



CITY OF KIRKLAND
Department of Parks & Community Services
505 Market Street, Suite A, Kirkland, WA 98033 425.587.3300
www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager

From: Jennifer Schroder, CPRP, Director of Parks and Community Services
Michael Cogle, Deputy Director

Date: July 27, 2012

Subject: ACCEPTANCE OF WORK AND ESTABLISH LIEN PERIOD:
Juanita Beach Park Redevelopment Phase I

RECOMMENDATION:

It is recommended that City Council accept the work on Juanita Beach Park Redevelopment Phase I as completed by Marshbank Construction, Inc. and establish statutory lien period. In addition, it is recommended that Council authorize a budget increase of \$346,000 from the General Capital Contingency.

BACKGROUND DISCUSSION:

In 2010 the City Council awarded a construction contract to DMSL Construction, Inc. (DMSL) as the low responsive bidder for the Juanita Beach Park Project – Phase I. Project items included all work related to demolition of existing shelters and creek bridge, construction of a concrete waterfront promenade, parking lot reconfiguration and associated rain gardens, surface drainage bio-filtration swales and associated water quality improvements, wetland restoration, riparian restoration of Juanita Creek including side channel (marsh) creation, removal of hazard trees, significant new plantings, lawn renovation, new site furniture, new bridge, new irrigation, new paths, and a public art sculpture. Scheduled improvements were consistent with the approved 2005 park master plan.

On June 3, 2011 the City terminated the contract of DMSL for non-performance. The contractor was only compensated for actual work which it completed. Approximately \$450,000 of DMSL's contract was available to help defray costs to complete the Project, as shown below:

\$1,180,390.57	Authorized Original DMSL Contract
<u>\$ 165,668.83</u>	Approved Change Orders (\$180,000 Construction Contingency Budgeted)
\$1,346,059.40	Revised Contract Amount

(\$ 897,315.28) Amount paid to DMSL for work completed

\$ 448,744.12 Balance to Finish Contract

Due to an urgent need to complete environmental work within permitting requirements and strong community interest in seeing the park's beachfront reopened during the summer season, the City Council on June 7, 2011 approved Resolution R-4883, thereby waiving competitive bidding requirements and authorizing staff to execute all necessary contracts for emergency completion of the Project. After receiving the waiver, staff hired Marshbank Construction, Inc., Lake Stevens, WA, on June 13, 2011

to proceed with the work as soon as possible, with activities compensated on a "time and materials" basis (rather than a lump sum). Due to the actions of the City Council and the responsiveness of Marshbank Construction, the City was able to partially reopen the park, including the popular beachfront, on August 5, 2011. Construction activities were completed within permit requirements in October of 2011.

Status of Surety

During this same time, we began working cooperatively with DMSL's bond company, First Sealord Surety Inc., in order to protect the City's financial interests. Sealord and the City monitored and evaluated the full costs necessary to complete the entire Project and those costs which would be the responsibility of the surety. After the Project was completed, the City was prepared to provide a comprehensive project accounting to Sealord for remittance to the City as anticipated by the terms of DMSL's payment and performance bonds.

Unfortunately, while the City was in the process of submitting the amount of its damages as a result of the DMSL default, we were made aware that First Sealord had gone into receivership. Receivership is similar to a bankruptcy, but under state law instead of bankruptcy's federal laws. At the time the City accepted the bond from First Sealord, it was believed to be a financially viable insurer and had an A.M. Best rating of A-. Also, at that time it was on the list of contractors approved to do business with the federal government. There was nothing that would have given the City notice that First Sealord was in financial distress, if it was, or that it would become distressed. The incidence of such insurers collapsing like this is relatively small: about one every five years, which is one of the lowest industry failure rates in the U.S. economy. Unfortunately the City has been impacted by this rare event.

As a result, the City will be unable to get reimbursed at this time for the expenses it incurred in finishing the Project. Likewise, the subcontractors and suppliers will remain unpaid at this time. The City has submitted a claim to the trustee appointed to administer the receivership but according to him it will be years before the extent of First Sealord's liabilities are known and the claims paid. It is unknown if any of the City's claim will be paid because the trustee does not know what financial resources will be available for distribution. Efforts to collect will be ongoing but the City cannot assume any future payment.

Impact to State Grant

The City received a \$500,000 matching grant from the State in 2007, and another \$500,000 matching grant in 2008, for a total of up to \$1,000,000 in State matching funds to complete the Project. Due to the City receiving a favorable bid from DMSL, the City determined that a total of up to \$925,000 of Project costs would be eligible for reimbursement under the terms of the grant agreement.

The original terms of the agreement were for the Project to be completed in 2009. Due to permitting challenges which delayed the start of construction, the City received an initial time extension from the State to complete the Project by the end of 2010. After construction started, a second and final extension request was approved by the State, requiring Project completion by June 1, 2011. Despite repeated efforts from the City, because the Project was not completed by this date, the City was only eligible to receive reimbursement for a total of \$622,000 of project expenses. This loss of grant funding was one financial item that the City believed would have been reimbursed by the First Sealord since the loss was attributable to DMSL's failure to perform the work in a timely manner. Unfortunately since First Sealord is in receivership, the City will need to cover the funding gap out of existing reserves.

Need for Supplemental Project Funding

Financial projections during the Marshbank phase were difficult to pinpoint, since not all of the costs could be anticipated. The additional costs were due in part to the transition from DMSL to Marshbank and the correction of nonconformities and defects in DMSL work that were discovered. Based on a rough order of magnitude projection, we originally anticipated that the cost to complete the work would exceed the DMSL contract balance of approximately \$450,000 by an estimated \$750,000. As a result, on

September 6, 2011 the Council approved a funding request from the City's General Capital Contingency fund to complete the project. The approved fund transfer of \$750,000 was the anticipated net effect of expenditures over and above the original estimated amount and lost grant revenue.

As shown in Figure 1 below, the final accounting for the Project shows a deficit of \$346,000, primarily due to the lost state grant revenues. This is the difference between available (approved) funding resources for the Project and the expenses necessary to complete the Project. Funding resources include a pending \$117,000 grant from the King County Flood Control District and Project expenses include a set-aside of \$78,000 for permit-required long-term wetland monitoring services.

Figure 1 - Juanita Beach Park Project Completion (CPK0119)

	Project Completion
Resources:	
City Contribution (CIP and Bond Proceeds)	1,518,000
City Supplemental (Capital Contingency)	750,000
State Grant	622,000
KC Flood Control District Grant	117,000
King County Contribution (per transfer agreement)	200,000
Total Resources	3,207,000
Expenses:	
DMSL Contract	897,000
Marshbank Contract	1,420,000
In-house management	148,000
Master Planning, A&E, Permitting, Inspections	791,000
Required Future Long Term Wetland Monitoring Services	78,000
Remove Pier Vertical Wave Baffles (separate contract)	31,000
Miscellaneous Costs 2003 - Present ⁽¹⁾	188,000
Total Expenses	3,553,000
Project Deficit/Request from Contingency	(346,000)

⁽¹⁾ *Miscellaneous Costs include:
Interim improvements to park after City takeover in 2003; Public Art;
Utility Connection Charges; Bathhouse repairs; Other costs such as
legal, printing, advertising, supplies, etc.*

The funding request of \$346,000 is the final net effect of expenditures over and above the adjusted funded amount and lost grant revenue. The following table identifies the original Project budget, what the City paid to have Marshbank complete the project, and the final variance. The lost grant revenue of \$303,000 and the added cost of \$1,153,000 eliminated the projected project savings and left a deficit final funding need of \$346,000.

Figure 1 - Juanita Beach Park Project Completion (CPK0119)

	Original Budget	Marshbank Completion	Variance
Resources:			
City Contribution (CIP & Bond Proceeds)	1,500,000	1,518,000	18,000
City Supplemental (Capital Contingency)	-	750,000	750,000
State Grant	925,000	622,000	(303,000)
KC Flood Control District Grant	100,000	117,000	17,000
King County Contribution (per transfer agreement)	200,000	200,000	-
Total Resources	2,725,000	3,207,000	482,000
Expenses:			
DMSL Contract	1,345,000	897,000	(448,000)
Marshbank Contract	-	1,420,000	1,420,000
In-house management	120,000	148,000	28,000
Master Planning, A&E, Permitting, Inspections	650,000	791,000	141,000
Required Long Term Wetland Monitoring Services	50,000	78,000	28,000
Remove Pier Vertical Wave Baffles (separate contract)	60,000	31,000	(29,000)
Miscellaneous Costs 2003 - Present	175,000	188,000	13,000
Total Expenses	2,400,000	3,553,000	1,153,000
Projected Project Savings/Funding Deficit	325,000	(346,000)	
Total Financial Impact			(671,000)

In summary, staff requests supplemental funding from the General Capital Contingency Fund in the amount of \$346,000 to complete the Project for environmental and park improvements to Juanita Beach Park. Please see the attached fiscal note.

Lessons Learned and Updated Processes

As a result of the challenges with the Juanita Beach Project, in the fall of 2011 the City Manager convened a high level working group of Parks, Public Works, Finance and the City Attorney's office that met multiple times to review all aspects of what went wrong and what changes were necessary to prevent similar capital project problems in the future. Staff has prepared an expanded report (Attachment C) summarizing the Project's history and highlighting some recommended changes to the implementation of future capital projects. Some of these changes have already been implemented and recommendations for specific revisions to the Chapter 3 of the Kirkland Municipal Code pertaining to public works bidding and contracting will be provided to Council later this year.

Attachments

Attachment A



FISCAL NOTE

CITY OF KIRKLAND

Source of Request							
Jennifer Schroder, Director Parks and Community Services							
Description of Request							
Request for \$346,000 from the General Capital Contingency to complete the Juanita Beach Park project improvements (CPK 0119) to complete funding for Phase I improvements.							
Legality/City Policy Basis							
Fiscal Impact							
One-time use of \$346,000 from the General Capital Contingency. The reserve is able to fully fund this request.							
Recommended Funding Source(s)							
<i>Reserve</i>	Description	2012 Est End Balance	Prior Auth. 2011-12 Uses	Prior Auth. 2011-12 Additions	Amount This Request	Revised 2012 End Balance	2012 Target
	General Capital Contingency	4,669,463	750,000		346,000	3,573,463	N/A
	2011-12 Prior Authorized Use of this reserve: \$750,000 for Juanita Beach Park						
<i>Revenue/Exp Savings</i>							
<i>Other Source</i>							
Other Information							

Prepared By	Neil Kruse, Senior Financial Analyst	Date	July 30, 2012
-------------	--------------------------------------	------	---------------

Attachment C



CITY OF KIRKLAND
Department of Parks & Community Services
505 Market Street, Suite A, Kirkland, WA 98033 425.587.3300
www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager

From: Jennifer Schroder, Director of Parks and Community Services
Michael Cogle, Deputy Director
Ray Steiger, Public Works Director

Date: July 24, 2012

Subject: Juanita Beach Project Debrief and Recommendations for Improvements to Capital Project Implementation

RECOMMENDATION:

That City Council receives a report on the Juanita Beach Project and recommendations for changes to the implementation of capital projects, including those related to bidding/contractor selection, ensuring performance, and construction management.

