To: Honorable Mayor and Members of the City Council

From: Phil Kamlarz, City Manager

Submitted by: Donna Corbeil, Director of Library Services

Subject: Contract: Reject the Bid Protest of BHM Construction, Inc. and Award of Contract to Fine Line Construction for Renovation and Construction of the Claremont Branch Library

RECOMMENDATION

Adopt a Resolution:

1. Approving plans and specifications for the Berkeley Public Library Claremont Branch Improvement Project;
2. Rejecting the Bid Protest of BHM Construction, Inc.;
3. Accepting the bid of Fine Line Construction; and
4. Authorizing the City Manager to execute a contract, amendments, and any extensions or change orders until completion of the project in an amount not to exceed $3,300,000 which includes a contingency of approximately 11%.

FISCAL IMPACTS OF RECOMMENDATION

Funding for the award of this contract is in the FY 2011 budget as follows:

<table>
<thead>
<tr>
<th>PROJECT</th>
<th>COST</th>
<th>FUND</th>
<th>BUDGET CODE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claremont Branch Project</td>
<td>$3,300,000</td>
<td>Measure FF, Branch Improvement Program</td>
<td>308-9301-450.65-70</td>
</tr>
</tbody>
</table>

CMS No. EGGMC.

CURRENT SITUATION AND ITS EFFECTS

The Claremont Branch Library located at 2940 Benvenue Avenue is in need of improvements to make it seismically safe, compliant with current codes – including the ADA, and to allow it to function as a modern library. To ensure that Berkeley can serve the needs of library patrons with adequate seating, computers, and for public functions, renovation and expansion is needed.
BACKGROUND
In November 2008 City residents voted in favor of Measure FF, a Library bond measure not to exceed $26M to renovate, expand, and make seismic and access improvements at the four branch libraries. In July 2009 the Board of Library Trustees voted to recommend to the City Council a preferred firm to complete architectural design services for the Claremont Branch Library; in September 2009 the City Council approved the hiring of Gould Evans Baum Thornley to design and develop construction documents for the renovation and expansion of the Claremont Branch Library.

The Claremont Branch Improvement Project was released for bid on January 18, 2011, and bids were opened on March 1, 2011. Twelve bids were received from a low of $2,970,000 to a high of $4,055,000 (Attachment 2). The low bidder was determined according to the instructions sent out with the request for bids. Based on these criteria the order of the five lowest bidders is as follows:

1. Fine Line Construction          $2,970,000
2. BHM Construction, Inc.          $3,336,400
4. J.H. Fitzmaurice, Inc.   $3,417,500
5. John Plane Construction, Inc.                $3,410,838

However, a protest was filed by BHM Construction, Inc (BHM) alleging bidding irregularities by Fine Line Construction (FLC). A copy of the bid protest was sent to FLC to provide them an opportunity to respond to the protest issues. The City held an informal hearing on March 14, 2011, to allow both FLC and BHM the opportunity to provide additional information before a hearing officer. The City’s representative facilitating the hearing was Mr. John Rosenbrock, P.E.

Based on the information submitted in writing prior to the hearing of March 14, 2011 and the information presented at that hearing, all protest issues were carefully considered. At the conclusion of the hearing, Mr. Rosenbrock provided each bidder an opportunity to submit further information to the City after the completion of the hearing. When no significant additional information or objection was received, Mr. Rosenbrock closed the process and prepared a written decision addressing each of BHM’s protest issues. Finding no merit to the issues, the protest was denied. A copy of the decision is attached as Attachment 3.

Accordingly, Fine Line Construction has been determined to be the lowest responsive and responsible bidder, and it is recommended that a contract for this project be awarded to that firm.

Pursuant to Berkeley code section 3.04.090(E) the Library shall recommend to the City Council the execution of contracts relating to the improvements at the four branch libraries, including but not limited to, contracts for design, engineering, construction management, and construction.
The Board of Library Trustees of the City of Berkeley approved by Resolution, R11-20, on March 17, 2011, to recommend to City Council award of a construction contract and any amendments with Fine Line Construction for the Claremont Branch Library renovation and expansion project.

The contract is subject to the Community Workforce Agreement approved by the Berkeley City Council on January 18, 2011. As a result, the successful bidder and all subcontractors will be required to sign an agreement to be bound before being eligible for award of a contract. The Living Wage Ordinance does not apply to this project since Public Works construction contracts are, pursuant to City policy, subject to State prevailing wage laws.

