

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 January 10, 2008 20110

Revisions include:

January 2008

Two additional Supplemental Bidder Responsibility criteria items
in Appendix A, page 5 (Optional Tools)

#10—Lawsuits

#11—Prevailing Wages

October 2010 January 2011

~~Replace Implementation Power Point slides (App. C) with a Checklist for Developing
Supplemental Responsibility Criteria~~

~~Add samples of supplemental criteria language~~

~~Training and Resource Panel~~

~~Example language for how Owners can consider changes to criteria during bidding~~

~~Updated with law changes pertaining to responsibility criteria~~

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Suggested Guidelines for Bidder Responsibility

NOTE TO JPA – NEED TO ADD TO THESE BULLET POINTS

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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: Implementing Bidder Responsibility Criteria](#)~~

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Suggested Guidelines for Bidder Responsibility

- o [Appendix C: Suggested Supplemental Bidder Responsibility Criteria Language for Bidding Documents](#)
- o [Appendix D](#): For Owners: Mandatory Bidder Responsibility Checklist
- o [Appendix E](#): For Contractors and Subcontractors: Subcontractor Responsibility Checklist
- o [Appendix F: Checklist for Developing Supplemental Bidder Responsibility Criteria](#)

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Suggested Guidelines for Bidder Responsibility

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 as resource ~~permittings are available~~, 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.

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Suggested Guidelines for Bidder Responsibility

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 relating to apprenticeship utilization and reporting on the use of out-of-state off-site prefabrication of non-standard, project specific items. However, the law requires that public owners (and as explained later, contractors and subcontractors) 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;
~~and~~
 - (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

Suggested Guidelines for Bidder Responsibility

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.

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

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Suggested Guidelines for Bidder Responsibility

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 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

Suggested Guidelines for Bidder Responsibility

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:
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 3.0.04.320, 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.

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Suggested Guidelines for Bidder Responsibility

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), ~~on appropriate criteria~~ as to what Supplemental Bidder Responsibility Criteria to include in bidding project solicitation/bid documents.
- ~~In order to~~ 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.
- ~~The competing interests in establishing Supplemental Bidder Responsibility Criteria, the competing interests of public agencies and contractors must be balanced. The public agency's interests in ensuring that a responsible contractor/bidders builds the project must be weighed against the competing interest to ensure that the procurement encourages sufficient competition, garners the maximum participation 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.
- ~~It is not CPARB's intent that Supplemental Bidder Responsibility Criteria be incorporated into and made part of all projects. Adopting Supplemental Bidder Responsibility Criteria applicable to all projects is not recommended, unless a~~

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Suggested Guidelines for Bidder Responsibility

~~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 to ensure that the public works owner is obtaining the appropriate contractor to construct the project without unduly restricting competition (pool of qualified bidders) to ensure the least cost project for the tax paying public. Adopting Supplemental Bidder Responsibility criteria applicable to all projects is not recommended~~

Comment [MP1]: I've deleted this concept of not restricting competition from here and moved it in the 5th bullet of this section where the balancing of interests is already discussed. The purpose of this specific bullet isn't about the balancing, but a cautionary note to not use the criteria on all projects without adapting them appropriately.

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.

Suggested Guidelines for Bidder Responsibility

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 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 ~~who meet the criteria~~. 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 ~~some of the resource organizations and individuals included in Appendix C~~. 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: ~~In order to~~ 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 for Owners 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 their public works bidding documents regarding the right of bidders of their right to question and request changes to the Supplemental Bidder Responsibility Criteria during the bidding period:

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 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)

Suggested Guidelines for Bidder Responsibility

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 _____ business days prior to the bid submittal deadline and address the request to _____.

Owners are encouraged to identify in the bidding documents (see blank in paragraph above) the name of a person in a higher level position in the Owner's organization, and not just 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

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 as well.

Comment [MP2]: I've changed the language away from "in a timely manner" to "no later than _____ business days" in accordance with Nora's suggestion. Nora had suggested 5 days, but I think the Guidelines should allow for more flexibility for each owner to make an appropriate decision on the timing.

Comment [MP3]: I've made a few adaptations to Nora's suggested language for this paragraph so that it reads more clearly, but that preserves the focus of her comments.