BACKGROUND DISCUSSION:

History

In 2010 the City Council awarded a construction contract in the amount of \$1,180,390.57 to DMSL Construction, Inc. (DMSL) as the lowest responsive bidder for the Juanita Beach Park Project – Phase I. Items included in the project included all work related to demolition of existing shelters and creek bridge, construction of a concrete waterfront promenade, parking lot reconfiguration and associated rain gardens, surface drainage bio-filtration swales and associated water quality improvements, wetland restoration, riparian restoration of Juanita Creek including side channel (marsh) creation, removal of hazard trees, significant new plantings, lawn renovation, new site furniture, a new bridge, new irrigation, new paths, and a public art sculpture. Scheduled improvements were consistent with the Council-approved 2005 park master plan.

The contractor officially began work in April 2010 and contractually was provided 300 calendar days to complete the Project. Due to allowances for poor weather and approved change orders over the course of the Project, the completion date was revised to June 1, 2011.

DMSL was issued a notice of default on January 20, 2011 stating that they were not following a schedule which would enable them to finish the Project in a timely manner. Subsequently, for several weeks DMSL was generally able to meet specific mutually-agreed-upon performance measures and milestones. However, DMSL was again notified on April 12, 2011 that it was in breach of contract once again for failure to prosecute the contract with sufficient diligence to ensure a timely completion. The contractor was given, as specified in the contract, 15 days to remedy the breach and subsequently provided

documentation of additional financing and a viable schedule intended to complete the Project within contract requirements.

However, in mid-May of 2011 the City received a Notice of Lien from the State of Washington Department of Revenue due to DMSL's non-payment of State sales tax, and on June 1, 2011 the City received a Notice of Claim from the State of Washington Department of Labor and Industries due to DMSL's non-payment of wages to its workers. On June 3, 2011, with the Project not completed and DMSL unable to provide an updated construction schedule, anticipated date of project completion, or prompt plan to resolve State claims, the City terminated the contract.

The contractor had not completed the installation of the wetland, stream and related buffer enhancements or shoreline restorative plants according to permit requirements. There was inadequate protection of the stream bank and riparian areas to prevent erosion and no vegetation in place to provide adequate shade for fish habitat. The contractor had not planted any vegetation specified for the wetland, stream and related buffer enhancements and shoreline areas as specified by the contract. In order to meet the requirements of the Endangered Species Act and for the protection of Puget Sound Chinook, Steelhead, and bull trout, the remaining in-stream, shoreline and buffer work needed to be completed by August 31, 2011 as described in the Nationwide Permit (NWP) Terms and Conditions issued by the U.S. Army Corps of Engineers.

Due to these factors, and pursuant to Kirkland Municipal Code (3.85.210), City Council passed a resolution at their meeting of June 7, 2011 authorizing an emergency public works procurement process to be established and for the City Manager to take the steps necessary to purchase the services required to complete the Juanita Beach Project as quickly as possible. Staff had consulted with the State Auditor's Office who concurred that an emergency waiver was warranted and met the criteria for exempting competitive bidding requirements for public works projects (RCW 39.04.280).

Subsequently, the City selected Marshbank Construction, Inc., Lake Stevens, WA, to complete the project. Marshbank had worked successfully with the City in the past and had the available resources to commit to Juanita Beach. As a result of their efforts the City was able to reopen the beachfront on August 5, 2011 and complete all other aspects of the project and meet all permit deadlines by October of 2011. The park has been fully open since that time with generally positive comments from park users about the improvements that were made to the park.

1. Bidding/Contractor Selection

The Juanita Beach Park Project was advertised for bids in November of 2009 and the bids were opened on December 1, 2009. Thirteen bids were received. After tabulating all the bids, checking references and determining that DMSL met the required bidder responsibility criteria, staff recommended awarding a contract to DMSL in the amount of \$1,180,380.57.

Legal context

RCW 39.04.010 and KMC 3.85.130(a) provide that contracts for public work be awarded to the bidder that submitted the lowest responsive and responsible bid.

DMSL's bid was the lowest bid and it was responsive in that it was submitted on time, in the right format, it was signed and it was accompanied by the required bid bond. DMSL was also found to meet the mandatory bidder responsibility criteria as set forth in RCW 39.04.350. These criteria address basic registration and compliance issues of the bidder. Those requirements are there to ensure that the contractor awarded the project is a legitimate contractor who pays appropriate taxes and has not been debarred from doing business in the state. Additionally, the reference checks for other public work projects (State of Washington, City of Olympia, City of Redmond, and Edmonds School District) performed by DMSL were satisfactory and they had successfully completed a demolition project for the

City of Kirkland at the Rose Hill Meadows park site. DMSL was also able to meet the Project's bonding requirement and was financially able to post the mandated payment and performance bonds.

Given that DMSL was the bidder that submitted the lowest responsive and responsible bid, there was no legal basis to deny them the award of the contract.

Use of Supplemental Bidder Responsibility Criteria

However, as a result of our process review, staff believes that the City could have taken an additional step to assure that a contractor with the appropriate experience and resources was awarded the contract. RCW 39.04.350 went into effect in 2007 and allows for the use of supplemental bidder responsibility criteria. As noted above, the mandatory criteria are very specific and must be met by any contractor being considered for award of a public works contract (e.g. contractor must be licensed in WA State). The supplemental criteria are discretionary bidder responsibility criteria designed to meet the needs of a specific project.

Prior to 2007, there was no statutory permission to employ supplemental bidder responsibility criteria and public entities were slow in adopting their use. After the Bidder Responsibility Statute was passed, many public works owners have now begun including the use of supplemental criteria in their bid documents when it is believed to be appropriate to do so.

The State's Capital Projects Advisory Review Board (CPARB) was instrumental in developing the requirements for both mandatory and supplemental bidder responsibility criteria, and CPARB developed suggested guidelines for the use of supplemental criteria. The CPARB guidelines define supplemental bidder responsibility criteria as follows:

"Supplemental Bidder Responsibility Criteria describe the relevant experience, training, and/or certification requirements or qualifications that must be met by the low bidder. Criteria may also include experience and other qualifications of the bidder's subcontractors, suppliers, or employees who will be performing specific work on the project. An Owner must make its determination of whether the bidder with the low responsive bid meets the Supplemental Bidder Responsibility Criteria and is a responsible bidder before award of the contract."

The awarding entity must be thoughtful in its use of supplemental criteria and contractors have the right to challenge the requirement for supplemental criteria during the bidding process if they believe that the criteria unduly restrict competition. Also, a contractor that is denied award of a contract because it is believed that the contractor did not sufficiently meet the supplemental criteria must be given the opportunity to appeal the decision denying them the award. So, if not carefully applied and evaluated, the use of supplemental criteria may cause delays in the bidding and award processes. But the use of supplemental criteria is intended to elicit bids only from contractors with the qualifications to meet the needs of a specific project, thus reducing the chances of an unqualified contractor disrupting a vital public project at taxpayer expense.

In order to assist entities in determining if supplemental criteria are appropriate for use on a given project, CPARB has made available a Checklist for Developing Supplemental Bidder Responsibility Criteria (Attachment D).

Kirkland's Public Works Department incorporated supplemental criteria in their "CIP tool kit" for project managers in 2008 and has utilized them for several capital projects. Recently supplemental bidder responsibility criteria were used when bidding the North Rose Hill Reservoir Repainting and Seismic Retrofit and the NE 85th Street Utility Undergrounding projects. In the case of the NE 85th Street project, the following supplemental bidder responsibility criteria were included in the bid document:

Supplemental Criteria: *The Contractor shall have experience in installing dry utility conduit lines and vaults within a Public right-of-way which contains existing utilities and surface improvements for a public agency. Experience shall mean: that the on-site field superintendent or on-site foreman assigned to the project has successfully installed utility conduits and utility vaults within existing public right-of-way where the contract value of such work is equal to or in excess of \$1,500,000, within the last 5 years counting from the date of the Bid submittal deadline.*

As evidence that the Bidder meets the project specific responsibility criteria above, the apparent two lowest Bidders must submit to the Contracting Agency within 48 hours of the official Bid tabulation by the City documentation demonstrating compliance with the above.

At a minimum, documentation will include but is not limited to Construction drawings, Contract amounts for dry conduit and utility vault work, time frame of construction, name of owner work was performed for, and a reference (name, title, phone number, e-mail address) whom is familiar with the work for the Contracting Agency to make contact with.

Even with the inclusion of the above requirements, the City received eight competitive bids from well recognized local contractors, indicative that by limiting the number of qualified bidders, the City nevertheless was able to obtain ample competition in the construction community for the work.

In the case of the Juanita Beach Park Project, staff might have asked for bids only from those contractors who could demonstrate to the City's satisfaction that they had successfully completed a major park renovation project in a timely manner and that they still had the personnel (e.g. superintendent) and equipment to do so again. Given the size and complexity of the Project, staff believes that the use of supplemental criteria would have been appropriate and consistent with the statutory guidelines.

Significantly Lower Bid

One of the possible indicators of a potentially problematic project is receiving a bid that is significantly lower than the engineer's estimate and significantly lower than the bids of other bidders. Such was the case with the Juanita Beach Project, in which the awarded bid was 22% lower than the second-lowest bidder, 53% lower than the average of the 13 bids received, and over 100% lower than the consulting architect's estimate of \$2,000,000. However the low DMSL bid for the project occurred during a time of high volatility in the construction industry, with many public projects being bid at well under their engineer's estimates and so did not raise as much concern as it should have.

Even so, as part of the bid evaluation process, staff did discuss with DMSL ownership our concern about DMSL's significantly lower bid. However, DMSL provided assurances that they had reviewed the scope of the Project and the details of their bid, and were confident in their bid amount and their ability to complete the Project as specified. Another "assurance" was that DMSL's bonding company underwrote the Project, DMSL's bid discrepancy notwithstanding. DMSL was only required to submit a "lump sum" price for the Project. A detailed, itemized review of their bid was not conducted.

Lesson Learned: In this circumstance it would have been prudent for the City Project team to meet at length with the bidder before the formal bid award to review and affirm the Project's scope of work, its equipment, manpower, and financial resources, as well as commitments on other projects. Such a meeting would have ensured that the bidder had an accurate understanding of the Project and the City's expectations. Requesting and reviewing a detailed breakdown of the bidder's bid should have occurred. Encouraging a bidder with a bid that is clearly *too* low to withdraw its bid is a long run preemptive measure that can save public agencies significant problems later on. This change shall be implemented in future projects.

Recommendation for bidding/contractor selection:

We recommend that the City revise purchasing policies to integrate Supplemental Bidder Responsibility Criteria into certain construction bid documents. The threshold for determining whether or not to require Criteria could be based either on the size of the project (i.e. for projects of \$1,000,000 or more, for example) and/or on a case-by-case basis, by reviewing CPARB's suggested Checklist for Developing Supplemental Bidder Responsibility Criteria (Attachment D). Inclusion of these Criteria for certain qualifying projects, particularly those of larger size and/or complexity can help ensure that the selected contractor has sufficient experience and resources to successfully complete the project. Staff is already using supplemental bidding on a case-by-case basis now, but a formal staff recommendation for policy changes will be presented to City Council later this year.

2. Ensuring Performance

Two tools are available to ensure the contractor selected performs the work awarded properly and timely, and pay its creditors: liquidated damages and bonding (performance & payments). For this project, both were in place but due to circumstances beyond the City's control, neither was ultimately effective to ensure performance.

Liquidated Damages

Where the actual damages a city may incur as a result of delay in the completion of a project are difficult to measure, the law allows for the parties to agree instead to a pre-determined amount as damages. This amount is referred to as "liquidated damages" and is generally calculated as an amount due for each day the work continues beyond the original completion date. Having a liquidated damages provision should motivate a contractor to complete a project on time because, unlike actual damages which can be difficult to calculate, liquidated damages are easy to determine and leave no room for argument by the Contractor.

