

May 2, 2022

Via Email: JPrice@townoftruckee.com

Judy Price, Town Clerk
Town of Truckee
10183 Truckee Airport Road
Truckee, CA 96161

*Re: Bid Protest by Walsh Construction Company II, LLC
Truckee River Legacy Trail Phase 4, CIP 0702
Mercer-Fraser Company*

Dear Ms. Price:

I am writing on behalf of my client, Mercer-Fraser Company ("Mercer-Fraser") in response to the protest to the Town of Truckee ("Truckee") filed by Walsh Construction Company II, LLC ("Walsh"). Walsh protested Truckee's intended award of a contract to Mercer-Fraser for the Truckee River Legacy Trail Phase 4 Project, CIP C0702 ("Project"). Fundamentally, Walsh misunderstands what information was required in the bids and what makes a bid responsive (or non-responsive). For the reasons stated below, Mercer-Fraser respectfully requests that Truckee deny Walsh's protest and proceed with the intended award to Mercer-Fraser as the lowest responsive, responsible bidder for the Project.

Mercer-Fraser was not required to list any material fabricators

Walsh's first issue is its claim that Mercer-Fraser's bid was non-responsive for not listing material fabricators. A bid is responsive if it includes all required information and promises to do what the solicitation document requires. *See, e.g., Valley Crest Landscape, Inc. v. City of Davis*, 41 Cal. App. 4th 1432, 1438 (1996); *Taylor Bus Serv., Inc. v. San Diego Bd. of Educ.*, 195 Cal. App. 3d 1331, 1341 (1987). Walsh claims that the subcontractor listing form required bidders to list not only subcontractors, but also material fabricators. This appears to be based on the title of the form, which is: "BIDDER'S STATEMENT OF SUBCONTRACTORS & MATERIAL FABRICATORS." However, the form indicates that bidders are required to list subcontractors required to be listed by the Subletting and Subcontracting Fair Practices Act ("Act"), including by specifically citing the Act on the form.

Truckee gave its ultimate decision on the issue of what material fabricators, if any, were required to be listed in response to Question 72 (RFI 108), apparently submitted by Walsh. In that question, Walsh argued that material suppliers were not “subcontractors” required to be listed by the Act, stating:

Material fabricators are not subcontractors. Material fabricators do not perform work on-site. **Material fabricators do not have license numbers or a DIR License.** Caltrans does not request listing material fabricators. Other owners do not request listing material fabricators unless it is a specific piece of mechanical equipment. Please revise the form.

(Emphasis added). Truckee responded: “No, we will not revise the form. List the material fabricators **that are required to have a license** for the work that they are performing for the project.” (Emphasis added). In other words, bidders were required to list only those material fabricators that were required to be licensed contractors.

Walsh’s protest fails to identify a single material fabricator that is required to have a contractor’s license and that Walsh claims Mercer-Fraser did not list. According to Walsh in its question to Truckee, material fabricators are not required to be licensed. Under that admission, which is consistent with Mercer-Fraser’s understanding (at least for the work bid here), Mercer-Fraser was not required to list any material fabricators. Walsh failed to establish that Mercer-Fraser’s bid deviated in any way from the requirements of the solicitation document, so its protest should be denied.

Mercer-Fraser provided the required reference projects

Walsh’s second ground of protest is its assertion that Mercer-Fraser did not list two “similar” projects. The requirement was listed solely in the “Technical Ability and Experience” attachment. The attachment stated:

The bidder is required to state what work of a similar character to that included in the proposed contract has been successfully performed and give references **which will enable the Town Council to judge his or her responsibility**, experience, skill and business, and financial standing.

(Emphasis added). With respect to the requirement, Question 2 (RFI 4) asked “Please clarify what qualifies as ‘similar character’?” Truckee responded: “Projects should be completed. Projects should be similar to the modified stress ribbon bridge or construction type (ie, not a pre-fab bridge) and experience in the way it will be [constructed].”¹

Assessing “responsibility,” as referenced in the requirement, involves determining a bidder’s trustworthiness as well as its quality, fitness, capacity, and experience to

¹ Although cited in the protest, questions 3 and 4 (RFIs 5 and 6) do not appear relevant to this protest ground. The protest does not explain how they apply.

satisfactorily perform the contract. Pub. Cont. Code § 1103; see also *City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court*, 7 Cal.3d 861, 867 (1972). A bid cannot be rejected as non-responsive when, in substance, the real reason for the rejection is responsibility, at least not without a responsibility hearing identifying the reasons and evidence indicating that the low bidder cannot perform. See *Great W. Contractors, Inc. v. Irvine Unified Sch. Dist.*, 187 Cal. App. 4th 1425, 1429 (2010). In that case, the court concluded that Great West's bid was responsive because it "complied literally with the bid request. There was a question. Great West answered it. Period." *Id.* at 1457.

Here, Mercer-Fraser also complied literally with the bid requirements. Mercer-Fraser provided five reference projects of a similar character that it has successfully recently performed, as required by the solicitation document. Thus, its bid was responsive.