Suggested Guidelines for Bidder Responsibility

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.](#)⁷

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 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)⁸, 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

⁷ ~~Evaluation of multiple bidders may occur concurrently.~~

⁸ Subject to complying with the requirements of RCW 39.04.350 (d) regarding the appeal process for bidders determined to not be responsible bidders.

Suggested Guidelines for Bidder Responsibility

proposing a different subcontractor if the originally proposed subcontractor did not meet the criteria,⁹ 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 ~~award-execute~~ a contract to another bidder until two (2) business days after the bidder receives the Owner's final determination that the bidder is not a responsible bidder.¹⁰

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

⁹ 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.

¹⁰ RCW 39.04.350 (2) (d)

Suggested Guidelines for Bidder Responsibility

5 projects installing a 48" watermain instead of only 4 projects with a 36" watermain?

B. Risk Management Necessity for Criteria:

- ~~Are there compelling reasons, 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? for including Supplemental Bidder Responsibility Criteria in the bidding documents?~~
- ~~Can the risks of the project be managed without? Why is it critical that the determination of responsibility be conditioned on using Supplemental Bidder Responsibility Criteria, and instead of relying instead on ensuring simply requiring~~ that the contractor awarded the project meets the performance standards of the specifications?

Comment [MP4]: Adapted from Nora's suggestions.

- ### 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 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 Guidelines for Bidder Responsibility

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,¹¹ 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 must submit the following documentation to the Owner within 48 hours¹² 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 hours¹³ 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

¹¹ This section is intended to follow the language describing the mandatory bidder responsibility criteria, explained earlier in these Suggested Guidelines. If ~~no~~~~one~~ Supplemental Bidder Responsibility Criteria are used, the mandatory bidder responsibility criteria should still be described in the bidding documents.

¹² 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.

¹³ 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.

Suggested Guidelines for Bidder Responsibility

determination affirms that the bidder is not responsible, the Owner will not execute a contract with any other bidder until two business days¹⁴ 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?
- ~~What specific work of the project is critical and necessitates that the bidder must meet specific criteria? Reference by section number of specification or other very specific language what bodies of work for the project have criteria associated with them.~~
- Describe the specific experience the bidder must have: how many years, 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~~some of resource organizations and individuals included in Appendix G~~ 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

Comment [MP5]: Deleted per Nora's comment.

Comment [MP6]: I did not adopt Nora's suggestion here. She wanted to add to the end of the sentence the following: "unless the owner defines in the solicitation document what is recent experience or similar work." Not necessary to make this addition as the sentence already discusses undefined terms, implying that if a term is defined, it's okay.

¹⁴ This two day period of time may not be reduced. It is required in RCW 39.04.350 (d).

Suggested Guidelines for Bidder Responsibility

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 because construction projects vary and each jobs is in many respects unique.

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 specification stated this as part of the Supplemental Bidder Responsibility Criteria.
- The documentation to be submitted should be clear and specific. ~~The Owner (and other bidders) should be able to tell from the documentation whether the bidder meets or doesn't meet the Supplemental Bidder Responsibility Criteria.~~
- 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.

Comment [MP7]: Deleted per Nora's suggestion.

Suggested Guidelines for Bidder Responsibility

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:

- 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;

Suggested Guidelines for Bidder Responsibility

- o Compliance with contract documents;
- o 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~~ bidder is declared not responsible by the public agency, and the public agency ~~would~~ then evaluates 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 FG of these Guidelines or may be accessed at www.mpurdy.com/resources.

Comment [MP8]: Nora does not think this website should be referenced and has concerns about the length of the checklist and some of the items. I will leave it up to others to decide whether to reference the checklist or not. For many agencies who are not as sophisticated as the Port of Seattle, the checklist may be beneficial. Nothing in these Guidelines, including the checklist if it is included, are mandatory, unless the Guidelines are specifically describing mandatory requirements of the RCW. If a decision is made to delete the checklist, this Appendix will need to be deleted. I’ve moved it to Appendix F, the last one, in this draft, so if it is not used, it can simply be dropped.

Suggested Guidelines for Bidder Responsibility

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.

Comment [MP9]: Added to address Nora's comment.

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/>.

Suggested Guidelines for Bidder Responsibility

3. MWBE Participation on Federally Funded Projects

- A. Criterion: The Bidder shall have complied with MWBE, DBE, or HUBZone, ~~or other similar~~ 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), ~~or similar programs~~ 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, a explanation of any extenuating circumstances that contributed to the Bidder not meeting the goals.