**RATIONALE FOR RECOMMENDATION**
Twelve bids were submitted for the project and Fine Line Construction was the lowest responsive and responsible bidder. The City does not have the available in-house work force to perform the construction services required for this scale of a project. It is therefore necessary to execute a contract with Fine Line Construction.

**ALTERNATIVE ACTIONS CONSIDERED**
No alternative actions have been considered.

**CONTACT PERSON**
John Rosenbrock, Office of the City Manager, 589-9573
Donna Corbeil, Berkeley Public Library, 981-6195

Attachments:
1: Resolution
2: Bid Results
3: Protest Resolution Letter
RESOLUTION NO. ##,###-N.S.

CONTRACT: FINE LINE CONSTRUCTION FOR THE CLAREMONT BRANCH IMPROVEMENT PROJECT

WHEREAS, in November 2008 City residents voted in favor of Measure FF a Library bond measure not to exceed $26M to renovate, expand, and make seismic and access improvements at the four branch libraries; and

WHEREAS, the City hired Gould Evans Baum Thornley to design and develop construction documents for the renovation and expansion of the Claremont Branch Library; and

WHEREAS, the City lacks sufficient staff and resources to complete the construction in-house; and

WHEREAS, a request for bids from contractors to renovate the library was released for bid on January 18, 2011 and twelve bids were opened on March 1, 2011; and

WHEREAS, a protest to the award of the contract to the apparent low bidder was received from the second lowest bidder; and

WHEREAS, on March 14, 2011, the City conducted an informal protest hearing to carefully consider the protest, all written responses, and provide an opportunity for the parties to provide additional information before the hearing officer; and

WHEREAS, the submitted protest was evaluated and found to have no merit and was therefore denied; and

WHEREAS, Fine Line Construction, was determined to be the lowest responsive and responsible bidder; and

WHEREAS, funding is available in FY 2011 of $3,300,000 from the Branch Improvement Program / Measure FF Fund budget code 308-930-450.65-70, CMS No. EGGMC; and

WHEREAS, pursuant to Berkeley Municipal Code section 3.04.090(E) the Library shall recommend to the City Council the execution of contracts relating to the improvements at the four branch libraries, including but not limited to, contracts for design, engineering, construction management, and construction; and

WHEREAS, the Board of Library Trustees adopted Resolution R11-20 to recommend City Council approve execution of a contract and any amendments with Fine Line Construction to provide construction related services.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that Plans and Specifications No. 11-10565-C for the Claremont Branch Improvement Project are approved.
BE IT FURTHER RESOLVED that the Council of the City of Berkeley confirms the previously issued written decision to deny the bid protest submitted by BHM Construction, Inc.

BE IT FURTHER RESOLVED that the Council of the City of Berkeley accepts the bid of Fine Line Construction and authorizes the City Manager to execute a contract and any amendments, extensions, or change orders until completion of the project in accordance with the approved plans and specifications with Fine Line Construction, for the Claremont Branch Improvement project, in an amount not to exceed $3,300,000. A record signature copy of said agreement and any amendments to be on file in the Office of the City Clerk.
<table>
<thead>
<tr>
<th>CONTRACTOR</th>
<th>Bid</th>
<th>Bond</th>
<th>Subcontractor</th>
<th>Collusion</th>
<th>Addenda</th>
<th>BASE</th>
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<tbody>
<tr>
<td>1 Fine Line Construction</td>
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<td>$ 2,970,000.00</td>
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<td>2 BHM Construction, Inc.</td>
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<td>4 J.H. Fitzmaurice, Inc.</td>
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<td>$ 3,417,500.00</td>
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<td>5 John Plane Construction, Inc.</td>
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<td>$ 3,410,838.00</td>
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<td>6 Roebuck Construction, Inc.</td>
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<td>7 Jeff Luchetti Construction, Inc.</td>
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<td>$ 3,649,500.00</td>
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<td>8 Di Giorgio Contracting Co.</td>
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<td>$ 4,055,000.00</td>
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Estimate: $ 2,900,000
Low Responsive Bid: $ 2,970,000
Variance: $ 70,000
Variance Percentage: 2.41%
Average Bid: $ 3,574,503
BACKGROUND

On March 1, 2011, bids were opened for the Claremont Branch Improvement Project. There were a total of 12 bids submitted and the five apparent lowest bidders in order were:

1. Fine Line Construction $2,970,000
2. BHM Construction, Inc  $3,336,400
4. John Plane Construction, Inc  $3,410,838
5. J.H. Fitzmaurice, Inc  $3,417,500

Shortly after the bid opening, a protest was filed by BHM Construction, Inc. (BHM). That protest was filed against Fine Line Construction (FLC) requesting FLC’s bid be determined to be non responsive because of a series of alleged irregularities in their bid. A copy of the protest was sent to FLC and a response as to their position was requested. Following receipt of FLC’s response, it was sent to BHM and an informal hearing was held on March 14, 2011 to give FLC and BHM an opportunity to be heard on the protest and to submit any additional information they wished to support their position(s).