For this Project, liquidated damages were calculated to be \$400 per day that the work was not completed by the agreed upon date. Unfortunately, this amount did not provide sufficient motivation for DMSL that one would normally expect because, as staff later found out, DMSL did not have the assets to pay such damages. The liquidated damages could have been doubled and the impact on DMSL would have been negligible because, as it turns out, it had no financial resources to pay any liquidated damages. However, staff recommends continuing to include liquidated damages provisions in future contracts to ensure performance because the incidence of insolvent contractors will hopefully be limited and generally liquidated damages provide a powerful incentive to an established contractor to perform work on schedule.

Performance and payment bonds

A Contractor has two primary obligations when it undertakes work for the City. First, it agrees that it will perform the work properly (in accordance with the City contract) and, second, it agrees to pay all of its subcontractors and suppliers for work and supplies they provide for the project. To attempt to ensure these commitments are kept, the City requires the contractor to get "insurance" to cover the cost of completing the project and paying the subs in the event the Contractor fails to do either. In the construction industry, this is called obtaining a "bond" for the project from a surety (bonding company). In the event the contractor fails to complete the work or pay its subs, the surety is then responsible for doing both.

The City requires such a bond, which we call a performance and payment bond, in the full amount of the Contract on all projects over \$35,000 (KMC 3.85.230). For this Project, DMSL submitted a bid of \$1,180,380.57, so, the bond was for that same amount. The surety selected by DMSL to provide this performance & payment bond was First Sealord Surety, Inc. When it became clear DMSL was not going to be able to complete the work and that it was not paying its subs, the City notified the surety that it expected the surety to cover these costs.

Unfortunately, while the City was in the process of calculating the amount of its damages as a result of the DMSL default, staff were made aware that First Sealord had gone into receivership. Receivership is akin to a bankruptcy but under state law instead of bankruptcy's federal laws. What this means is that the City will be unable to get reimbursed at this time for the expenses it incurred in finishing the Project. Likewise, the subcontractors and suppliers will remain unpaid at this time. The City has submitted a claim to the trustee appointed to administer the receivership but according to him it will be years before the extent of First Sealord's liabilities are known and the claims paid. Too, it is unknown how much of our claim, if any, will be paid because neither the trustee nor the City yet know what financial resources will be available for distribution.

At the time the City accepted the bond from First Sealord, it was believed to be a financially viable insurer and had an A.M. Best rating of A-. Also, at that time it was on the list of contractors approved to do business with the federal government. In other words, there was nothing that would have given the City notice that First Sealord was in financial distress, if it was, or that it would become distressed. Fortunately, the incidence of such insurers collapsing like this is relatively small: about one every five years, which is one of the lowest industry failure rates in the U.S. economy.

Recommendation for Ensuring Performance:

One fact staff did discover thorough this process is that the City could require separate performance and payments bonds, each in the total amount of the contract. Separate payment and performance bonds would give the City and subcontractors twice as much coverage and would not cost the Contractor any more to provide. Of course, for the Juanita Beach Project this would not have made any difference because of DMSL's collapse. However, going forward, this doubling of coverage will be implemented once the Council approves amendment of KMC 3.85.230, thus enabling staff to take this step, which will be presented to Council at a future meeting.

As an alternative to bonding, staff did considerable research into the possibility of the City becoming the surety for projects rather than requiring a bond. Rather than requiring a Contractor to purchase a bond at the cost of about 1% of the Contract amount, the City would become the insurer for the project, which would be funded over time by the savings the City should realize because Contractors would not include the cost of bonds in their bids. However, determining whether the City actually received such savings in each case might be difficult. Too, it is possible that the City might have to complete a project or pay subs before sufficient savings have been realized to cover those costs. Last, there is some concern that the City might have to adhere to the regulations governing sureties duties (similar to the obligations insurance companies owe) because it would be acting like a surety. For the foregoing reasons, staff does not recommend self-insuring the bonding at this time as it appears to create potential expense and liability for the City. Setting aside capital contingency reserves against such rare losses is much simpler and is in fact how the City is currently paying for the deficit in the Juanita Beach Park project.

3. Construction Management

Historically the City has delegated oversight of park capital projects to the Parks and Community Services Department, and the Department has a long history of completing capital construction projects on time and on budget. The Juanita Beach Project was administered by the (then) Park Planning and Development Manager, a position which has since been discontinued within the Department and its responsibilities absorbed within the Deputy Director's duties. Construction management involves ensuring compliance with the terms and conditions of the contract, as well as documenting and agreeing on any changes or amendments that may arise during its implementation or execution.

Recommendation for Construction Management:

Given the experience with Juanita Beach and the potential for significant capital park projects occurring in the future, the Parks and Community Services Department will be partnering with the Public Works

Department on future CIP projects. Public Works has the technical expertise and administrative support to manage parks projects, which is a common practice in other cities, including Redmond, Bothell, and Edmonds.

The following are established project management elements within the Kirkland Public Works Project Contract Development Manual, with an emphasis on the administration of municipal projects in anticipation and defense of claims and/or lawsuit based project completion:

Key Project Management personnel:

- Refine project management training for Project Engineering staff – spend time with new hires and seasoned staff on potential construction contract issues before they administer projects.
- Educate those in key roles in dealing with Washington State Department of Transportation (WSDOT) Standard Specifications regarding changes, protests by the Contractor, and disputes (specifically Standard Spec Sections 1-04.4, 1-04.5, 1-09.11 respectively).
- Review the City's Change Order Matrix developed specifically for addressing contract changes and the requirements of the parties under the WSDOT Standard Specifications.
- Discuss the importance of Inspector's Daily Report, Owner created meeting minutes, photographs, and other job progress documentation.
- Provide opportunities to observe a deposition in preparation of a lawsuit; consider conducting mock deposition process as a part of training.
- Encourage all City project personnel to raise potential contractor payment and performance issues to decision makers for early resolution.

During the Project Development stage:

- Involve construction claim analyst/construction counsel in more complex projects; build these costs into budget.
- Develop conflict mitigation strategies (pre-con, construction).
- Build a system that requires franchisees and utility companies to submit plans/coordination agreements earlier; consider not going to bid until commitments are in hand – balance timeliness with other factors: bid climate, community expectations, grant requirements.
- Consider franchise authority and timelines.
- Consider adding bidder "responsibility" criteria to bid documents beyond those currently utilized; allow legislative disqualification to be acceptable.
- Consider supplementing the existing Critical Path Method (CPM) scheduling obligation by the Contractor; consider tying to payments.
- Keep abreast of termination for convenience (Standard Spec Section 1-08.10) for work completed in City standard contract.
- Consider augmenting the WSDOT Standard Spec provision for liquidated damages.
- Consider/review Standard Spec 1-04.5 in light of 2004 Johnson vs. Spokane (failure of Contractor to comply with notification and pricing during municipal construction project).
- Use Supplemental Criteria (SC), as appropriate, given the specifics of each project; not all projects need or warrant the use of SC – large and/or especially complex projects are prime candidates for SC.

Prior to Award of contract:

- Include broader contacts in reference checks.
- Conduct financial inquiries beyond standard 5% bid bond/insurance evaluation.
- For key subcontractors, consider requiring identification in addition to RCW 39.30.060 plumbing, piping and electrical at bid time.

- Make sure subcontractor listing for RCW 39.30.060 plumbing, piping and electrical is NOT going to be grounds for protests.
- Check viability of performance bond company
- Reject Contractor's bids that are unable to meet the City's Supplemental Bidder Criteria.

During Construction:

- Move to a "Partnering" or "Synergistic Teaming" approach in lieu of "Kirkland Friendly".
- Obtain contractor weekly work plans where applicable and analyze logic/resources.
- Adhere to CPM requirements in specifications.
- Analyze CPM for logic and resources, reject if not correct; make a requirement for payment.
- Force CPM adherence/analysis by Contractor – "no play, no pay"
- Early engagement of construction claim analyst/construction counsel; consider risk management in advance of construction issues/impacts, as/if appropriate.
- Schedule Periodic "audit" meetings with construction claims analyst and construction counsel re: notice, changes, delays etc.
- Make sure weekly meeting minutes are accurate with Owner/Engineer authored minutes.
- Maintain strict control of internal email, documentation, and memoranda; consider out-of-context disclosure.
- Utilize Cost Reduction Incentive Proposal (CRIP) or other WSDOT Standard Specifications approved procedures to manage changes.
- Force immediate pricing and resolution of issues; employ change order for quantity increases/decreases.
- Remove unqualified contractor personnel through existing contract language.
- Reaffirm legislative support and willingness to terminate for cause or terminate for convenience.
- Insistence on early and complete resolution of all Project issues including change orders and claims.

Summary of Recommendations

The following is a summary of recommendations for changes outlined in this report which will be made by the City resulting from lessons learned from the Juanita Beach Project:

1. Revise purchasing policies to integrate Supplemental Bidder Responsibility Criteria into construction bid documents for certain capital projects. A formal staff recommendation will be presented to City Council later this year.
2. Revise purchasing policies to require separate payment and performance bonds from general contractors, which would give the City and subcontractors twice as much coverage and would not cost the Contractor any more to provide. A formal staff recommendation will be presented to City Council later this year.
3. Assign responsibility for Parks capital projects to the Public Works Department so as to maximize in-house expertise and take advantage of organizational efficiencies.

Attachment

Attachment D

State of Washington

Capital Projects Advisory Review Board
(CPARB)

Suggested Guidelines
for
Bidder Responsibility

Approved by CPARB

October 11, 2007

Revised January 10, 2008

Last Revised February 9, 2012

Table of Contents

- [Introduction](#)

Mandatory Requirements

- [Bidder Responsibility Criteria \(mandatory\)](#)
 - Purpose and Goals
 - The Law
 - Suggested Language for Bidding Documents
 - Documentation
- [Subcontractor Responsibility Criteria \(mandatory\)](#)
 - Purpose and Goals
 - The Law
 - Suggested Language for Contracts

Optional Tools

- [Supplemental Bidder Responsibility Criteria \(optional\)](#)
 - Purpose and Goals
 - The Law
 - Definition
 - Adequate Competition
 - Changing Criteria During Bidding Period
 - Collecting Documentation
 - Bidder Fails to Submit Documentation
 - Evaluating Bidder Responsibility
 - Reference Checks
 - Optional Remedy Period
 - Appeal Process
 - Impact on Project Schedule
 - Elements of Supplemental Bidder Responsibility Criteria
 - Information Required in Bidding Documents
 - Suggested Language for Bidding Documents
 - Developing Criteria
 - Developing List of Documentation to be Submitted
 - Example of Structure for Criteria and Documentation
 - Standards for Declaring a Bidder Responsible
 - Checklist for Developing Supplemental Bidder Responsibility Criteria

- [Appendices](#)

- [Appendix A](#): Examples of Supplemental Bidder Responsibility Criteria
- [Appendix B](#): Sample Supplemental Bidder Responsibility Language from Actual Projects
- Appendix C: Suggested Supplemental Bidder Responsibility Criteria Language for Bidding Documents
- [Appendix D](#): For Owners: Mandatory Bidder Responsibility Checklist

Attachment D

- [Appendix E](#): For Contractors and Subcontractors: Subcontractor Responsibility Checklist
- Appendix F: Checklist for Developing Supplemental Bidder Responsibility Criteria

Attachment D

Introduction

In 2007, legislation was approved regarding responsible bidder criteria for public works projects, and is codified in RCW 39.04.010, 39.04.350, and 39.06.020.¹ The purpose of the law is to provide tools for public owners in the award of public works contracts that will help ensure that responsible contractors and subcontractors perform the work.