Comment [MP10]: Deleted "similar" based on Nora's comment.

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. Apprenticeship¹⁵

- 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;

Comment [MP11]: Nora raised the question of whether the references to "goals" here should be to "requirements." See footnote. This criterion is for agencies with goals, not the mandatory use required by RCW 39.04.320.

¹⁵ 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.

Suggested Guidelines for Bidder Responsibility

- 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 ~~that may be available~~ 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:

Suggested Guidelines for Bidder Responsibility

- 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. Completion of Similar Projects

~~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 control;~~
- ~~• 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 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:~~

- ~~• 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 control;~~
 - ~~○ Safety record;~~
 - ~~○ Timeliness of performance;~~

Suggested Guidelines for Bidder Responsibility

- ~~○ Use of skilled personnel;~~
- ~~○ Management of subcontractors;~~
- ~~○ Availability of and use of appropriate equipment;~~
- ~~○ Compliance with contract documents;~~
- ~~○ Management of submittals process and change orders.~~
- ~~○~~

9.8. 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 ~~that may be available~~ to demonstrate whether the Bidder is in compliance with this criterion.

10.9. 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.

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

Suggested Guidelines for Bidder Responsibility

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.

Completion of Similar Projects

~~The most challenging, but also, in many instances, the most pertinent of supplemental bidder criteria is assessing the Bidder's qualification by querying/questioning the Bidder's "Completion of Similar Projects." The key to writing a balanced/meaningful specification is establishing fair and relevant bidder selection criteria involving completion of similar projects is "balance." The interests of the public works owner of having a qualified contractor build the project and at the same time should be weighed against ensuring sufficient competition to protect the tax paying public. The public works owner'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 timely and within budget. That expectation must be balanced against the taxpaying public's interest in ensuring that the selection criteria are such that they foster competition. This challenge is difficult to describe in guidelines and therefore, the completion of similar project guidelines has been placed in its own category and separated from the other criteria.~~

~~The difficulty in describing a well-written fair and balanced specification is best illustrated by example. A project for a hypothetical utility installation involves 1,300 feet of 24" ductile iron pipe, the maximum depth of excavation is expected to be at 15' and the cost of the project is anticipated to come in around \$1.9 million.~~

~~The specifications provide in terms of "Completion of Similar Projects" that the contractor shall have performed a minimum of three (3) projects in the last five (5) years of installing 1,000 feet or over, of 24" or greater ductile iron pipe with excavations of 15' or deeper.~~

~~The bids come in as follows:~~

~~**Contractor No. 1: price \$1,850,000**~~

~~The contractor can meet the pipe diameter requirements and depth requirements, however, cannot meet the requirement of three (3) qualifying projects in the last five (5) years. In the last five (5) years, the contractor/bidder has only performed two (2) projects of over 1,300', seven (7) projects of 800 — 1,000' and two (2) qualifying projects in the last seven (7) years.~~

Comment [MP12]: I've deleted the example for a number of reasons. First, it somewhat implies that an agency must obtain qualifications from all bidders and then evaluate. Second, since CPARB has directed that there be the pass/fail and discretionary options, I think this can be described generically. It seems to me that the purpose of the example is to justify the discretionary approach, which CPARB has already sanctioned.

Suggested Guidelines for Bidder Responsibility

Contractor No. 2: price \$1,800,000

The contractor can meet the three (3) projects in the last three (3) years, and can meet the depth requirement, however, cannot meet the pipe diameter requirement. Two (2) of the contractor's projects were 36" diameter pipe, one (1) project, 18" diameter pipe.

Contractor No. 3: price \$1,900,000

The contractor can meet the three (3) project requirement and the diameter requirement, only two (2) of the projects were over 15' in depth. The contractor has performed numerous other projects that were over 10', but less than 15' in depth.

Contractor No. 4: price \$2,100,000

The contractor meets or exceeds all the criteria to the letter.

Fact Scenario: Contractors No. 1, 2 and 3 failed to obtain a modification of the responsibility criteria before award as envisioned in RCW 39.04.350(2)(b) (see page 101 of 15 of this Suggested Guideline for Bidder Responsibility) and the bids were opened. Only bidder No. 4 meets the criteria to the letter, however, the best price for the tax payers was bidder No. 2. Should bidder No. 2 be rejected simply because it failed to meet the criteria to the letter or would the taxpaying public be better off were the criteria waived and bidder No. 2 was awarded the project despite the fact that it did not meet the responsibility criteria to the letter?