PROTEST ISSUES

Based on the submitted protest and response the issues were distilled into the following list:

1) Subcontractor listing issues – BHM contended that FLC omitted one or more subcontractors from their Bid List included in their submitted bid. BHM contended that FLC did not submit subcontractors for Aluminum-Framed Entrances and Storefronts, Sliding Automatic Entrance Doors, Steel Windows, and Wood Window Mullion Systems and that the cost of the work for those items far exceeded ½% of their bid. BHM also contended that FLC did not hold a C-17 specialty contractors license and therefore they are not qualified to do that work themselves.
2) The Aluminum-Framed Entrances and Storefronts Section, in Paragraph 08410-1.6.B, requires that the installer of the entrance and storefront systems assume certain responsibilities, have specific experience qualifications, and be acceptable to the manufacturer of the systems. BHM claims that FLC did not list a subcontractor to perform this work and they do not meet the specification requirements to perform the installation themselves.

3) The Sliding Automatic Entrance Doors Section, in Paragraph 08461-1.8.A, requires that the installer of the referenced door system be an authorized representative of the manufacturer, meet certain training requirements, and have in their employ a certified inspector. BHM claims that FLC did not list a subcontractor to perform this work and they do not meet the specification requirements to perform the installation themselves.

4) The Steel Windows Section, in Paragraph 08510-1.6.A, requires that the installer of these windows be acceptable to the manufacturer of the units. BHM claims that FLC did not list a subcontractor to perform this work and they do not meet the specification requirements to perform the installation themselves.

5) The Wood Window Mullion System Section, in Paragraph 08552-1.6.A, requires that the installer of these systems be acceptable to the manufacturer of the units. BHM claims that FLC did not list a subcontractor to perform this work and they do not meet the specification requirements to perform the installation themselves.

6) BHM noted that FLC’s listed hazmat abatement subcontractor was the same subcontractor that BHM listed and the subcontractor’s quote to BHM was a lump sum of $83K. FLC’s bid listed an abatement price of only around $36K and BHM questioned why the difference and contended that some work must have been omitted or overlooked.

7) BHM noted that the Specifications required the contractor to provide an Environmental Liability Insurance policy with $5M/$15M limits and, because of the high price of that policy, BHM questioned whether FLC had overlooked that requirement.

CONSIDERATION AND DISPOSITION

The substance of this list was presented to both parties attending the hearing and, after some discussion and explanations, both agreed that the above distilled list noted above properly described the issues to be considered. The first issue regarding the listing issue was not discussed in detail because the issues seemed clear and a reading of the appropriate statutes was all that would be necessary for the City to determine this issue.

The first issue concerns alleged violations of the requirements contained in Public Contract Code Sections 4100-4114 (Listing Law). BHM contends that FLC’s failure to list subcontractors for certain work, by operation of law, means that FLC must do the work themselves if the cost of the work exceeds ½% of FLC’s bid amount. That premise is correct on its face because that is what the Listing Law in Section 4106 explicitly says. BHM then goes on to assert that since FLC does not hold a C-17 (Glazing) specialty contractor’s license they are not qualified to do the work themselves. FLC responded
that there is no statute that prevents FLC from doing the installation of the noted systems under the cover of their B contractor’s license. A reading of the applicable sections of the Business and Professions Code (Division 3, Chapter 9, Article 4) does not appear to contain any restriction preventing a general contractor with a B license from doing any specialty contractor work, except for Fire Protection (C-16) or Well Drilling (C-57). No Code or Section was cited by BHM supporting their contention that FLC legally must possess a C-17 license in order to install the window units in question. Since FLC indicated that they were subcontracting for the installation of the Aluminum-Framed Entrances and Storefronts and the Sliding Automatic Entrance Doors; the only other work at issue is the Steel Windows and the Wood Window Mullion System installation. The installation of those systems does appear to be consistent with the work clearly contemplated by the contractor’s B license. Accordingly, the protest relating to the requirement for FLC to have a C-17 license in order to legally perform the installation work of identified systems (Issue 1) does not appear to have merit and is therefore denied.

