



**METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY**

November 7, 2014

**to: All Parties to the Protest of RFQ 629873, Shelby Park Rehabilitation – Area 3 – Greenland Avenue**

Pursuant to § 4.36.10 M.C.L., *Authority to Resolve Protested Solicitations and Awards*, this correspondence serves as written notification of the Purchasing Agent's protest decision. The protest of Metro's intent to award to Layne Inliner, LLC. (Layne) was filed by Insituform Technologies, LLC. (Insituform). An administrative hearing for RFQ 629873, Shelby Park Rehabilitation - Area 3 - Greenland Avenue was held on Friday, October 31, 2014.

**Background of Solicitation Offers**

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Layne's total cost offer was \$5,718,975

Their subcontracting report identified the firms and the work performed as follows:

- CK Masonry Co. Inc.\* with a subcontracting award of \$228,450 for Manhole Rehabilitation
- CraftCo\* with a subcontracting award of \$3,520,738 for Excavation/Pavement Restoration

Layne's reported small business subcontracting award was \$3,749,188, or 65.56% of the total offer.

Insituform's total cost offer was \$5,636,195

Their subcontracting report identified the firms and the work performed as follows:

- Underground Eyes<sup>+</sup> with a subcontracting award of \$2,205,825 for clean outs and Lateral Rehab
- Pipeworks Plus\* with subcontracting award of \$1,145,500 for Surface Restoration and Lateral Rehab
- CK Masonry Co. Inc.\* with a subcontracting award of \$222,200 for Manhole Rehabilitation
- Pipeline Innovation\* with a subcontracting award of \$109,965 for Clean and CTTV, Post Testing
- Sunbelt Rentals with a subcontracting award of \$24,967 for Bypass Pumping

Insituform's reported small business subcontracting award was \$1,447,665, or 26.22% of the total offer.

\* Approved Small Businesses and served as the basis for SBE Incentive calculations

+ Claimed as a Small Businesses on the Subcontractor Form but was not approved

At the time of award, Metro Water Services (MWS) engineers were satisfied that both firms qualified to perform the contract and that the specifications would be met based on past performance. The Business Assistance Office confirmed that the ownership classifications were satisfied. The Purchasing Office provided process oversight and verified that the Code and Regulations were followed.

**The protest is based on the following two claims by Insituform.**

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**Protest Hearing Findings related to Claim One**

*“Layne failed to name any subcontractors who are certified to install the approved lateral lining technologies, nor is Layne certified as required by the Contract Specification Section 33 01 88”.*

Based upon the total dollar of the offer’s and the reported Small and/or Service Disable Veteran-owned Business participation, the award was made to Layne.

At the protest hearing, Insituform’s argument was that Layne would self-perform the lateral lining work and they are not a certified installer of that lateral lining service. Additionally, neither of the two identified subcontractors is certified to provide the specified lateral lining products. As a result, Layne should be deemed non-responsive.

Layne’s rebuttal was that CraftCo, as evidenced by their SBE subcontracting amount, included the lateral lining costs in their offer. CraftCo, as a subcontractor to Layne, assumed the responsibility for lateral lining services and that the work would be performed by a certified installer, satisfying the specifications of MSW.

While Layne did not identify the subcontractor’s identity, Insituform concluded that if it were not being self-performed by Layne, it was being provided by Underground Eyes.

Underground Eyes, formerly an approved Small Business, either experienced enough business growth to no longer qualify as a Small Business or allowed their SBE approval to lapse as of the solicitation due date.

**Protest Hearing Findings related to Claim Two**

*“Layne greatly increased the dollar value of the subcontract work allegedly to be performed by CraftCo, LLC while specifically stating on its Subcontractor Report that CraftCo would only be performing Excavation/Pavement Restoration”.*

As stated previously, Layne clarified at the protest hearing that CraftCo was assuming the business responsibility for a large portion of the work and reflected the larger financial commitment on the subcontractor form. Layne did not specifically state that CraftCo was to perform the lateral lining services on the subcontracting form but confirmed this at the hearing and stated that this was why their subcontracting value was higher.

## **Purchasing Agent's Analysis**

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### ***Specifications and Departmental Approval***

The following is a section of the MWS specifications (410 pages) related to the lateral lining work:

#### **2.01 MATERIALS**

- G. The service lateral lining shall be manufactured and installed by T-Liner by LMK Technologies; SCS+L by BLD Services, LLC; epros DrainMth System by Trelleborg Pipe Seals Milford, Inc.; or approved equal.

Neither the specifications nor the solicitation required the provider of the lateral lining products be certified or identified. The only requirement was that the product provided be one of the three approved products listed in the specification or be preapproved by MWS.

