

TRANSPORTATION COMMISSION OF WYOMING

The Transportation Commission of Wyoming met via video conference on December 8, 2020. Chairman Newton convened the special business meeting at 8:00 a.m. The following members were present constituting a quorum:

Rick Newton, Chairman, Buffalo
Phil Schmidt, Vice Chairman, Casper
Mike Larson, Commissioner, Lusk
Jim Espy, Commissioner, Savery
Jon Dolezal, Commissioner, Evanston
Lee Filer, Commissioner, Cheyenne
Greg Venable, Commissioner, Worland
K. Luke Reiner, Director
Sandra J. Scott, Commission Secretary

Other meeting participants: Garrett Foster and Beth Martin, Avail Valley Construction-ID, LLC, Victor, ID; and Kim Wilson, Stuart Frost, Michael Frost, and Danny May, Mountain Construction Co., Lovell, Wyoming; and Joey Darrah, Darrah Law Office, P.C., Powell, Wyoming, legal counsel for Mountain Construction Company.

Other WYDOT participants: Mark Gillett, Chief Engineer; Keith Fulton, Assistant Chief Engineer for Engineering and Planning; Mike Kahler, Senior Assistant Attorney General; Bryan Cawley, Division Administrator, Federal Highway Administrator; Doug Jensen, State Contracts & Estimates Engineer; and Lisa Fresquez, Civil Rights Program Manager.

Others present in the meeting: Dennis Byrne, Chief Financial Officer; Tom DeHoff, Assistant Chief Engineer for Operations; Taylor Rossetti, Support Services Administrator; Brian Olsen, Aeronautics Administrator; Troy Babbitt, Chief Technology Officer; Colonel Kebin Haller, Wyoming Highway Patrol (WHP) Administrator; Ryan Thompson, Assistant Attorney General; Cindy Thompson, Financial Manager, FHWA; Doug McGee, Public Affairs Program Manager; and Katie Legerski, Executive Director, Associated General Contractors (AGC) of Wyoming.

1. Pledge of Allegiance: Chairman Newton led the attendees in the Pledge of Allegiance.
2. The Commission called the special business meeting to award Federal Project NHPP-N302055 from the November 13, 2020, letting. The Commission tabled the project award at its November 19, 2020, regular business meeting so additional information could be gathered about Mountain Construction Company's forensic log from their data entry as well as other pertinent information about what a contractor should do if they encounter problems with preparing or submitting their bids.

It was moved by Commissioner Larson, seconded by Commissioner Dolezal, and carried to remove from the table the award of federal Project NHPP-N302055.

Director Reiner offered opening comments, including some guiding principles that were provided to the Commission about the critical importance of preserving the integrity of WYDOT's bidding process. This principle is important to WYDOT and to its contractors.

At the November 19, 2020, business meeting, Mr. Fulton recommended awarding this project to the second low bidder, Avail Valley Construction because of missing disadvantaged business enterprise (DBE) information in Mountain Construction's bid. Based on Civil Rights Program review of the Mountain Construction Company bid, the bid was deemed irregular because of a discrepancy on the contact and quote of a DBE subcontractor.

Mr. Fulton provided several handouts to the Commission. The first document was a printout from WYDOT's bidding system documenting the instructions to contractors. It read, "WYDOT has been using a new software for bidding since the January 2015 bid letting. To be able to bid as a prime contractor in Wyoming, your company must be prequalified. After getting prequalified, contact Mark Janicek to set up an administrator for the company. This person will manage the company user access and company information." Furthermore, at the bottom of that printout, it says, "If you have any questions call Mark Janicek of the Contracts & Estimates office at (307) 777-4214." The main phone number for the Contracts & Estimates office is also included at the bottom of the document.