In addition, Truckee asked Mercer-Fraser for additional information confirming its responsibility following bidding, as Truckee is permitted to do in determining responsibility. See *Taylor Bus*, 195 Cal. App. 3d at 1341-42 (responsibility determination is a complex matter that generally is dependent on information outside of the bid itself). For example, before rejecting a bidder as not responsible, a public entity must

notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him an opportunity to rebut such adverse evidence, **and permit him to present evidence** that he is qualified to perform the contract.

City of Inglewood, 7 Cal.3d at 871 (emphasis added). Asking a bidder to provide information confirming that it is qualified and has the experience to perform is not changing the **bid** in any way, but providing more information regarding the **bidder**. Although the contract specifications do not apply until after the contract is awarded, Mercer-Fraser complied with specification section 15-1.03 by providing the information requested by Truckee related to Mercer-Fraser's experience—its ability to perform—when it was requested. This was proper in a responsibility assessment.

Not only was Mercer-Fraser's bid responsive, but Truckee presumably found that the references allowed it to confirm Mercer-Fraser's responsibility, including its experience, skill, and financial standing (to the extent the reference projects were intended for financial purposes, although RFI 6 suggests that they were not). Walsh has not submitted any evidence indicating that Mercer-Fraser is not responsible or cannot perform the Project work. Again, its protest on this ground should be rejected.

The solicitation document did not require bidders to identify and provide qualifications for the Superintendent and Micro-Pile Foreman with the bid

Walsh next argues that Mercer-Fraser failed to submit information regarding personnel. Again, Walsh fails to identify any requirement of the **solicitation document** to include the name or qualifications of the Superintendent and Micro-Pile Foreman with the bid.

Even the answers to questions that it cites do not contain such a requirement. Thus, its protest identifies no bidding requirement with which Mercer-Fraser failed to comply.

Walsh suggests in this and its prior ground of protest that bids were required to include information referenced in a **contract** specification. Walsh is incorrect. To be responsive, bidders must provide only information that is required to be included in the bid by the solicitation document. The contract does not bind the bidder until well after bidding, when Truckee awards it the contract. For example, even the bid form states:

Pre-construction submittals shall be submitted to the Town within eleven (11) calendar days after the contract is approved by Town Council and prior to the issuance of a Notice to Proceed, consistent with Section 5-1.15 of the Special Provisions.

Although not expressly identified as a “pre-construction submittal,” Section 15-1.03 does provide that the contractor is “to submit qualifications” for its superintendent and micro-pile foreman. Thus, presumably, that information is required within 11 days after the contract is approved at the earliest, not with the bid.

Certainly, Truckee has the discretion to ask any bidder to provide additional information on its experience or the identity and experience of its personnel. Truckee did so here, and Mercer-Fraser provided that information. The fact that Truckee may investigate responsibility at the time of bidding to confirm that the low bidder is able to perform the contract does not convert an issue of responsibility to one of responsiveness.

The bid forms and bidding instructions did not require bidders to identify or provide qualifications of their Superintendent and Micro-Pile Foreman as part of the bids. As a result, not including such information cannot make a bid non-responsive.

Mercer-Fraser’s bid complies with the Act

Walsh’s final ground of protest is that Mercer-Fraser did not list a subcontractor for revegetation or bridge overlay work. Walsh’s protest even includes the reason for that—because Mercer-Fraser will perform that work itself. The fact that a bidder will perform work itself does not constitute a violation of the Act. Walsh’s assertion that if Mercer-Fraser were to try to subcontract that work then it would violate the Act is neither a violation of the Act nor evidence suggesting a potential future violation of the Act. Compliance with the Act during the contract is an issue for performance, and unsupported speculation is not a basis for protest.

Mercer-Fraser gained no competitive advantage

As explained above, Mercer-Fraser’s bid was fully responsive to the requirements of the solicitation document. Thus, it had no advantage not available to any other bidder.

Even if bidders were required to list material fabricators—which they were not—Mercer-Fraser could gain no advantage over any other bidder by not listing the fabricator. The Act does not require such listing. Further, by conducting a responsibility assessment,



Truckee could verify any bidder's material fabricator prior to award. Thus, no "advantage" is available by not listing a fabricator.

Even if bidders were required to include information required by **contract** specifications in their bids—which they were not—Mercer-Fraser could gain no advantage over any other bidder by not listing the information. Again, Truckee had the right to verify the information as related to a bidder's responsibility prior to award, and it chose to do so to the extent it had any question regarding Mercer-Fraser's experience. No advantage exists because Mercer-Fraser meets the contract requirements.

Finally, Mercer-Fraser had no advantage over any other bidder by choosing to perform some of the work itself. Any bidder could have done so.

For the reasons stated above, Walsh's protest should be denied as entirely unfounded. Mercer-Fraser is the lowest responsive, responsible bidder and looks forward to working with Truckee on the Project.

Sincerely,

DIEPENBROCK ELKIN
DAUER McCANDLESS LLP

A handwritten signature in blue ink, appearing to read 'JL Dauer', is positioned above the printed name.

Jennifer L. Dauer

JLD/mj