The legislation, effective July 22, 2007, addresses three major areas of bidder responsibility:

1. Bidder responsibility criteria (mandatory)
2. Supplemental bidder responsibility criteria (optional)
3. Subcontractor responsibility criteria (mandatory)

These Suggested Guidelines have been developed in response to the charge in RCW 39.04.350 (3) for CPARB to develop Suggested Guidelines to assist public agencies in developing and implementing the bidder responsibility statute.²

Note: These Suggested Guidelines are not legal advice. Public agencies with questions or issues related to the implementation of the bidder responsibility requirements should contact appropriate individuals, including but not limited to the agency's legal counsel, other management and technical personnel, or applicable governmental associations (i.e., Association of Washington Cities, Washington State Association of Counties, Washington Ports, etc.).

Training: As needed and resource permitting, CPARB, in conjunction with various industry stakeholders, may sponsor training for public agencies on the use of bidder responsibility criteria. Contact CPARB personnel as noted on CPARB's website (<http://www.ga.wa.gov/CPARB/index.html>) for more information.

¹ SHB 2010

² RCW 39.04.350 (3) requires that "The capital projects advisory review board created in RCW 39.10.800 shall develop suggested guidelines to assist the state and municipalities in developing supplemental bidder responsibility criteria. The guidelines must be posted on the board's web site." Note: RCW 39.10.800 was recodified as RCW 39.10.220.

Mandatory Requirements

Bidder Responsibility Criteria (mandatory)

Purpose and Goals: The 2007 Legislature defined the term “responsible bidder” for public works contracts by amending RCW 39.04.010 and creating a new section RCW 39.04.350. To be considered a responsible bidder, the bidder must have a certificate of registration as a contractor at the time of bid submittal; a current state unified business identifier number; and if applicable, industrial insurance coverage for the bidder’s employees working in Washington, an Employment Security Department number, and a state excise tax registration number. In addition, the bidder must not be disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065(3). Most of these requirements existed prior to the enactment of RCW 39.04.350. Since the adoption of the bidder responsibility legislation in 2007, the Legislature has added additional mandatory bidder responsibility criteria pertaining to apprenticeship utilization and reporting on the use of out-of-state off-site prefabrication of non-standard, project specific items. The law requires that public owners verify these items prior to award of a public works contract, and requires contractors and subcontractors to verify these items prior to execution of a subcontract.

The Law: [RCW 39.04.350 \(1\)](#) states the following:

- (1) Before award of a public works contract, a bidder must meet the following responsibility criteria to be considered a responsible bidder and qualified to be awarded a public works project. The bidder must:
 - (a) At the time of bid submittal, have a certificate of registration in compliance with chapter 18.27 RCW;
 - (b) Have a current state unified business identifier number;
 - (c) If applicable, have industrial insurance coverage for the bidder's employees working in Washington as required in Title 51 RCW; an employment security department number as required in Title 50 RCW; and a state excise tax registration number as required in Title 82 RCW;
 - (d) Not be disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065(3).
 - (e) If bidding on a public works project subject to the apprenticeship utilization requirements in RCW 39.04.320, not have been found out of compliance by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under chapter 49.04 RCW for the one-year period immediately preceding the date of the bid solicitation; and
 - (f) Until December 31, 2013, not have violated RCW 39.04.370 more than one time as determined by the department of labor and industries.

Attachment D

Suggested Language for Bidding Documents: The following is suggested language for bidding documents addressing the requirements for mandatory bidder responsibility criteria:

Bidder Responsibility Criteria

- A. It is the intent of Owner to award a contract to the low responsible bidder. Before award, the bidder must meet the following bidder responsibility criteria to be considered a responsible bidder. The bidder may be required by the Owner to submit documentation demonstrating compliance with the criteria. The bidder must:
1. Have a current certificate of registration as a contractor in compliance with chapter 18.27 RCW, which must have been in effect at the time of bid submittal;
 2. Have a current Washington Unified Business Identifier (UBI) number;
 3. If applicable:
 - a. Have Industrial Insurance (workers' compensation) coverage for the bidder's employees working in Washington, as required in Title 51 RCW;
 - b. Have a Washington Employment Security Department number, as required in Title 50 RCW;
 - c. Have a Washington Department of Revenue state excise tax registration number, as required in Title 82 RCW;
 4. Not be disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065(3).
 5. Until December 31, 2013, not have violated more than one time the off-site, prefabricated, non-standard, project specific items reporting requirements of RCW 39.04.370.
 6. For public works projects subject to the apprenticeship utilization requirements of RCW 3.0.04.320, not have been found out of compliance by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under chapter 49.04 RCW for the one-year period immediately preceding the first date of advertising for the project.

Documentation: It is advisable for audit purposes that Owners maintain documentation in their contract files demonstrating that the bidder met all of the bidder

Attachment D

responsibility criteria. With respect to maintaining documentation of a bidder's UBI number, such an action is required by the three statutes referenced in RCW 39.06.010 (2).

Subcontractor Responsibility Criteria (mandatory)

Purpose and Goals: RCW 39.06.020 requires that public works contractors and subcontractors verify that any subcontractors they directly hire meet the responsibility criteria for the project at the time of subcontract execution. In addition to verifying the bidder responsibility criteria (mandatory) discussed at the beginning of these Suggested Guidelines, the contractor or subcontractor must also verify that a subcontractor has an electrical contractor license or elevator contractor license, if required.

The Law: [RCW 39.06.020](#) states the following:

A public works contractor must verify responsibility criteria for each first tier subcontractor, and a subcontractor of any tier that hires other subcontractors must verify responsibility criteria for each of its subcontractors. Verification shall include that each subcontractor, at the time of subcontract execution, meets the responsibility criteria listed in RCW [39.04.350](#) (1) and possesses an electrical contractor license, if required by chapter [19.28](#) RCW, or an elevator contractor license, if required by chapter [70.87](#) RCW. This verification requirement, as well as the responsibility criteria, must be included in every public works contract and subcontract of every tier.

Suggested Language for Contracts: The following is suggested contract language for Owners to include in their public works contracts regarding subcontractor responsibility criteria:

Subcontractor Responsibility:

- A. The Contractor shall include the language of this section in each of its first tier subcontracts, and shall require each of its subcontractors to include the same language of this section in each of their subcontracts, adjusting only as necessary the terms used for the contracting parties. Upon request of the Owner, the Contractor shall promptly provide documentation to the Owner demonstrating that the subcontractor meets the subcontractor responsibility criteria below. The requirements of this section apply to all subcontractors regardless of tier.
- B. At the time of subcontract execution, the Contractor shall verify that each of its first tier subcontractors meets the following bidder responsibility criteria:

Attachment D

1. Have a current certificate of registration in compliance with chapter 18.27 RCW, which must have been in effect at the time of subcontract bid submittal;
 2. Have a current Washington Unified Business Identifier (UBI) number;
 3. If applicable, have:
 - a. Have Industrial Insurance (workers' compensation) coverage for the subcontractor's employees working in Washington, as required in Title 51 RCW;
 - b. A Washington Employment Security Department number, as required in Title 50 RCW;
 - c. A Washington Department of Revenue state excise tax registration number, as required in Title 82 RCW;
 - d. An electrical contractor license, if required by Chapter 19.28 RCW;
 - e. An elevator contractor license, if required by Chapter 70.87 RCW.
 4. Not be disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065 (3).
 5. Until December 31, 2013, not have violated more than one time the off-site, prefabricated, non-standard, project specific items reporting requirements of RCW 39.04.370.
 6. For public works projects subject to the apprenticeship utilization requirements of RCW 3.04.320, not have been found out of compliance by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under chapter 49.04 RCW for the one-year period immediately preceding the first date of advertising for the project.
-

Optional Tools

Supplemental Bidder Responsibility Criteria (optional)

Purpose and Goals: In developing these Suggested Guidelines for Supplemental Bidder Responsibility Criteria, CPARB notes the following purposes and goals:

- RCW 39.04.350 (2) specifically authorizes public owners to develop Supplemental Bidder Responsibility Criteria applicable to particular projects. Public owners are *not required* to adopt Supplemental Bidder Responsibility Criteria. However, if a public owner chooses to adopt Supplemental Bidder Responsibility Criteria, the law provides statutory requirements that public owners and bidders must follow.
- These Suggested Guidelines are only suggestions to help provide a framework for public agencies. They are not requirements, except as the Suggested Guidelines specifically reference provisions of the law.
- Each public agency adopting Supplemental Bidder Responsibility Criteria is responsible for making its own decisions, consistent with the requirements of RCW 39.04.350 (2), as to what Supplemental Bidder Responsibility Criteria to include in bidding documents.
- To avoid challenges to a bidding process that includes Supplemental Bidder Responsibility Criteria, public agencies should make efforts to ensure that their use of supplemental criteria is deliberate, documented, and defensible, and that the criteria used are relevant to the project.
- In establishing Supplemental Bidder Responsibility Criteria, the competing interests of public agencies and contractors must be balanced. The public agency's interests to ensure that a responsible contractor builds the project must be weighed against the competing interest to ensure that the procurement encourages sufficient competition from the contracting community, without unduly restricting the pool of qualified bidders. Only when these two interests are balanced will the public obtain the work at the best price.
- It is not CPARB's intent that these Suggested Guidelines be used either by contractors or auditors to demonstrate that a public agency's establishment of Supplemental Bidder Responsibility Criteria is deficient for failure to follow these Suggested Guidelines.
- Adopting Supplemental Bidder Responsibility Criteria applicable to all projects is not recommended, unless a public agency utilizes some or all of the examples of generic Supplemental Bidder Responsibility Criteria found in Appendix A. Instead, Supplemental Bidder Responsibility Criteria should be carefully crafted for each project based on the specific constraints of each project.

Attachment D

The Law: [RCW 39.04.350 \(2\)](#) states the following:

- (2) In addition to the bidder responsibility criteria in subsection (1) of this section, the state or municipality may adopt relevant supplemental criteria for determining bidder responsibility applicable to a particular project which the bidder must meet.
- (a) Supplemental criteria for determining bidder responsibility, including the basis for evaluation and the deadline for appealing a determination that a bidder is not responsible, must be provided in the invitation to bid or bidding documents.
- (b) In a timely manner before the bid submittal deadline, a potential bidder may request that the state or municipality modify the supplemental criteria. The state or municipality must evaluate the information submitted by the potential bidder and respond before the bid submittal deadline. If the evaluation results in a change of the criteria, the state or municipality must issue an addendum to the bidding documents identifying the new criteria.
- (c) If the bidder fails to supply information requested concerning responsibility within the time and manner specified in the bid documents, the state or municipality may base its determination of responsibility upon any available information related to the supplemental criteria or may find the bidder not responsible.
- (d) If the state or municipality determines a bidder to be not responsible, the state or municipality must provide, in writing, the reasons for the determination. The bidder may appeal the determination within the time period specified in the bidding documents by presenting additional information to the state or municipality. The state or municipality must consider the additional information before issuing its final determination. If the final determination affirms that the bidder is not responsible, the state or municipality may not execute a contract with any other bidder until two business days after the bidder determined to be not responsible has received the final determination.