Mountain Construction's bid documents indicate "No Response" from P&E Painting and Lead Removal following its email contact on November 12, 2020, yet the comments indicate "Quote on fencing: Lower quote received from Faction Constructors 180.329.42," a non-DBE firm. The note implies that Mountain received and accepted a lower quote from the non-DBE firm. If the contractor received a quote from P&E Painting and Lead Removal, the amount should have been recorded in the system.

Mr. Fulton provided another handout, Form E80, containing instructions about what is and is not allowed in the bidding process. At the top of Form E-80, it states, "It is mandatory that all bids be prepared using WYDOT EBS with an EBS-paper printout at letting; it is mandatory that all bonds are electronic."

The printed DBE Participation Certificate, as part of the bid document signed by a Mountain Construction representative, states:

"Mountain Construction Company certifies the following:

- a. It has taken affirmative action to seek out and consider Disadvantaged Business Enterprise as potential subcontractors.
- b. It has taken affirmative action to seek out and consider Disadvantaged Business Enterprise as potential suppliers.

Further, the Contractor shall:

- c. Specifically describe, on separate lines of this form, each component of work of the contract to be subcontracted to each Disadvantaged Business Enterprise firm is being used as a supplier of materials and for other subcontract work (e.g., furnish sign materials as a supplier

and traffic control as a subcontractor) the firm must be shown twice, once as a supplier and once performing subcontract work.

- d. List all contact and follow-up contacts made with the potential Disadvantaged Business Enterprise subcontractors and Disadvantaged Business Enterprise material suppliers (if necessary, use additional sheets).
- e. List the dollar amount quoted by each responding Disadvantage Business Enterprise subcontractor for the work described in accordance with c. above and the dollar amount quoted by each Disadvantaged Business Enterprise material supplier for the materials described in accordance with c. above.
- f. Indicate those Disadvantaged Business Enterprise that will be used and those that will not be used.
- g. Only those Disadvantaged Business Enterprises possessing current certification by the Wyoming Department of Transportation will be eligible to meet the requirements of the DBE program.”

Mountain Construction alleges that a system error occurred when they entered the DBE quote.

Mr. Fulton provided the following guiding principles, requirements, and best business practices for considering WYDOT bids.

- 1) It is imperative that WYDOT ensure the integrity of the bidding process.
- 2) It is the bidder’s responsibility to ensure that their bids are accurate, complete, and timely. By signing the bid documents, the bidder is attesting that what is contained in the bid packet is accurate, complete, and timely. WYDOT is not responsible for the accuracy, completeness, or timeliness of any bid as WYDOT must avoid all appearance of collusion or impropriety.
- 3) WYDOT has a robust “help desk” to assist with any questions, concerns, or problems a bidder may have with the bidding process. However, as stated in 2) above, it is the bidder’s responsibility to reach out to those individuals if they are experiencing any issues during the bidding process.
- 4) WYDOT’s recommendations must ensure, and be consistent with, the integrity of the bidding process.
- 5) If WYDOT makes an error, we will own it. Additionally, we will not hold the bidder responsible for our errors.
- 6) The Commission reserves the right to reject any or all bids, to waive bid irregularities, or to advertise for new bids (103.1 Consideration of Bids).
- 7) Any decision the Commission makes can change precedent from the past for all future construction, equipment, and supply bids.

Copies of the applicable excerpts from the WYDOT Standard Specifications for Road and Bridge Construction were also provided to the Commission.

No representatives from Mountain Construction Company contacted WYDOT Contracts & Estimates about problems with the bidding system, nor did any other contractor contact the Department about having issues with preparing their bids for the November 13, 2020 letting.

Mountain Construction also prepared a bid for another WYDOT project in that letting and they experienced no known issues in preparing that bid.

