



April 21, 2022

*Via Email*

Judy Price

Town Clerk

Town of Truckee

10183 Truckee Airport Road

Truckee, California 96161

[JPrice@townoftruckee.com](mailto:JPrice@townoftruckee.com)

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

Ms. Price:

On April 15, 2022, Walsh Construction Company II, LLC ("Walsh") submitted a proposal for the Truckee River Legacy Trial Phase 4, CIP 0702 project ("Project") in accordance with the Town of Truckee ("Truckee") bid and contract documents which includes but is not limited to the Notice to Contractors, Special Provisions, Addenda, Bid and Contract (collectively referred to herein as "Contract Documents"). On Friday April 15, 2022 Truckee publicly opened and read the bids received which identified Mercer-Fraser Company ("Mercer") as the apparent low bidder with a price of \$12,352,671.32. Walsh was the apparent second low bidder with a price of \$12,489,209.25. On Monday April 18, 2022 Walsh requested and received from Truckee the bid documents submitted by the other two bidders on the project. A review of the bid submitted by Mercer revealed several fatal flaws which render Mercer's bid nonresponsive. The flaws in Mercer's bid include the failure to comply with the requirements of the Contract Documents and apparent failure to comply with California's Subletting and Subcontracting Fair Practices Act, Public Contract Code §§4100-4114 ("Listing Law"). Therefore, Walsh is protesting the award of this project to Mercer and, based upon the facts and authorities set forth below, requests Truckee reject Mercer's bid as nonresponsive and award this project to Walsh as the lowest responsive and responsible bidder.

## **I) Timeliness and Standing to Protest**

The Contract Documents require a protest to be filed in accordance with the Truckee Municipal Code. Title 3.12.245 of the Truckee Municipal Code states that only a person or entity that submitted a bid has standing to file a protest and any such protest must be filed within five (5) business days of the bid opening. As the bid opening for this project was April 15, 2022, and Walsh submitted a bid for the Project, Walsh has standing to file a protest and such protest is timely.

## II) Mercer's bid is nonresponsive as it fails to comply with the requirements of the Contract Documents

The Contract Documents have very specific requirements to, among other things, (1) list subcontractors and material fabricators whose bids exceed one-half of one percent of the total bid that the Bidder intends to employ on the work, (2) list a minimum of two (2) projects completed within the last two (2) years similar to the Project, and (3) submit qualifications for the superintendent and micro-pile foreman for the Project.

Unfortunately, Mercer failed to comply with these bid requirements, rendering its bid nonresponsive.

A basic rule of competitive bidding is that bids must conform to the specifications, and that if a bid does not so conform, it may not be accepted. *Ghilotti Construction co. v. City of Richmond*, 45 Cal.App.4<sup>th</sup> 897, 905 (1996). Further, the Contract Documents and the California Public Contract Code clearly require the award of the project to the lowest responsive and responsible bidder. "A bid is responsive if it promises to do what the bidding instructions require. Thus, a responsive bid must conform to the public agency's specifications for the contract." *DeSilva Gates Construction, LP v. Department of Transportation*, 242 Cal. App. 4<sup>th</sup> 1409, 1417 (2015). Determining bid "responsibility is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment; whereas responsiveness is less complex and can be determined from the face of the bid. Thus, in most cases, the determination of non-responsiveness will not depend on outside investigation or information and a determination of non-responsiveness will not affect the reputation of the bidder. Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information. *Great West Contractors, Inc. v Irvine Unified School District*, 187 Cal.App.4<sup>th</sup> 1425, 1452 (2010).

Here, it is clear on the face of Mercer's bid that Mercer failed to conform with what the bidding specifications and instructions required in multiple ways, any one of which alone would render Mercer's bid nonresponsive.

### 1) Failure to list material fabricators.

Bidders Statement of Subcontractors and Material Fabricators<sup>1</sup>, which is part of the bid form, requires the bidder to provide a "list of subcontractors **and material fabricators** whom he/she proposes to employ on the work with the proper firm name and business address of each." (emphasis added). This requirement is further clarified and solidified in Addenda 1 RFI #3, Addenda 3 RFI #63 and Addenda 4 RFI #108. The Bidders Statement of Subcontractors and Material Fabricators submitted with Mercer's bid does not list any material fabricators that it proposes to employ on the work as required by the Contract Documents. Conversely, and in compliance with the Contract Documents, Walsh listed both its structural steel and prefabricated bridge fabricators. Mercer's failure to comply with the requirements of the Contract Documents render its bid nonresponsive.

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<sup>1</sup> The Bidders Statement of Subcontractors and Material Fabricators is contained in the Notice to Contractors, Requests for Bids identified as page 9 within the Contract Documents

***2) Failure to list two projects completed within two years similar to this project.***

The Bidders Technical Ability and Experience on page 11 of the bid form as well as Section 15-1.03 of the Special Provisions outline specific qualifications a Bidder is required to submit with its bid. Specifically, this Section requires a listing of at least two (2) projects, completed within the last two (2) years that are similar to this project. This requirement is further clarified in Addenda 1 RFIs #4, #5 and #6. Mercer provides a listing of several projects previously completed, however, only one (1) project listed by Mercer was completed within the last two years. Walsh's bid includes two (2) projects similar to this project that were completed in the last two (2) years in compliance with the Contract Documents. As Mercer's bid fails to comply with the past qualification requirements of the Contract Documents, Mercer's bid is nonresponsive.