Definition: Supplemental Bidder Responsibility Criteria describe the relevant experience, training, and/or certification requirements or qualifications that must be met by the low bidder. Criteria may also include experience and other qualifications of the bidder's subcontractors, suppliers, or employees who will be performing specific work on the project.³ An Owner must make its determination of whether the bidder with the

³ Supplemental Bidder Responsibility Criteria are included in bidding documents and are different from pre-qualification. In pre-qualification, bids are only accepted from bidders whose qualifications have been

Attachment D

low responsive bid meets the Supplemental Bidder Responsibility Criteria and is a responsible bidder before award of the contract. Refer to Appendix A for examples of Supplemental Bidder Responsibility Criteria that an Owner may choose to utilize. Refer to Appendix B for examples of language from actual bidding documents of various Owners.

Adequate Competition: Supplemental Bidder Responsibility Criteria should not be written in such a way as to unduly restrict the pool of available qualified bidders. As part of the process of developing the criteria, Owners should have an understanding of how many potential bidders would meet or exceed the criteria. Such an understanding may be developed through discussions with other Owners, with consultants, or by contacting others involved in the construction industry. If a consultant to the Owner develops the draft criteria, it is important for the Owner to still have an understanding of how many potential bidders meet the criteria.

Changing Criteria During Bidding Period: To ensure that potential bidders are aware of the Supplemental Bidder Responsibility Criteria, an Owner may want to highlight the existence of the criteria in the public advertisement. During the bidding period, a potential bidder who believes that the Supplemental Bidder Responsibility Criteria will exclude them from bidding may request the Owner to consider modifying the criteria. The Owner shall evaluate any such requests, and if a decision is made by the Owner to modify the criteria, such modification shall be communicated to all bidders and plan holders via the issuance of an addendum to the bidding documents.⁴ Likewise, in the event the Owner determines not to modify the criteria, the Owner is encouraged to notify the requesting bidder of its decision. In the interest of maintaining transparency in the bidding process, it is considered a good practice to describe (in the bidding documents) the process and right of potential bidders to request that the Supplemental Bidder Responsibility Criteria be modified.

The following is suggested contract language for Owners to include in public works bidding documents which advises bidders of their right to question and request changes to the Supplemental Bidder Responsibility Criteria during the bidding period:

Request to Change Criteria During Bidding: Bidders with concerns about the relevancy or restrictiveness of the Supplemental Bidder Responsibility Criteria required in these bidding documents may make or submit requests to the Owner to modify the criteria. Such requests shall be in writing, describe the nature of the concerns, and propose specific modifications to the criteria that will make the criteria more relevant and/or less restrictive of competition. Bidders should submit such requests to the Owner no later than [redacted] business days prior to the bid submittal deadline and address the request to [redacted].

Owners are encouraged to identify in the bidding documents (see blank in paragraph

evaluated ahead of time as meeting certain criteria. With Supplemental Bidder Responsibility Criteria, the evaluation of whether a bidder meets the criteria is determined after bid submittal.

⁴ RCW 39.04.350 (2) (b)

Attachment D

above) the name of a person in a higher level position in the Owner's organization, and not simply list the specification writer or project manager.

Collecting Documentation: After bid opening⁵ and within the time period specified in the bidding documents, the low bidder must submit to the Owner the documentation required by the bidding documents for evaluation by the Owner on whether the bidder meets the Supplemental Bidder Responsibility Criteria and is a responsible bidder.⁶

In the interests of meeting a project's schedule, an Owner may request that the next lowest bidder(s) also submit the documentation.

Bidder Fails to Submit Documentation: If a bidder does not submit the documentation required by the bidding documents to demonstrate compliance with the Supplemental Bidder Responsibility Criteria within the time period specified in the bidding documents, the Owner may:

- Find the bidder not responsible, or
- Find the bidder responsible based upon any available information that demonstrates that the bidder meets the Supplemental Bidder Responsibility Criteria. The Owner should be prepared to justify this decision to other bidders upon request.

Evaluating Bidder Responsibility: The Owner evaluates the documentation submitted by the low bidder to determine if the bidder meets the Supplemental Bidder Responsibility Criteria. Determination of bidder responsibility by the Owner must be made prior to award of the contract. If, in the interest of meeting the project's schedule, the Owner has requested other bidders to submit documentation, they should be evaluated in the same manner as the low bidder. Evaluation of bidder responsibility is not to determine whether one bidder has better qualifications than another. The test is whether the low bidder meets the Supplemental Bidder Responsibility Criteria or not. If not, then the second low bidder's documentation is evaluated to determine if they are responsible. Evaluation of multiple bidders may occur concurrently.

Reference Checks: The Owner may conduct reference checks for the bidder whose bid is under consideration for award. In the event that information obtained from the reference checks:

- Reveals that the bidder does not meet the Supplemental Bidder Responsibility Criteria; or
- Indicates concerns about the bidder's performance on projects identified as

⁵ While an Owner "may" request such documentation to be submitted with the bid, this is not recommended as it can lead to a non-responsive bid if the bidder fails to submit the documentation. In addition, requiring such documentation with the bid takes away from the focus of the bidder on submitting a competitive bid, and requires all bidders to submit the documentation.

⁶ A bidder must meet not only any Supplemental Bidder Responsibility Criteria in order to be determined to be responsible, but must also meet the mandatory bidder responsibility criteria.

Attachment D

meeting the Supplemental Bidder Responsibility Criteria, which may include, but not be limited to the quality of construction, the bidder's management of subcontractors, timeliness of required submittals, and safety record on the project; or

- Indicates other concerns about the bidder's ability to successfully perform the work,

the Owner may determine that the bidder is not a responsible bidder. Prior to making such a determination that a bidder is not responsible based on information received through reference checks, the Owner is encouraged to discuss with the bidder the information obtained from the references, and provide the bidder with the opportunity to offer explanations that may help inform whether the Owner declares the bidder not responsible.

In conducting reference checks, the Owner may include itself as a reference if the bidder has performed work for the Owner, even if the bidder did not identify the Owner as a reference.

If the Owner determines the bidder is not a responsible bidder, subject to following the requirements of the appeal process (see below)⁷, the Owner may award the contract to the next lowest bidder who meets the Supplemental Bidder Responsibility Criteria and whose reference checks validate the ability of the bidder to successfully perform the work. The Owner is encouraged to use the same process in checking references for any bidders other than the low bidder.

Optional Remedy Period: If the Owner determines that the bidder does not meet one or more of the Supplemental Bidder Responsibility Criteria based on its evaluation of the documentation submitted by the bidder and reference checks conducted, the Owner may provide the bidder with the opportunity to submit different or additional information in an effort to be deemed responsible. For example, this may involve the bidder proposing a different subcontractor if the originally proposed subcontractor did not meet the criteria,⁸ or proposing a different superintendent who meets the Supplemental Bidder Responsibility Criteria.

Appeal Process: If an Owner determines that a bidder does not meet the Supplemental Bidder Responsibility Criteria, it shall provide in writing to the bidder the reasons for determining that the bidder is not a responsible bidder. The bidder may appeal such a determination within the appeal period specified in the bidding documents and submit additional supporting documentation with its appeal. The Owner must consider such an appeal and additional information. After review, if the Owner determines that the bidder is still not a responsible bidder, the Owner shall issue in writing its final determination. The Owner shall not execute a contract to another bidder

⁷ Subject to complying with the requirements of RCW 39.04.350 (d) regarding the appeal process for bidders determined to not be responsible bidders.

⁸ If the subcontractor to be substituted was listed on a subcontractors list required by RCW 39.30.060, the requirements of that law would apply with respect to any cause of action that the substituted subcontractor may wish to pursue against the bidder.

Attachment D

until two (2) business days after the bidder receives the Owner's final determination that the bidder is not a responsible bidder.⁹

Impact on Project Schedule: Owners should be aware that development and evaluation of Supplemental Bidder Responsibility Criteria may add additional time to the project schedule. This may occur due to a variety of reasons, including but not limited to the time required to address the following:

- Develop the criteria;
- Evaluate the bidder's documentation;
- Consider an appeal from a bidder determined not to be responsible;
- Deal with a protest from another bidder that the low bidder under consideration does not comply with the Supplemental Bidder Responsibility Criteria.
- Check references supplied by the bidder to validate information provided.

Elements of Supplemental Bidder Responsibility Criteria: The following are suggested elements for Owners to consider in developing and implementing Supplemental Bidder Responsibility Criteria. These elements may help to reduce the risk for protests and legal challenges:

- A. **Relevancy of Criteria:** RCW 39.04.350 (2) requires that Supplemental Bidder Responsibility Criteria be "relevant" to the project.

There should be a clear relationship between the Owner's concerns about obtaining a qualified contractor and the specific Supplemental Bidder Responsibility Criteria. The Owner should be deliberate and logical in developing Supplemental Bidder Responsibility Criteria, and be able to demonstrate, upon request, the rationale of why a particular criterion is appropriate and what methodology was used in establishing the requirements. For example, why is it important and necessary that the bidder have completed 5 projects installing a 48" watermain instead of only 4 projects with a 36" watermain?

- B. **Risk Management:**

- Based on the particular project, what areas pose significant risks to timely completion of the project? What experience or other factors can help in managing or mitigating those risks?
- Can the risks of the project be managed without using Supplemental Bidder Responsibility Criteria, and relying instead on ensuring that the contractor awarded the project meets the performance standards of the specifications?

- C. **Clarity of Criteria:** The Supplemental Bidder Responsibility Criteria should be clear and specific (e.g. "5 projects, each over \$500,000, each completed in the last 3 years, installing for each project at least 2,000 feet of 48" ductile iron

⁹ RCW 39.04.350 (2) (d)

Attachment D

watermain pipe.”) It is recommended that Owners not use general language such as: “ability and capability to install watermain pipe,” since such a criterion is not clear about the expectations of what requirements must be met.

Information Required in Bidding Documents: According to RCW 39.04.350 (2), Owners using Supplemental Bidder Responsibility Criteria must include the following information in their bidding documents:

- A. **Criteria:** Supplemental Bidder Responsibility Criteria. The criteria should be developed separately for each project, dependent upon the particular needs and features of the project.
- B. **Evaluation:** The basis for evaluating whether a bidder meets the criteria. The bidding documents should describe the specific documentation that must be submitted by the low bidder and that the Owner will use to evaluate whether the bidder meets the Supplemental Bidder Responsibility Criteria. There should be a one-to-one relationship between the criteria and the documentation that must be submitted by the low bidder to demonstrate that they meet the criteria specified. The role of reference checks in determining bidder responsibility should also be described.
- C. **Deadline for Submitting Documentation:** The period of time after the bid submittal deadline that the low bidder has to submit documentation demonstrating compliance with the Supplemental Bidder Responsibility Criteria.
- D. **Appeal Deadline:** The deadline for a bidder to appeal a determination that they are not a responsible bidder.

Suggested Language for Bidding Documents: The following is suggested language and a structure that a public agency may decide to use in its bidding documents regarding Supplemental Bidder Responsibility Criteria. The actual criteria would still need to be developed on a project-by-project basis. There is no one structure that works in all situations, however, and thus the wording related to the actual criteria and documentation to be submitted for each project must be adapted to meet the specific needs of a project.

Supplemental Bidder Responsibility Criteria

- B. **Criteria:** In addition to the bidder responsibility criteria above,¹⁰ the bidder must also meet the following relevant supplemental bidder responsibility criteria applicable to the project:

- 1.

¹⁰ This section is intended to follow the language describing the mandatory bidder responsibility criteria, explained earlier in these Suggested Guidelines. If no Supplemental Bidder Responsibility Criteria are used, the mandatory bidder responsibility criteria should still be described in the bidding documents.

Attachment D

2.

3.

C. Documentation: As evidence that the bidder meets the bidder responsibility criteria in paragraph B above, the apparent low bidder must submit the following documentation to the Owner within 48 hours¹¹ of the bid submittal deadline. The Owner reserves the right to request such documentation from other bidders also.