Past work performed for MWS by both Insituform and Layne support that they use the approved products. Additionally, should any provider fail to use the specified products, the firm will be found in breach of contract. MWS was satisfied that all offerors on this solicitation were qualified to perform the work.

### ***Subcontractor Business Status and BAO Approval***

The Business Assistance Office (BAO) approves business status annually as prescribed by the Procurement Regulations. This is based on the past year's tax returns. The approval is not based on a specific offer or for a specific business activity/function. The two firms presented by Layne met the Small Business requirements and were approved by the BAO as such. The claim by Insituform that Underground Eyes was a small business was disallowed because they do not hold this status.

### ***Subcontractor Performance***

The heart of the protest is centered on what consideration is given to the value assigned to the subcontractors submitted by Layne. Insituform asserts that CraftCo is not responsible for the lateral lining work because they are not performing it. Therefore, they should not receive small business consideration for that body of work.

Layne makes the counterclaim that CraftCo is responsible for the lateral lining work. There is no requirement that all work performed must be identified on the subcontractor form. Neither is there a requirement that second tier (sub-subcontractors) firms be identified. The form serves as a snap shot of the subcontracting efforts. If this form were to serve as the only basis for the determination of responsiveness, Insituform would also be deemed non-responsive for incorrectly claiming Underground Eyes as an Approved Small Business.

The question is, can an approved small business subcontract out work to an unapproved small business and still claim the total value for SBE consideration? Clearly, had CraftCo used Layne as their sub-subcontractor, we would have determined that they were fronting the contract and deemed them non-responsive. However, that is not the case. CraftCo, a small business, assumed the financial commitment and management for the work they are subcontracting to a third party.

This same occurrence has been the focus of past protests and it has been permitted. The rationale was that subcontracting work allows a small business to grow beyond its current status, which is the intent of the program. There is no prohibition of such growth strategies in Title 4 of the Metropolitan Code of Law, the Procurement Regulations, or the solicitation. However, the magnitude of this subcontracting work exceeds that of past protest considerations.

### **Purchasing Agent's Determination**

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At the time of the award, both Insituform and Layne submitted their lists of subcontractors and the value of those subcontracts. MWS was satisfied that both firms provide products meeting the specifications. BAO confirmed the ownership status of the proposed small businesses. The Purchasing Office correctly calculated the proposed small business impact on the evaluated contract price.

While both firms offered post award/protest input on how the award was evaluated, the protest decision must be made on what was known at the time of the award. No post award information was considered for the award or this decision.

It appears that Layne used the opportunity to expand a small business's services as a growth strategy to their advantage. The magnitude of this subcontracting causes concern. The suggestion at the protest hearing by Insituform that they subcontract all future work through their janitorial contractor who is a small business to maximize their incentive, causes one to question whether what was intended to provide growth capability for a small business has now become a significant gaming problem. The integrity of the Small Business and Service Disabled Veteran-owned Business Program is being challenged.

While there is no basis (Code, Regulation, or prohibition in the solicitation prohibiting this practice) to support upholding the protest, it is clear that the issue must be addressed going forward without unduly disadvantaging small businesses to grow. The BAO has been tasked with submitting a manageable control for future SBE/SDV cost considerations. This may or may not require consideration by the Procurement Standards Board.

However, in reviewing what was in place at the time of the award, the protest claims are dismissed and the award to Layne, Inc. stands.

Respectfully,



JEFF L. GOSSAGE C.F.I.VI.

Purchasing Agent

The Metropolitan Government of Nashville and Davidson County

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#### **Notification:**

The protest decision of the Purchasing Agent may be appealed within seven (7) days of the written decision to the Appeals Board. The notice of appeal must be mailed via either U.S. Mail or hand-delivered to the Office of the **Director of Finance** and the **Purchasing Agent** prominently stating "**Notice of Appeal.**"

Procurement Division

730 Second Avenue South, Suite 112  
P.O. Box 196300  
Nashville, Tennessee 37219-6300

[www.Nashville.gov](http://www.Nashville.gov)  
Phone: 615-862-6180  
Fax: 615-862-6179

A written decision will be issued by the Board which states the extent to which, the decision by the Purchasing Agent was in accordance with the Constitution, statutes, the Metropolitan Code of Law, Procurement Regulations, the terms, and conditions of the solicitation, and the best interests of the Metropolitan Government.

This information is a brief, layman's summary of the processes. Please refer to the Code & Procurement Regulations for official information on these administrative rights. Please refer to [www.Nashville.gov](http://www.Nashville.gov) under the Purchasing section of Finance for the Metro Code and Procurement Regulations that govern Protests and Appeals.