total to \$15,637,242; and

WHEREAS, although Bove was not, on the face of the bid forms, the apparent low bidder for Option B, Bove's representatives, immediately after the opening of the bids on July 19, 2019, contacted the Village's representative during the bidding process (Sandpebble) and left a voice-mail message clarifying to the Village that the amount of \$11,164,588.00 listed under Option B was meant to be the total bid for Option B, rather than an amount to be added to the Option A bid; and

WHEREAS, based on this clarification, Bove would be the low bidder for Option B, having bid a total of \$11,164,588.00 for Option B as compared to the only other bid received for Option B in the total amount of \$15,637,242; and

WHEREAS, the Village and its representatives carefully analyzed the bid forms received from Bove to determine whether the clarification was supported by the entirety of the bid forms, and the Village and its representatives found substantial evidence corroborating the clarification, including the fact that the itemized schedule of values contained in the bid form submitted by Bove would not make sense unless the Option B amounts were intended to be total amounts, rather than additions to the Option A amounts; and

WHEREAS, although Bove's inclusion of the total amount of the bid for Option B was a technical noncompliance with the bid specifications (which directed the amount of Option B to be listed as an addition to the amount of Option A), the Village does have the power and authority under New York law to waive a technical noncompliance with bid specifications if the defect is a mere irregularity and immaterial and it is in the best interests of the Village to do so; and

WHEREAS, the bid documents reserved the right of the Village's Board of Trustees to, among other things, "waive any information in any or all Bids, and to accept the Bid or part thereof which it deems most favorable for the Village after all Bids have been examined ..."; and

WHEREAS, before deciding whether to waive the technical noncompliance with the bid specifications, the Village must first determine whether the defect in the bid is an immaterial irregularity or is instead a material defect; and

WHEREAS, under New York law, noncompliance with bid specifications is considered a material defect only when it would 1) deprive the Village of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and 2) place some of the bidders at a competitive disadvantage;

THEREFORE BE IT RESOLVED THAT the Village Board of Trustees, after due diligence, investigation, and consideration, hereby finds that Bove's noncompliance with the bid specifications, to the extent that it included the total amount under Option B rather than the "add" amount to Option A, is in fact an immaterial irregularity and not a material defect, based, among other things, on the following evidence:

1. The noncompliance with bid specifications pertained only to the manner in which the forms were completed, and the only mistake made in the bid was that the amounts listed under Option B were listed as the total bid amount and total line item amounts for Option B, rather than being listed as "additions" to the Option A amounts.
2. The noncompliance was clarified immediately, without any solicitation from the Village, after the opening of the bids on July 19, 2019.

3. The clarification and explanation of the total amount of the bid for Option B is corroborated entirely by the rest of the bid form, which includes an itemization of the schedule of values for various aspects of the project and which itemization would not make any sense if the amounts listed under Option B were meant to be "additions" to Option A rather than "totals." In particular, the line items that would logically remain the same whether or not the project was conducted in one off season versus two off seasons (for example, the cost of materials that would be purchased at the same time under both options) did, in fact remain the same. The line items that would logically be increased under Option B due to the added costs and risks for a shorter period of time (for example, items that included labor costs that would expectedly rise due to overtime pay) did, in fact, rise under Option B. And the line items that would logically decrease under Option B due to the completion of the project in a single off-season from 2019 to 2020 (in particular, the mobilization expenses) did, in fact, decrease. In short, the bid form itself corroborates Bove's clarification that the Option B amounts were listed as totals, rather than additions to the Option A amounts.
4. The clarification is further corroborated by the expectations of the Village as to the amounts of the various bids. Logically, Option B was expected to be higher than Option A, due to the additional labor costs that would be involved to ensure the job was completed in one off-season instead of two, but the added costs would certainly not be expected to bring the Option B to more than double the Option A bid. Yet, if Bove's Option B bid had truly been intended to be an "addition" to the Option A bid, then the total bid of \$20,315,588.00 would be astronomically high, and the "add" would be more than 120% of the Option A bid. On the other hand, if Bove's Option B bid was, as clarified by Bove, the total bid price, then it would only be 22% higher than the Option A bid, which is in line with the expectations of the Village and its consultants.

BE IT FURTHER RESOLVED THAT the Village Board of Trustees, after due diligence, investigation, and consideration, also finds that the treatment of the noncompliance by Bove as an immaterial irregularity would not deprive the Village of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements and place any other bidders at a competitive disadvantage. This clearly was not a case where Bove was "hedging its bets" and only decided, after the bids were opened, to characterize the Option B amounts as the "total" bid rather than an "addition" to the Option A totals. Rather, the facts are clear that Bove bid on all three options and simply misunderstood that the column blanks for the Option B totals and line items was supposed to be written as the "addition" to the Option A column totals and line items, rather than in the cumulative (net) amount of the Option B bid. Allowing Bove to clarify its bid as being written with the totals presented in the column would not afford Bove any unfair competitive advantage over any of the other bidders but would allow the Village to review the bids of all three bidders as they were intended to be presented. Nor would the acceptance of Bove's clarification be akin to Bove supplying essential information after the fact; rather, all information needed by the Village to make a decision is available within Bove's bid, subject only to Bove clarifying the difference between the Option B amounts being "totals" rather than "additions" to the Option A amounts. And, the acceptance of Bove's bid, as clarified, will not deprive the Village of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; in fact, the irregularity described above does not change any of the contracts' terms, specifications and assurances.

BE IT FURTHER RESOLVED THAT the Village Board of Trustees, after due diligence, investigation, and consideration, also finds that the waiver of the technical defect in the bid forms by Bove is clearly in the best interests of the Village, and the technical defect is hereby waived. The Village has indicated its preference for Option B, but the only other bid received for Option B (from Pioneer) was for a total of \$15,637,242, which is \$4,472,654 more than Bove's bid and more than the Village would be willing to spend as a premium to avoid having the project work take two off seasons rather than one off season. On the other hand, Bove's bid for Option B (as clarified) was more than its Option A bid and more than the Option A bid from the lowest bidder for that option (Laser), but Bove's Option B bid of \$11,164,588.00 is still within the range of costs that the Village expected for that preferred option. The savings and benefits to the Village,

whether viewed in terms of cost of the project (compared to Pioneer's Option B bid) or time to complete the project (compared to Laser's Option A bid) provide a substantial benefit to the Village as a whole.

BE IT FURTHER RESOLVED THAT the Village hereby waives Bove's technical noncompliance with the bid specifications, as set forth above, because it is, in fact, a mere irregularity and it is in the best interests of the Village to do so.

BE IT FURTHER RESOLVED THAT, pursuant to the Village Law and Article 5A of the General Municipal Law, the Mayor of the Village of Westhampton Beach be and is hereby authorized to enter into an agreement with Bove in the amount of \$11,054,588, which amount includes a credit of \$110,000 to Bove's base bid for Option B because Bove will not supply planting materials to construct the project.

This Resolution shall take effect at such time that the low bidder furnishes the insurance and bond required in the bidding specifications.

Seconded by Trustee Rubio and unanimously approved 5 Ayes, 0 Nays.

Dated: August 6, 2019

Elizabeth Lindtvit
Village Clerk-Treasurer