1.

2.

3.

D. Appeals: If the Owner determines the bidder does not meet the bidder responsibility criteria in paragraph B above and is therefore not a responsible bidder, the Owner shall notify the bidder in writing with the reasons for its determination. If the bidder disagrees with this determination, it may appeal the determination within 24 hours¹² of receipt of the Owner's determination by presenting additional information to the Owner. The Owner will consider the additional information before issuing its final determination. If the final determination affirms that the bidder is not responsible, the Owner will not execute a contract with any other bidder until two business days¹³ after the bidder determined to be not responsible has received the final determination.

Developing Criteria (Item B above): The following may help Owners in thinking through some of the issues involved in developing Supplemental Bidder Responsibility Criteria:

- Who do the criteria apply to: contractor, subcontractor, field superintendent, project manager, etc.? Be specific. Think through the difference between a requirement for a company versus a person, and what is most important. For example, is it important that the company have certain experience even if it doesn't currently have employees with the specific knowledge and experience desired? Likewise, if a company hasn't done this type of work before, but they have hired personnel with the necessary experience, is this acceptable?
- Describe the specific experience the bidder must have: how many years,

¹¹ The time deadline indicated here for the bidder to submit documentation indicating compliance with the criteria may be adjusted by the Owner, adopting either a standard for all projects or changing it on a project-by-project basis.

¹² The time deadline for a bidder to appeal a determination that they are not responsible, as indicated here, may be modified by the Owner, adopting either a standard for all projects or changing it on a project-by-project basis.

¹³ This two day period of time may not be reduced. It is required in RCW 39.04.350 (d).

Attachment D

doing what type of work, what certifications must they or workers have, how recent must the experience be, etc.

- Language must be clear and specific. Do not use undefined terms such as “recent experience” or “similar work.”
- An Owner may develop Supplemental Bidder Responsibility Criteria that are relevant to and applied to all projects.
- Owners are encouraged to discuss proposed Supplemental Bidder Responsibility Criteria with other Owners, with consultants, and with others involved in the construction industry in order to help gauge the reasonableness of the criteria and how many bidders would meet the criteria.
- The most challenging, but also, in many instances, the most pertinent of Supplemental Bidder Responsibility Criteria relates to assessing the Bidder's qualifications by questioning the Bidder's "Completion of Similar Projects." The key to writing, fair and relevant Supplemental Bidder Responsibility Criteria involving completion of similar projects is “balance.” The interests of the public agency of having a qualified contractor build the project should be weighed against ensuring sufficient competition to protect the taxpaying public. The public agency's interest is to ensure that the contractor selected to build the project has adequate experience such that the project is performed safely, and completed in a timely manner and within budget. That expectation must be balanced against the taxpaying public's interest in ensuring that the responsibility criteria are such that they foster competition. This challenge is difficult to describe in guidelines.

Developing List of Documentation to be Submitted (Item C above):

- It is recommended that there be a one-to-one correspondence between the Supplemental Bidder Responsibility Criteria and the documentation requested. Thus, if the specification requires “5 projects each over \$500,000, each completed in the last 3 years, installing for each project at least 2,000 feet of 48” ductile iron watermain pipe,” the Owner should ask the bidder to list information about each of these facets of the projects. In addition, the Owner would not want to ask the bidder to document things not included in the Supplemental Bidder Responsibility Criteria.
 - For example, the documentation portion should request the bidder to list the 5 projects, the contract amount, the date of completion of each project, the diameter of the watermain for each project, and the length of the watermain pipe for each project. The Owner may also request more specific project information, such as the name of the owner or contractor, a contact person and telephone number so that the Owner can verify the information. As an example, the Owner should not, however, require the bidder to document whether the watermain installation involved an excavation of a certain depth, unless the

Attachment D

specification stated this as part of the Supplemental Bidder Responsibility Criteria.

- The documentation to be submitted should be clear and specific.
- The Owner may choose to develop and provide a form to the bidder for collecting the documentation necessary to demonstrate compliance with the Supplemental Bidder Responsibility Criteria. Such a form may help ensure that the bidder submits clear information addressing each of the issues in the Supplemental Bidder Responsibility Criteria.
- If the Supplemental Bidder Responsibility Criteria language requires specific qualifications or experience for certain personnel who will be involved with the project, it may be appropriate for the Owner to request a copy of resumes or certifications, as applicable, to document the specific requirements.

Example of Structure for Criteria and Documentation: The following provides an example of one potential structure for Supplemental Bidder Responsibility Criteria. The example includes details of both criteria and documentation that a public agency may choose use or adapt for a specific project:

- A. **Criterion:** The Bidder shall have successfully completed projects of a similar size and scope as required by the contract documents for this project. In evaluating whether the projects were “successfully completed,” the Owner may check owner references for the previous projects and may evaluate the owner’s assessment of the Bidder performance, including but not limited to the following areas:
- Quality of project and quality control;
 - Management of safety and safety record;
 - Timeliness of performance;
 - Use of skilled personnel;
 - Management of subcontractors;
 - Availability of and use of appropriate equipment;
 - Compliance with contract documents;
 - Management of schedule, submittals process, change orders, and close-out.
- B. **Documentation:** The Bidder shall submit a list of projects of similar size and scope to this project. For the purposes of meeting this criterion, the Owner has determined that “similar size and scope to this project” means projects that have the following characteristics:_____ **[Note to Owner: Include a detailed description of the important features of this project that must be met by the Bidder.]** The information about each project shall include the following:

Attachment D

- Owner's name and contact information for the owner's representative;
- Awarded contract amount;
- Final contract amount;
- A description of the scope of the project and how the project is similar to this project;
- The Bidder's assessment of its performance of each project, including but not limited to the following:
 - Quality of project and quality control;
 - Management of safety and safety record;
 - Timeliness of performance;
 - Use of skilled personnel;
 - Management of subcontractors;
 - Availability of and use of appropriate equipment;
 - Compliance with contract documents;
 - Management of schedule, submittals process, and change orders, and close-out.

Standards for Declaring a Bidder Responsible: There are two basic options available to public agencies in making a determination whether a bidder is responsible and meets the Supplemental Bidder Responsibility Criteria.

1. **Meet All the Criteria:** Under this option, also known as the "pass/fail" option, a bidder must meet all of the Supplemental Bidder Responsibility Criteria established by the public agency. If a bidder doesn't meet each element of the criteria, they would be declared not responsible by the public agency, and the public agency would then evaluate the responsibility of the second low bidder.
2. **Substantially Meet the Criteria:** Under this option, also known as the "discretionary" option, a bidder must substantially meet the Supplemental Bidder Responsibility Criteria established by the public agency. If the bidder does not meet each element of the criteria, the public agency may, nevertheless, exercise its discretion and declare the bidder responsible if the agency is confident that the bidder is capable of successfully performing the project.

Checklist for Developing Supplemental Bidder Responsibility Criteria: It is recommended that Owners review and complete the Checklist for Developing Supplemental Bidder Responsibility for each project on which the criteria are applied. The Checklist is available in Appendix F of these Guidelines or may be accessed at www.mpurdy.com/resources.

Appendix A

OPTIONAL TOOLS

Examples of Supplemental Bidder Responsibility Criteria

The use of Supplemental Bidder Responsibility Criteria by Owners is optional. The criteria may be either tailored to a specific project or may apply more generally to all projects. In either event, the criteria must be relevant to the project.

In reviewing the examples of Supplemental Bidder Responsibility Criteria listed below, Owners should:

- Be aware that some of the criteria may not be applicable to all projects.
- Make appropriate changes in the criteria to fit the Owner's objectives, which may include modifying the number of years identified in some of the criteria.

The following are examples of Supplemental Bidder Responsibility Criteria that an Owner may decide to use on some or all of its projects. If Supplemental Bidder Responsibility Criteria are utilized, they must be incorporated into the bidding documents. The examples below also suggest the documentation that must be produced by the Bidder in order to demonstrate compliance with the criteria.

1. **Delinquent State Taxes**

- A. Criterion: The Bidder shall not owe delinquent taxes to the Washington State Department of Revenue without a payment plan approved by the Department of Revenue.
- B. Documentation: The Bidder shall not be listed on the Washington State Department of Revenue's "Delinquent Taxpayer List" website: <http://dor.wa.gov/content/fileandpaytaxes/latefiling/dtlwest.aspx>, unless accompanied by a written payment plan approved by the Department of Revenue.

2. **Federal Debarment**

- A. Criterion: The Bidder shall not currently be debarred or suspended by the Federal government.
- B. Documentation: The Bidder shall not be listed as a current debarred or suspended bidder on the U.S. General Services Administration's "Excluded Parties List System" website: <http://www.epls.gov/>.

Attachment D

3. **MWBE Participation on Federally Funded Projects**

- A. **Criterion:** The Bidder shall have complied with MWBE, DBE, or HUBZone utilization requirements or goals on federally funded public works projects with such requirements, completed by the Bidder within three years of the bid submittal date for this project, unless there are extenuating circumstances acceptable to the Owner.
- B. **Documentation:** For each federally funded public works project with requirements for utilization of Minority and Women's Business Enterprises (MWBE), Disadvantaged Business Enterprises (DBEs), or Historically Underutilized Businesses (HUBZone) that was completed by the Bidder within three years of the bid submittal date for this project, the Bidder shall submit the following:
- A list of such projects;
 - The owner and contact information for the owner's representative;
 - A description of the goal for the project;
 - The actual of utilization of such businesses by the Bidder;
 - If the Bidder failed to meet the contracts' utilization goal, an explanation of any extenuating circumstances that contributed to the Bidder not meeting the goals.

The Owner may contact previous owners to validate the information provided by the Bidder, and shall consider whether the goals were mandatory or voluntary, and the validity of any explanation of extenuating circumstances.

4. **Apprenticeship**¹⁴

- A. **Criterion:** The Bidder shall have complied with apprenticeship utilization goals on public works projects with such requirements, that were completed by the Bidder within three years of the bid submittal date for this project, unless there are extenuating circumstances acceptable to the Owner.
- B. **Documentation:** For each public works project with an apprenticeship utilization goal that was completed by the Bidder within three years of the bid submittal date for this project, the Bidder shall submit the following:
- A list of such projects;
 - The owner and contact information for the owner's representative;

¹⁴ This suggested criterion may be used by public agencies not subject to the requirements of RCW 39.04.320 that imposes mandatory apprenticeship utilization requirements and mandatory bidder responsibility criteria on certain projects. The agencies affected by RCW 39.04.320 include the following: State Department of Transportation (WSDOT), State Department of Enterprise Services (DES), all institutions of higher education, all school districts.

Attachment D

- The apprenticeship utilization percentage goal for the project;
- The actual percentage of utilization by the Bidder;
- An explanation of any extenuating circumstances that contributed to the Bidder not meeting the goals.

The Owner may contact previous owners to validate the information provided by the Bidder, and shall consider whether the goals were mandatory or voluntary, and the validity of any explanation of extenuating circumstances.

5. **Public Bidding Crime**

- A. **Criterion:** The Bidder and its owners shall not have been convicted of a crime involving bidding on a public works contract within five years from the bid submittal deadline.
- B. **Documentation:** The Bidder shall sign a statement (on a form to be provided by the Owner) that the Bidder and owners have not been convicted of a crime involving bidding on a public works contract. The Owner may also use independent sources of information to demonstrate whether the Bidder is in compliance with this criterion.