Federal project NHPP-N302055, involving bituminous pavement surfacing, chip seal, fencing, and miscellaneous work on approximately 5.00 miles of US 26, beginning at reference marker (RM) 40.68, between Moran Junction and Dubois, in Fremont County. Completion date: October 31, 2021

Engineer's Estimate	\$2,746,989.50	
Mountain Construction Company, Lovell, WY	\$2,570,324.41	-6.4%
Avail Valley Construction-ID, LLC, Victor, ID	\$2,574,600.00	
McGarvin-Moberly Construction Co., Worland, WY	\$2,629,920.96	
H-K Contractors, Inc., Idaho Falls, ID	\$2,649,769.00	

Mr. Fulton recommended that the project be awarded to the second apparent low bidder, Avail Valley Construction-ID, LLC, Victor, Idaho, having prequalified in accordance with rules and regulations adopted by the Transportation Commission of Wyoming.

Mr. Cawley noted that the FHWA's concurrence when awarding projects is based upon maintaining the integrity of the bidding process administered by WYDOT. The FHWA does not review individual projects or the individual bids submitted. On behalf of the Federal Highway Administration, Mr. Cawley concurred with Mr. Fulton's recommendation to award the contract to Avail Valley Construction, of Victor, Idaho.

Mr. Joey Darrah, attorney for Mountain Construction Company, expressed concern that WYDOT personnel are taking the situation "somewhat to an extreme." He believes the Commission has the ability to wave irregularities or reject bids, but Standard Specification SS-100F, Supplementary Specification for Disadvantaged Business Enterprise Participation, dictate the bid requirements. Mr. Darrah explained that Mountain Construction's bid, on page 10 of 11, indicates P&E Painting and Removal was contacted via email on November 12, 2020, for a subcontractor quote, but claimed there was no place to enter an amount of the quote. Mr. Darrah believes that, if there is an irregularity in the bid, it is de minimis and he argued that the Commission should overlook the matter because it does not affect the price, timing, scope of work, nor the job in general, so it is not a material aspect of the project. WYDOT does not require individual project DBE goals, and it is merely an administrative requirement, so Mr. Darrah does not believe this issue is an important aspect of the job.

Mr. Darrah advised that because WYDOT contacted P&E Painting & Removal after the bid opening, the Department received the necessary clarification and Mountain Construction's bid should be considered whole and acceptable.

Mr. Darrah quoted the following from the Federal Acquisition Regulation, Sealed Bidding section of the Code of Federal Regulations:

“48 CFR § 14.405 - Minor informalities or irregularities in bids. A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.”

Mr. Darrah urged the Commission to consider the fact that Mountain Construction’s error was not intentional. In his opinion, the bid ambiguity does not violate any criteria for documented bid solicitation for the DBE under SS-100F, Supplementary Specification for Disadvantaged Business Enterprise Participation.

Mr. Kahler advised that the Commission has broad discretion about whether or not to accept the irregular bid. It is a matter of policy for the Commission to decide whether to wave the ambiguity and award the bid to Mountain Construction.

Vice Chairman Schmidt noted that the Commission has a set precedence of rejecting these types of irregularities in the past. Mr. Kahler agreed that precedence is a factor, particularly if there was some sort of future challenge to the Commission’s final decision.

Commissioner Espy advised that he does not support awarding to the second low bidder, Avail Valley Construction, because he believes WYDOT’s “software glitch” contributed to Mountain Construction’s bid irregularity.

Mr. Garrett Foster, of Avail Valley Construction, stated that the bid software is not perfect, but he believes each contractor has the responsibility to enter information into the software and to provide due diligence by ensuring that the information entered in the bid system is what is on the final printed document before signing and submitting the bid.

Ms. Wilson, of Mountain Construction Company, stated that their bid was completed in the bid system, but it did not print all of the information on the paper copy. Mountain Construction hired a forensic data analyst to produce the exact keystrokes made when entering the DBE information. The forensic data showed that the DBE information was entered at 7:11 a.m. Mountain Standard Time, but the bid system failed to save that information. Ms. Wilson advised that, after printing the bid, there was no field on the paper copy to fill in the DBE information. Because there was no field shown on the paper copy, the contractor did not know the information was missing.