***3) Failure to identify and provide qualifications for Superintendent and Micro-Pile Foreman***

Additionally, the Bidders Technical Ability and Experience on page 11 of the bid form and Section 15-1.03 of the Special Provisions also require the submission, with the bid, of qualifications for the Bidder's "(1) Superintendent responsible for managing construction of the bridge, and (2) micro-pile Foreman." This requirement is further clarified in Addenda 1 RFI #5 and Addenda 3 #64. Mercer's bid does not identify or include qualifications for these required team members. Comparatively, in the Bidders Technical Ability and Experience submitted Walsh, Walsh identifies its Superintendent and micro-pile foreman including qualifications, as required by the Contract Documents. Mercer's bid fails to comply with the Contract Documents Qualifications provisions, rendering its bid nonresponsive.

**III) Mercer's bid failed to comply with the Listing Law and should therefore be rejected as nonresponsive**

In addition to the fatal flaws identified above, it also appears Mercer's bid failed to comply with the Listing Law. The Listing Law establishes a detailed mandatory framework for competitive bids on public works contracts. *Golden State Boring & Pipe Jacking, Inc. v. Orange County Water Dist.*, 143 Cal. App. 4<sup>th</sup> 718, 721 (4<sup>th</sup> Dist. 2006). The Listing Law requires general contractors to identify in their bids all subcontractors "who will perform work or labor or render service to the prime contractor" in excess of one-half of 1 percent of the total bid of the prime contract. *Id.*; *Cal. Pub. Contract Code § 4104*. The Listing Law further requires that if "a prime contractor fails to specify a subcontractor...for work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself." *Cal. Pub. Contract Code § 4106*. These requirements stem from the Legislature's finding "that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils." *Id.* At 722.

Walsh has examined the subcontractors and scopes listed by Mercer and notes that, in addition to the failure to list a material fabricator as discussed above, Mercer failed to list a subcontractor for both the bridge overlay and revegetation scopes of work. The estimated value of these scopes of work are in excess of one-half of one percent, therefore listing was required. Since Mercer did not list a subcontractor for these scopes of work as required by the Listing Law, Mercer will be required to self-perform this work or will otherwise be in violation of the Listing Law. Walsh notes that there are other scopes wherein Mercer did not identify subcontractors such as paving and tree removal, however these are scopes prime contractors often self-perform and therefore likely do not violate the Listing Law, though Mercer will be required to self-perform these scopes as well. If Mercer does not intend to self-perform the bridge overlay and revegetation scopes, its failure to list a subcontractor for such scopes opens the door to bid shopping and bid peddling, which is in square violation of the language and intent of the Listing Law.

**IV) The flaws in Mercer's bid fail to comply with the Contract Documents, provide a potential competitive advantage and render Mercer's bid nonresponsive.**

The myriad of flaws and omissions in Mercer's bid not only fail to comply, in a material way, with the requirements of the Contract Documents, but even more, these flaws and omissions provide a competitive advantage. Failing to commit and include subcontractors and suppliers in the Bidders Statement of Subcontractors and Material Fabricators opens the door for Mercer to shop bids for these scopes of work. Failing to provide the required project experience and management qualifications provides a competitive advantage to Mercer to not meet the same standards of other bidders and further to not commit the required qualified staff. Walsh's inclusion of all requested information is a testament to our desire to meet your expectations.

The purpose of the public contracting statutes is to ensure full compliance with competitive bidding laws as a means of protecting the public from misuse of public funds, to provide all qualified bidders the fair opportunity to join the bidding process, and to eliminate favoritism, fraud and corruption in the awarding of public contracts. See *Public Contract Code section 100*. Even the appearance or possibility of an impropriety is forbidden in public contracting, even where it is clear that no impropriety occurred. See e.g., *Thomson v. Call* (1985) 38 Cal.3d 633, 649.

Any attempt by Mercer to explain or modify its bid day submission is strictly prohibited by California law, is improper, and cannot be allowed. In *Valley Crest Landscaping vs. City Council* (1996) 41 Cal.App.4th 1432, a bidder sought to clarify its initial bid after bid opening by recalculating the amount of work to be performed by the bidder's own forces. The *Valley Crest* appellate court held that a public agency may not permit a bidder to explain its bid when such explanation would give the bidder the opportunity to back out of the bid. *Id.*

Further, a bidder may not correct its bid after bid opening. (See e.g., *National Coach Corp. v. Board of Control* (1982) 137 Cal.App.3d 754; *Amendola Construction Co.* (1984) Comp.Gen. Dec. B-214258 (bidder may not change, correct or explain bid "after bid opening since to permit this would give the firm the option of accepting or rejecting a contract after bids are exposed");

*Pacro, a Division of Blue Mountain Products, Inc. (1983) Comp.Gen. Dec. B-211016 (bid may not be considered for correction after bid opening because competitors' bids had already been revealed)).*

In contrast to the bid submitted by Mercer, the bid submitted by Walsh on April 15, 2022 complied with the requirements of the Contract Documents and the Listing Law.

As such, Mercer's bid should be rejected as nonresponsive for the various reasons stated herein, any one of which alone would render Mercer's bid nonresponsive and this project should be awarded to the lowest responsive and responsible bidder, Walsh. Walsh is 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