



April 29, 2022

Via Email

Judy Price
Town Clerk
Town of Truckee
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Truckee, California 96161
JPrice@townoftruckee.com

**Re: Supplement to Bid Protest submitted by Walsh Construction Company II, LLC
Truckee River Legacy Trial Phase 4, CIP 0702**

Ms. Price:

On April 21, 2022, Walsh Construction Company II, LLC (“Walsh”) submitted a protest (“Protest”), protesting the award of the Truckee River Legacy Trial Phase 4, CIP 0702 project (“Project”) to Mercer-Fraser Company (“Mercer”) as Mercer’s bid was nonresponsive. Thereafter on April 26, 2020, Walsh staff observed the Town of Truckee (“Truckee”) City Council meeting wherein the Project was discussed. Walsh noted that during this meeting Truckee employees represented that Walsh submitted a bid protest relating only to what appear to be only minor technical deficiencies which did not provide a competitive advantage. Walsh disagrees with Truckee’s initial analysis of the errors identified and asserts that Mercer’s material failure to comply with the requirements of the Contract Documents provided a clear competitive advantage, rendering Mercer’s bid nonresponsive. Therefore, Walsh provides this supplement to its Protest in further support of its position.

The Contract Documents for this Project were carefully crafted by Truckee and further thoroughly explained through the extensive Request for Information (“RFI”) and Addenda process. As discussed more fully in Walsh’s Protest, Mercer failed to comply with the requirements of the Contract Documents in several, material, ways that provided Mercer a competitive advantage over Walsh and opened the door to bid shopping.

The Contract Documents and California law require the award of this Project to the lowest responsive and responsible bidder. California law is clear that, in evaluating the responsiveness of bids, ***a public owner is required to follow its own published rules.*** See, e.g., *Pozar v. Department of Transportation*, 145 Cal. App. 3d 269-271 (1983) (emphasis added). *Pozar* holds that it is a mandatory obligation of public owners to enforce their published rules regarding procurements and the solicitations of bids. Furthermore, the decision of *Konica Business Machines U.S.A., Inc. v. Regents of the University of California*, instructs that bids on public projects must strictly comply with the bidding requirements. 206 Cal.App.3d 449, 454 (1988).

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The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous marketplace competition. (See legis. intent declared in Pub. Contract Code, § 10300). Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and ***contracts awarded without strict compliance with bidding requirements will be set aside***. This preventative approach is ***applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money***. The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements. (emphasis added)

MCM Construction Inc., v. City and County of San Francisco, 66 Cal.App. 4th 359, 369 (1998).

Not only did Mercer fail to comply with the bidding requirements, but Mercer failed to do so in a substantial, material way. A deviation from the bid requirements is considered substantial, “unless it is so inconsequential that it could not affect the amount of the bid.” *Ghilotti Construction v. City of Richmond*, 45 Cal.App.4th 897, 906 (1996). When determining whether a bid deviation is a minor or a substantial departure, factors considered include whether deviation could be a vehicle for favoritism, affect the amount of the bid, influence potential bidders to refrain from bidding, or affect ability to make bid comparisons. *Konica* at 454.

Here, Mercer’s failure to list the required project experience, identify the required project staff, identify material fabricators and list subcontractors as required by the California Subletting and Subcontracting Fair Practices Act (“Listing Law”) are substantial, material deviations that provided Mercer with a competitive advantage. Truckee clearly stated various requirements to bid the Project in the Contract Documents presumably to properly evaluate the bids received and ensure that the Project was awarded to a bidder with the required experience and staff to administer the Project. These requirements further help to make comparisons between the bids submitted. By Mercer failing to comply with these requirements, Truckee is unable to make the required fair comparison required between the bids. An evaluation of Mercer’s bid alone, which is all that can be considered at this point, would suggest Mercer does not have the requisite experience and does not have the requisite staff required by the Contract Documents to perform this Project.

Walsh ensured that, at the time of bid, it had the requisite experience and management in place to perform this Project, which came at a cost to Walsh. By allowing this requirement to be set aside only for Mercer provides Mercer the clear competitive advantage to now take the Project where they were identified as apparent low bidder and solicit the necessary management for the Project. Or alternatively, to try and submit a superintendent or micro-pile foreman that is lacking in qualifications.

Mercer's competitive advantage for the failure to substantially and materially comply with the requirements of the bid and the Contract Documents does not end there. By Mercer failing to identify the required material fabricators and further comply with the Listing Law, the door is now open for Mercer to bid shop and obtain more competitive pricing than other bidders that complied with the requirements of the Contract Documents and the Listing Law, such as Walsh. In compliance with the Contract Documents, Walsh's bid identified and committed to material fabricators as well as bridge deck overlay and revegetation subcontractors for the Project. Mercer did not.

If Mercer is allowed to skirt these requirements and is awarded the Project, Mercer can shop prices for these scopes. The Public Contract Code and California Law have long stated that the practices of bid shopping and bid peddling result in poor quality of materials and workmanship, deprive the public of the benefit of fair competition and lead to insolvencies, loss of wages and other evils. Public Contract Code §4101, see also *MCM Construction Inc.* at 369. Bid shopping occurs where the general contractor uses the lowest bid received to pressure other subcontractors to submit even lower bids. *Id.* Since Mercer is not committed to material fabricators as well as several subcontractors for required scopes on the Project, Mercer has the opportunity to bid shop, pressuring firms to provide a lower price to Mercer as the apparent low bidder. Such an opportunity, even if not realized, unequivocally provides Mercer with a competitive advantage.

Walsh trusts that this supplemental information will assist Truckee in its review of the bids submitted and Walsh's Protest of the award of the Project to Mercer. Mercer failed to comply with the bid and Contract Documents, providing Mercer with a competitive advantage and rendering its bid nonresponsive. Mercer failed to identify the required material fabricators and subcontractors providing Mercer with a competitive advantage and the ability to bid shop, rendering its bid nonresponsive. Due to the failures in Mercer's bid, Truckee is also unable to make the appropriate bid comparisons. As such, Mercer's bid should be rejected as nonresponsive for the various reasons stated herein as well as in Walsh's previously submitted Protest, and this Project should be awarded to the lowest responsive and responsible bidder, Walsh. Walsh remains excited about the opportunity to construct this Project for you. Thank you for your attention to these matters. Walsh reserves all rights.

Sincerely,
Walsh Construction Company II, LLC



Blair A. Knopp
Corporate Counsel

Copy: Jessica Thompson, Project Manager
David Cramer