Vice Chairman Schmidt asked if Mountain Construction contacted WYDOT's help desk about the issue with preparing their bid. Mr. Fulton advised that no one from Mountain Construction contacted WYDOT in the hours leading up to the bid opening.

Mr. Jensen explained that WYDOT's bidding software is a web-based application, which requires interaction from WYDOT and the bidder. Regular web browser updates may conflict with WYDOT's bidding software. When WYDOT learns about conflicts, it contacts the software developer to review and update the software to avoid future conflicts. WYDOT has no control over what browsers or browser settings contractors use, so there will always be potential conflicts. Since this incident occurred, WYDOT has worked diligently with its software developer to try to recreate the issue, but the programmer has not been successful. Mr. Jensen noted that the alleged issue cannot be fixed if it cannot be found.

Ms. Lisa Fresquez, Civil Rights Program Manager, advised that her staff reviews bids after the bid opening. Mountain Construction did not contact her office about any DBE issues before the letting. Ms. Fresquez stressed the importance of the DBE program and maintaining the integrity of the bid process. The DBE program is the basis from which WYDOT receives significant federal funds for its projects, and not meeting federal regulations could potentially jeopardize the Department's ability to continue receiving project-specific or a percentage of its federal funds. WYDOT's annual overall DBE goal is 4.78 percent.

Ms. Fresquez clarified that the Civil Rights Program contact with the contractor after the bid letting is merely to verify the information received. When reviewing bids, Civil Rights Program staff contacts the DBE to confirm they were actually contacted, as stated on the prime contractor's bid documents, and to obtain any necessary support documents.

Commissioner Filer asked if Mountain Construction's forensic findings were sent to WYDOT before the bid opening. Ms. Wilson advised that the forensic information was generated after the bid letting when they became aware of the issue. Ms. Wilson shared that their company has experienced other issues while preparing past bids, but this particular situation has never occurred before for their company.

Mr. Gillett reiterated that, according to WYDOT specifications, the paper copy governs the bid results. Contractors sign the bid document signifying it is true and accurate. If a contractor finds an inaccuracy on the printed copy, they can contact WYDOT about the finding, or they can make a handwritten note or change on the document and initial it in ink.

Mr. Gillett believes that allowing contractors to provide supplemental information after the bid opening is risky.

Director Reiner asked Mountain Construction to reiterate what happened when they entered the DBE information into the bidding software and how the information ultimately disappeared. Ms. Wilson advised that the video provided by Mountain Construction was prepared a few days after the actual bid letting as an example of what they encountered when preparing their bid. The video depicted Ms. Wilson entering DBE information into the bidding system for a future

WYDOT bid, and how the system defaults to removing certain already-entered details when she added new information.

Mr. Darrah reiterated the criteria in Standard Specification SS-100F, Supplementary Specification for Disadvantaged Business Enterprise Participation, on page 2, sections 1 through 4, which requires that the DBE source be indicated on the bid document. Mr. Darrah believes the bidding system created the ambiguity, not his client, Mountain Construction.

It was recommended by Mr. Fulton, moved by Commissioner Filer, seconded by Commissioner Larson, and carried that Avail Valley Construction-ID, LLC, of Victor, Idaho, being the apparent responsive low bidder, on federal project NHPP-N302055, be awarded the contract. The FHWA concurred with this decision. Commissioner Espy voted no.

Commissioner Filer recommended that WYDOT review its bidding system to avoid ambiguities in the future, and encourage contractors to feel free to write on and initial necessary changes on the paper copy of their bids.

Commissioner Espy advised he voted against the motion because he believes the errors are de minimus, both parties made errors, and there is no prejudice because the total amount was stated in the bid package that was originally presented to the Commission.

2. It was moved by Vice Chairman Schmidt, seconded by Commissioner Filer, and carried to adjourn the meeting. Chairman Newton adjourned the meeting at 9:17 a.m., on Tuesday, December 8, 2020.