If it is not illegal for FLC to perform the installation of the systems named in the protest, then the question must turn to whether FLC is qualified to install the systems if they choose to do that. At the hearing and in written responses to the bid protest allegations, FLC has indicated that they do intend to install some of the systems at issue themselves and they intend to have subcontractors install other systems. FLC presented two bids from subcontractors for less than ½% of FLC’s total bid for the installation of the Aluminum-Framed Entrances and Storefronts and the Sliding Automatic Entrance Doors. Since both bids were less than the amount that would require listing the subcontractors on the bid form attachment, FLC is free to either contract with those subcontractors, or contract with any other subcontractors as long as the subcontract amount is below ½%. Nothing was presented from either side suggesting that it would be improper for FLC to do this and so, as long as the contract requirements are met for both the materials and the installation of those two systems, and the subcontract amounts are below the listing limit threshold, the protest on these systems (Issues 2 and 3) appear to be without merit and are therefore denied.

With respect to the next two protest items (Issues 4 and 5), FLC provided evidence that they have experience installing these types of systems. The only other contract requirement for them to meet in order to be qualified to install the Steel Windows and the Wood Window Mullion System is for FLC to be approved by the manufacturer of those systems. While FLC did not present any evidence that they were currently approved by the manufacturer, there was similarly no evidence presented that they would be unable to obtain such an approval. There is no specific manufacturer required by the specifications and so FLC can select any manufacturer they wish to supply the units, subject to meeting the specification requirements, and it is likely they will select a manufacturer who will approve them. FLC was reminded that they will have to be approved by the manufacturer as the specifications require and they agreed that they would be able to do that. Without any evidence that they will be unable to be so approved, it is not possible to give merit to these protest issues and so they are denied.
The next protest item (Issue 6) concerns the listed hazardous materials subcontractor. BHM expressed concern that FLC had not listed the correct amount for their hazmat subcontractor because BHM had received a quotation from the same hazmat subcontractor that FLC listed, but for an amount that was significantly more. In response, FLC supplied a copy of the written quotation that formed the basis for their subcontractor listing. That quotation had three line items, one of which coincided with the amount FLC included in their sub listing. FLC indicated that they were performing a portion of the abatement work (primarily lead and roofing abatement) with their own forces and that they were looking to the subcontractor only for asbestos abatement. In addition, there was some other lead abatement not covered by the subcontractor quote such as that required by the wood refinishing section 06910. That was the portion of the subcontractor quote that BHM noted in their protest letter. FLC indicated that they would be doing all of that lead abatement under their EPA certification letter that they submitted in response to the bid protest. FLC was satisfied that they had accounted for all of the hazmat abatement necessary in the project and that if there was any portion that they were not qualified for under their EPA certificate, they could just add that to the subcontractor’s scope later. Therefore, after a lengthy discussion of this matter and assurances by FLC that they had covered all of the necessary scope, it appeared that FLC did have a basis for selecting their named subcontractor, and appeared qualified to do the remainder themselves and they were certain that they had included all necessary abatement work in either their subcontractor price or in the work being done by their own forces. Thus, FLC adequately demonstrated that its bid was responsive to the bid specifications regarding all hazardous abatement requirements. Thus, it does not appear to be a situation where FLC failed to list a subcontractor, or that they listed an incorrect subcontractor, or that they omitted any abatement work. Thus it did not appear to be a valid protest item in that no obvious unfair bid advantage appeared to exist. Accordingly, this protest issue appears to have no merit and therefore is denied. FLC was reminded, however, that any resolution of this issue with the subcontractor must be done in a manner consistent with the requirements of the Listing Law.

The final protest issue (Issue 7) concerned whether or not FLC was aware of the high limits required by the contract for Environmental Liability Insurance. FLC indicated that they were aware of the limits and they were fully capable of obtaining the required insurance at the stated limits. FLC provided a copy of a letter from their insurance broker attesting to that fact. Accordingly this protest issued does not appear to have merit and is therefore denied.

At the conclusion of the hearing, all participants were invited to submit any additional information they wanted to that would either support or refute the protest issues. They were advised that to be considered, such information would have to be submitted by 10:AM on Tuesday, March 15, 2011. No additional information was submitted by FLC. BHM submitted a minor clarification of one of their issues which was considered in making this determination.
CONCLUSION

Based on the information submitted in writing prior to the hearing of March 14, 2011 and the information presented at that hearing, all protest issues have been carefully considered and are hereby denied. No bidder has been found to be non-responsive based on the protest issues.

Respectfully submitted,

John H. Rosenbrock, P.E.
Hearing Officer