6. **Subcontractor Responsibility**

- A. **Criterion:** The Bidder's standard subcontract form shall include the subcontractor responsibility language required by RCW 39.06.020, and the Bidder shall have an established procedure which it utilizes to validate the responsibility of each of its subcontractors. The Bidder's subcontract form shall also include a requirement that each of its subcontractors shall have and document a similar procedure to determine whether the sub-tier subcontractors with whom it contracts are also "responsible" subcontractors as defined by RCW 39.06.020.
- B. **Documentation:** The Bidder shall submit a copy of its standard subcontract form for review by the Owner, and a written description of its procedure for validating the responsibility of subcontractors with which it contracts.

7. **Claims Against Retainage and Bonds**

- A. **Criterion:** The Bidder shall not have a record of excessive claims filed against the retainage or payment bonds for public works projects during the previous three years, that demonstrate a lack of effective management by the Bidder of making timely and appropriate payments to its subcontractors, suppliers, and workers, unless there are extenuating circumstances and such circumstances are deemed acceptable to the Owner.
- B. **Documentation:** The Bidder shall submit a list of the public works projects completed within the previous three years and include for each project the following information:

Attachment D

- The owner and contact information for the owner;
- A list of claims filed against the retainage and/or payment bond for any of the projects listed;
- A written explanation of the circumstances surrounding each claim and the ultimate resolution of the claim.

The Owner may contact previous owners to validate the information provided by the Bidder.

8. **Termination for Cause / Termination for Default**

- A. **Criterion:** The Bidder shall not have had any public works contract terminated for cause or terminated for default by a government agency during the five year period immediately preceding the bid submittal deadline for this project, unless there are extenuating circumstances and such circumstances are deemed acceptable to the Owner.
- B. **Documentation:** The Bidder shall sign a statement (on a form to be provided by the Owner) that the Bidder has not had any public works contract terminated for cause by a government agency during the five year period immediately preceding the bid submittal deadline for this project. The Owner may also use independent sources of information to demonstrate whether the Bidder is in compliance with this criterion.

9. **Lawsuits**

- A. **Criterion:** The Bidder shall not have lawsuits with judgments entered against the Bidder within five years of the bid submittal date that demonstrate a pattern of failing to meet the terms of contracts, unless there are extenuating circumstances and such circumstances are deemed acceptable to the Owner.
- B. **Documentation:** The Bidder shall submit a list of lawsuits with judgments entered against the Bidder within five years of the bid submittal date, along with a written explanation of the circumstances surrounding each such lawsuit. The Owner shall evaluate these explanations to determine whether the lawsuits demonstrate a pattern of failing to meet of terms of construction related contracts. The Owner may also evaluate lawsuits within the time period specified that are not reported by the Bidder.

10. **Prevailing Wages**

- A. **Criterion:** The Bidder shall not have a record of prevailing wage complaints filed against it within five years of the bid submittal date that demonstrates a pattern of failing to pay workers prevailing wages, unless there are

Attachment D

extenuating circumstances and such circumstances are deemed acceptable to the Owner.

- B. Documentation: The Bidder shall submit a list of prevailing wage complaints filed against it within five years of the bid submittal date along with an explanation of each complaint and how it was resolved. The Owner shall evaluate these explanations and the resolution of each complaint to determine whether the complaints demonstrate a pattern of failing to pay its workers prevailing wages as required. The Owner may also evaluate complaints filed within the time period specified that were not reported by the Bidder.

Appendix B

OPTIONAL TOOLS

Sample Supplemental Bidder Responsibility Criteria Language from Actual Projects

Explanation of Samples: The following are *samples only* of Supplemental Bidder Responsibility Criteria that different public agencies have used on specific projects of varying size and complexity. The samples are included solely as examples of what other agencies have used. Some of the samples show both an early draft of the Supplemental Bidder Responsibility Criteria, and how it was edited to be more relevant, specific, and less restrictive of competition.

Each of these samples was developed for the unique circumstances of a particular project. No representation is made that these samples are specifically applicable to any other agency’s projects. Because each public works project is different, the project specific Supplemental Bidder Responsibility Criteria should be different for each project. Some of the samples provide a better structure than others and public agencies should not interpret the samples below as an endorsement of any of the samples.

Sample 1:

University of Washington: During the year 2000 or more recently, the Bidder shall have successfully completed at least one project with a construction cost of at least \$750,000, in a licensed acute care hospital that remained in operation during the construction period, and that included work adjacent to an occupied patient care area (“adjacent” means immediately adjacent to the work, or on the floor below or above the work). This project must have included the installation of complex diagnostic imaging or radiation therapy equipment (for example: MRI, Angiography Bi-Plane, Linear Accelerator, Gamma Knife, CT Scanner) by the owner’s equipment vendor.

Sample 2:

University of Washington

<u>Early Version of Criteria</u>	<u>Edited Version of Criteria</u>
Contractor must have worked at least one project involving medium voltage cable and terminations at the University of Washington within the last 5 years.	The Contractor must have performed work stringing and terminating medium voltage cables (at least 601 volts) on at least one project in which the electrical work a.) was substantially complete in the year 2003 or later, and b.) had a contract cost of at least \$250,000.

Attachment D

<u>Early Version of Documentation</u>	<u>Edited Version of Documentation</u>
<p>Documentation that Contractor worked at least one project involving medium voltage cable and terminations at University of Washington within the last 5 years.</p>	<p>The Contractor shall submit the following information about the project being submitted in compliance with the supplemental bidder responsibility criteria: name of the project, location of the project, description of the scope of work performed by the Contractor, the voltage of the cables worked on, name and contract information of the owner and engineer/designer, date of substantial completion of the electrical work, total contract cost of the electrical portion of the project.</p>

Samples Not to Use:

<u>Inappropriate Criteria</u>	<u>Criticism of Criteria</u>
<p>The Bidder must have the ability, capacity and skill to perform the Contract or provide the services for work required</p>	<p>This statement is not really a criterion as there are no specific standards or details describing the required qualifications of the Bidder's ability, capacity, and skill. This "criteria" is too broad and arbitrary, and should not be used.</p>
<p>The Bidder must have the character, integrity, reputation, judgment, experience, and efficiency to perform the work in a desirable manner.</p>	<p>This statement is not really a criterion as there are no specific standards or details describing how the Bidder's character, reputation, judgment, experience and efficiency will be evaluated. This "criteria" is too broad and arbitrary, and should not be used. "Experience" may be used as part of Supplemental Bidder Responsibility Criteria, but must include details. See the Guidelines (page ___) section titled "Example of Structure for Criteria and Documentation."</p>
<p>The Bidder must be able to perform the contract within the time specified.</p>	<p>This statement is not really a criterion, but only a statement of expectations, and should not be used. A contractor awarded a public works project must meet all of the conditions of the contract documents including the time of performance.</p>

Attachment D

Samples Not to Use:

<i>Inappropriate Criteria</i>	<i>Criticism of Criteria</i>
A Bidder may be deemed not responsible and its bid rejected if the Bidder, in the opinion of the Owner, is not qualified for the work of the bid.	This statement is not really a criterion. The purpose of Supplemental Bidder Responsibility Criteria is to define the Owner's specific expectations and standards for what a bidder must do to be qualified to perform the work. The basis of rejection is too broad and arbitrary, and this "criterion" should not be used.
A Bidder may be deemed not responsible and its bid rejected if an unsatisfactory performance record exists based on past or current Owner work or work done for others, as judged from the standpoint of the work, workmanship, progress, affirmative action, equal employment opportunity practices, or disadvantaged business enterprise, minority business enterprise, or women's business enterprise utilization.	This criterion is too broad and arbitrary and lacks a definition of the Owner's specific expectations and standards of the bidder's past performance. This criterion should not be used.
A Bidder may be deemed not responsible and its bid rejected if the Owner defines the Bidder as not responsible.	This criterion is too broad and arbitrary. It lacks any definition of the Owner's expectations and standards. Bidders will be unable to determine the basis of how the Owner will make its responsibility determination. Thus, it is impossible for a bidder to know, prior to submitting a bid, whether they are likely to be deemed responsible or not.

Additional samples from other public agencies will be added to these Suggested Guidelines in the future.

Appendix C

***SUGGESTED BIDDER RESPONSIBILITY CRITERIA
LANGUAGE FOR BIDDING DOCUMENTS***

Mandatory Bidder Responsibility Criteria

- A. It is the intent of Owner to award a contract to the low responsible bidder. Before award, the bidder must meet the following bidder responsibility criteria to be considered a responsible bidder. The bidder may be required by the Owner to submit documentation demonstrating compliance with the criteria. The bidder must:
1. Have a current certificate of registration as a contractor in compliance with chapter 18.27 RCW, which must have been in effect at the time of bid submittal;
 2. Have a current Washington Unified Business Identifier (UBI) number;
 3. If applicable:
 - a. Have Industrial Insurance (workers' compensation) coverage for the bidder's employees working in Washington, as required in Title 51 RCW;
 - b. Have a Washington Employment Security Department number, as required in Title 50 RCW;
 - c. Have a Washington Department of Revenue state excise tax registration number, as required in Title 82 RCW;
 4. Not be disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065(3).
 5. Until December 31, 2013, not have violated more than one time the off-site, prefabricated, non-standard, project specific items reporting requirements of RCW 39.04.370.
 6. For public works projects subject to the apprenticeship utilization requirements of RCW 3.04.320, not have been found out of compliance by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under chapter 49.04 RCW for the one-year period immediately preceding the first date of advertising for the project.

Attachment D

Supplemental Bidder Responsibility Criteria

B. Criteria: In addition to the bidder responsibility criteria above, the bidder must also meet the following relevant supplemental bidder responsibility criteria applicable to the project:

- 1.
- 2.
- 3.

C. Documentation: As evidence that the bidder meets the bidder responsibility criteria in paragraph B above, the apparent low bidder submitting a responsive bid must submit the following documentation to the Owner within 48 hours¹⁵ of the bid submittal deadline . The Owner reserves the right to request such documentation from other bidders also.

- 1.
- 2.
- 3.

D. Appeal: If the Owner determines the bidder does not meet the bidder responsibility criteria in paragraph B above and is therefore not a responsible bidder, the Owner shall notify the bidder in writing with the reasons for its determination. If the bidder disagrees with this determination, it may appeal the determination within 24 hours¹⁶ of receipt of the Owner's determination by presenting additional information to the Owner. The Owner will consider the additional information before issuing its final determination. If the final determination affirms that the bidder is not responsible, the Owner will not execute a contract with any other bidder until two business days¹⁷ after the bidder determined to be not responsible has received the final determination.

E. Request to Change Criteria During Bidding: Bidders with concerns about the relevancy or restrictiveness of the Supplemental Bidder Responsibility Criteria required in these bidding documents may make or submit requests to the Owner to modify the criteria. Such requests should be in writing, describe the nature of the concerns, and propose specific modifications to the criteria that will make the criteria more relevant and/or less restrictive of competition. Bidders should

¹⁵ The time deadline indicated here for the bidder to submit documentation indicating compliance with the criteria may be adjusted by the Owner, adopting either a standard for all projects or changing it on a project-by-project basis.

¹⁶ The time deadline for a bidder to appeal a determination that they are not responsible, as indicated here, may be modified by the Owner, adopting either a standard for all projects or changing it on a project-by-project basis.

¹⁷ This two day period of time may not be reduced. It is required in RCW 39.04.350 (d).

Attachment D

submit such requests to the Owner in a timely manner prior to the bid submittal deadline and address the request to _____.

Appendix D

FOR OWNERS**Mandatory Bidder Responsibility Checklist**

The following checklist may be used by Owners in documenting that a Bidder meets the mandatory bidder responsibility criteria. It is suggested that Owners print a copy of documentation from the appropriate website to include with this checklist in the contract file.

General Information	
Project Name:	Project Number:
Bidder's Business Name:	Bid Submittal Deadline:
Contractor Registration – https://fortress.wa.gov/lni/bbip/	
License Number:	Status: Active: Yes <input type="checkbox"/> No <input type="checkbox"/>
Effective Date (must be effective on or before Bid Submittal Deadline):	Expiration Date:
Current UBI Number – http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/	
UBI Number:	Account Closed: Open <input type="checkbox"/> Closed <input type="checkbox"/>
Industrial Insurance Coverage – https://fortress.wa.gov/lni/crpsi/MainMenu.aspx	
Account Number:	Account Current: Yes <input type="checkbox"/> No <input type="checkbox"/>
Employment Security Department Number –	
Employment Security Department Number:	
<ul style="list-style-type: none"> • Has Bidder provided account number on the Bid Form? Yes <input type="checkbox"/> No <input type="checkbox"/> • And/or have you asked the Bidder for documentation from Employment Security Department on account number? Yes <input type="checkbox"/> No <input type="checkbox"/> 	
State Excise Tax Registration Number – http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/	
Tax Registration Number:	Account Closed: Open <input type="checkbox"/> Closed <input type="checkbox"/>
Not Disqualified from Bidding – http://www.lni.wa.gov/TradesLicensing/PrevWage/AwardingAgencies/DebarredContractors/default.asp	
Is the Bidder listed on the "Contractors Not Allowed to Bid" list of the Department of Labor and Industries? Yes <input type="checkbox"/> No <input type="checkbox"/>	
Checked by:	
Name of Employee:	Date:

Attachment D

Appendix E

FOR CONTRACTORS AND SUBCONTRACTORS

Subcontractor Responsibility Checklist

The following checklist may be used by Contractors and Subcontractors in documenting that a subcontractor of any tier meets the subcontractor responsibility criteria. It is suggested that Contractors and Subcontractors print a copy of documentation from the appropriate website to include with this checklist in their contract file.

General Information	
Project Name:	Project Number:
Subcontractor's Business Name:	Subcontract Execution Date:
Contractor Registration – https://fortress.wa.gov/lni/bbip/	
License Number:	Status: Active: Yes <input type="checkbox"/> No <input type="checkbox"/>
Effective Date (must be effective on or before Subcontract Bid Submittal Deadline):	Expiration Date:
Current UBI Number – http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/	
UBI Number:	Account Closed: Open <input type="checkbox"/> Closed <input type="checkbox"/>
Industrial Insurance Coverage – https://fortress.wa.gov/lni/crpsi/MainMenu.aspx	
Account Number:	Account Current: Yes <input type="checkbox"/> No <input type="checkbox"/>
Employment Security Department Number –	
Employment Security Department Number:	
<ul style="list-style-type: none"> • Has Subcontractor provided account number on the Bid Form? Yes <input type="checkbox"/> No <input type="checkbox"/> • And/or have you asked the Subcontractor for documentation from Employment Security Department on account number? Yes <input type="checkbox"/> No <input type="checkbox"/> 	
State Excise Tax Registration Number – http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/	
Tax Registration Number:	Account Closed: Open <input type="checkbox"/> Closed <input type="checkbox"/>
Not Disqualified from Bidding – http://www.lni.wa.gov/TradesLicensing/PrevWage/AwardingAgencies/DebarredContractors/default.asp	
Is the Subcontractor listed on the "Contractors Not Allowed to Bid" list of the Department of Labor and Industries? Yes <input type="checkbox"/> No <input type="checkbox"/>	
Contractor Licenses – https://fortress.wa.gov/lni/bbip/	
Electrical: If required by Chapter 19.28 RCW, does the Subcontractor have an Electrical Contractor's License? Yes <input type="checkbox"/> No <input type="checkbox"/>	Elevator: If required by Chapter 70.87 RCW, does the Subcontractor have an Elevator Contractor's License? Yes <input type="checkbox"/> No <input type="checkbox"/>
Checked by:	
Name of Employee:	Date:

Appendix F

***CHECKLIST FOR DEVELOPING SUPPLEMENTAL BIDDER
RESPONSIBILITY CRITERIA***

It is recommended that Owners review and complete the Checklist for Developing Supplemental Bidder Responsibility for each project on which the criteria are applied. The Checklist may also be accessed at www.mpurdy.com/resources.

Attachment D

(206) 762-2699 (office)
 (206) 295-1464 (cell)
 mpurdy@mpurdy.com
 www.mpurdy.com



PO Box 46181
 Seattle, WA 98146

Checklist for Developing Supplemental Bidder Responsibility Criteria

No.	Description
1	<p><u>Appropriateness:</u> Why do you think Supplemental Bidder Responsibility Criteria are appropriate for this project? What are the risks to the project if you don't include Criteria?</p>
2	<p><u>Suggested Guidelines:</u> Have you reviewed the Suggested Guidelines for Bidder Responsibility published by the Capital Projects Advisory Review Board (CPARB) (http://www.ga.wa.gov/CPARB/index.html)? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
3	<p><u>Details of Criteria:</u> Based on the project, what types of criteria are important?</p> <ul style="list-style-type: none"> <input type="checkbox"/> Contractor's experience in similar type of work (must be defined) <input type="checkbox"/> Experience of contractor's key personnel <input type="checkbox"/> Contractor's and their key personnel's experience <input type="checkbox"/> Number of years of experience of the contractor <input type="checkbox"/> Dollar size of previous projects completed by the contractor <input type="checkbox"/> Specialty subcontractor qualifications <input type="checkbox"/> Criteria from CPARB's Suggested Guidelines for Bidder Responsibility <input type="checkbox"/> Other
4	<p><u>Reasons:</u> Describe your reasons for including the specific Criteria you have included in the bidding documents? Be specific. For example, if you have asked for 4 years of experience, describe why 4 years is the appropriate number of years and how you arrived at your conclusion.</p>

Attachment D

Checklist for Developing Supplemental Bidder Responsibility Criteria

5	<u>References:</u> Have you described how references will be used in validating the Documentation submitted and in evaluating whether the bidder is responsible?	<input type="checkbox"/> Yes <input type="checkbox"/> No
6	<p><u>Relevancy:</u> On a scale of 1 to 10, with 10 being the most relevant, rate the relevancy of the Supplemental Bidder Responsibility Criteria you have developed to the project.</p> <p style="text-align: center;">1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 <input type="checkbox"/> 9 <input type="checkbox"/> 10 <input type="checkbox"/></p> <p>Provide an explanation for why you have rated the Criteria as you have, and describe in detail how the Criteria are "Relevant" to the project.</p>	
7	<u>Project Criteria:</u> Have you included project-specific Supplemental Bidder Responsibility Criteria in the bidding documents?	<input type="checkbox"/> Yes <input type="checkbox"/> No
8	<u>Generic Criteria:</u> Have you included any generic Supplemental Bidder Responsibility Criteria in the bidding documents?	<input type="checkbox"/> Yes <input type="checkbox"/> No
9	<u>Documentation:</u> Have you included a list of the documentation that must be submitted by the bidder to demonstrate they meet the Criteria?	<input type="checkbox"/> Yes <input type="checkbox"/> No
10	<u>Relevance of Documentation:</u> Is there a one-to-one correspondence between the Criteria and the Documentation to be submitted?	<input type="checkbox"/> Yes <input type="checkbox"/> No
11	<u>Deadline for Submittal:</u> Do the bidding documents include the length of time after the bid submittal deadline the bidder has to submit the Documentation?	<input type="checkbox"/> Yes <input type="checkbox"/> No
12	<u>Deadline for Appeal:</u> Do the bidding documents include how long the bidder has to appeal after being notified they are not a responsible bidder?	<input type="checkbox"/> Yes <input type="checkbox"/> No

Attachment D

Checklist for Developing Supplemental Bidder Responsibility Criteria

13	<p><u>Research:</u> What market research have you done to validate which bidders meet the Supplemental Bidder Responsibility Criteria?</p>
14	<p><u>Bidding Pool:</u> How many bidders will meet the criteria?</p>
15	<p><u>Potential Bidders:</u> What are the names of the bidders who will meet the Criteria?</p>
16	<p><u>Bidding Pool Analysis:</u> On a scale of 1 to 10, with 10 being the most restrictive of the bidding pool, rate how restrictive you think the Supplemental Bidder Responsibility Criteria are?</p> <p style="text-align: center;"> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 <input type="checkbox"/> 9 <input type="checkbox"/> 10 <input type="checkbox"/> </p>
17	<p><u>Non-Complying Bidders:</u> What are the names of the bidders who will probably not meet the Criteria?</p>
18	<p><u>Protesters:</u> Do you think any bidders may protest the Criteria? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, what would be their likely basis of protest?</p>
19	<p><u>Bid Protest Risk:</u> On a scale of 1 to 10, with 10 being the highest risk, what do you think the risk is of a bid protest with the Supplemental Bidder Responsibility Criteria you have developed?</p> <p style="text-align: center;"> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 <input type="checkbox"/> 9 <input type="checkbox"/> 10 <input type="checkbox"/> </p> <p>Do you think your Criteria are defensible if your agency was taken to court? Why?</p>

Attachment D

Checklist for Developing Supplemental Bidder Responsibility Criteria

20	Definitions: Have you defined all terms and concepts included in the criteria?	<input type="checkbox"/> Yes <input type="checkbox"/> No
21	Undefined Terms: Are there undefined or ambiguous terms included in the Supplemental Bidder Responsibility Criteria that may be subject to a different interpretation by various parties? What are those terms?	<input type="checkbox"/> Yes <input type="checkbox"/> No
22	Delays: Does your project schedule have sufficient time to deal with possible delays resulting from use of Supplemental Bidder Responsibility Criteria based on time to: <ul style="list-style-type: none"> <input type="checkbox"/> Develop the Criteria <input type="checkbox"/> Consider requests for changes in the Criteria during bidding <input type="checkbox"/> Evaluate bidder's documentation after bid submittal <input type="checkbox"/> Check references to validate information provided <input type="checkbox"/> Manage an appeal and possible lawsuit from a bidder determined to be not responsible <input type="checkbox"/> Deal with a protest from another bidder that the low bidder doesn't meet the Criteria 	
23	Review of Criteria: Who in your agency has reviewed the draft Criteria? <ul style="list-style-type: none"> <input type="checkbox"/> Project Manager <input type="checkbox"/> Public Works Director <input type="checkbox"/> Construction Manager <input type="checkbox"/> Purchasing/Contracting/Procurement personnel <input type="checkbox"/> Attorney <input type="checkbox"/> Outside design consultant (architect or engineer) <input type="checkbox"/> Other public agencies <input type="checkbox"/> Contractors 	
24	Mandatory Responsibility Criteria: Are any of the items you've included in the Supplemental Bidder Responsibility Criteria part of the Mandatory Bidder Responsibility Criteria from RCW 39.04.350?	<input type="checkbox"/> Yes <input type="checkbox"/> No
25	Responsiveness Issues: Are any of the Supplemental Bidder Responsibility Criteria really issues of responsiveness instead of responsibility?	<input type="checkbox"/> Yes <input type="checkbox"/> No
26	Clarity of Criteria: On a scale of 1 to 10, with 10 being the most clear, rate the clarity of the Supplemental Bidder Responsibility Criteria. <div style="text-align: center; margin-top: 5px;"> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 <input type="checkbox"/> 9 <input type="checkbox"/> 10 <input type="checkbox"/> </div>	