Some owners view responsibility as pass/fail criteria and inject no discretion in the selection decision of the low bidder once bids are opened. Either the bidder meets the responsibility criteria to the letter, if not, the bid is rejected as "non-responsible." Other public works owners inject exercise a level of discretion in the selection process at this stage, recognizing that though the option exists to change the criteria early on as envisioned by statute, in the event of a scenario as given here, an owner could nevertheless, in the exercise of its discretion, select bidder No. 2 and award the project to bidder No. 2 even though bidder No. 2 did not strictly meet all the responsibility requirements.

It is these competing interests that make a properly written Completion of Similar Projects criteria so challenging. The public works owner should carefully consider the relevance of the contractor's similar experience on other projects and the appropriateness of those criteria as weighed against the competing interest that the public works projects be completed at the least cost to the tax paying public.

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

Suggested Guidelines for Bidder Responsibility

owner's assessment of the Bidder performance, including but not limited to the following areas:

- Quality control;
 - 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 submittals process, change orders, and close-out.
- 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:
- 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 control;
 - 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 submittals process and change orders.

Suggested Guidelines for Bidder Responsibility

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>
<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.</u>	<u>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.</u>

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Suggested Guidelines for Bidder Responsibility

<u>Early Version of Documentation</u>	<u>Edited Version of Documentation</u>
<u>Documentation that Contractor worked at least one project involving medium voltage cable and terminations at University of Washington within the last 5 years.</u>	<u>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.</u>

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Other Samples Not to Use:

<u>Inappropriate Criteria</u>	<u>Criticism of Criteria</u>
<u>The Bidder must have the ability, capacity and skill to perform the Contract or provide the services for work required</u>	<u>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.</u>
<u>The Bidder must have the character, integrity, reputation, judgment, experience, and efficiency to perform the work in a desirable manner.</u>	<u>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."</u>
<u>The Bidder must be able to perform the contract within the time specified.</u>	<u>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.</u>
<u>A Bidder may be deemed not responsible and its bid rejected if the Bidder, in the</u>	<u>This statement is not really a criterion. The purpose of Supplemental Bidder</u>

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Suggested Guidelines for Bidder Responsibility

<p>opinion of the Owner, is not qualified for the work of the bid.</p>	<p>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.</p>
<p>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.</p>	<p>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.</p>
<p>A Bidder may be deemed not responsible and its bid rejected if the Owner defines the Bidder as not responsible.</p>	<p>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.</p>

~~The City may, in its discretion, reject a bidder and bid as not responsible for any of the following reasons: **NOTE TO JPA: CITY OF NORMANDY PARK**~~

~~— The Bidder does not have the ability, capacity and skill to perform the Contract or provide the services for work required;~~

~~Criticism: This basis for rejection is simply too broad and too wide open to be meaningful/arbitrary. No specific criteria are provided. **NOTE TO JPA: CITY OF NORMANDY PARK**~~

~~— The Bidder does not have the character, integrity, reputation, judgement, experience, and efficiency to perform the work in a desirable manner;~~

~~Criticism: The basis for rejection is too broad and arbitrary. No specific criteria are provided. Criticism: This basis for bid rejection is simply too broad and too wide open to be meaningful. **NOTE TO JPA: CITY OF NORMANDY PARK**~~

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Suggested Guidelines for Bidder Responsibility

~~—The Bidder cannot perform the contract within the time specified;~~

~~Criticism: The basis for rejection is too broad and arbitrary. No specific criteria are provided. Criticism: This basis for bid rejection is simply too broad and too wide open to be meaningful. NOTE TO JPA: CITY OF NORMANDY PARK~~

~~—The Bidder has failed to pay or settle bills for labor or materials on any former or current contracts;~~

~~Criticism: The basis for rejection is too broad and arbitrary. No specific criteria are provided. Criticism: This basis for bid rejection is simply too broad and too wide open to be meaningful. No basis for consideration as to why the bills for labor were not paid. NOTE TO JPA: CITY OF NORMANDY PARK~~

A Bidder may be deemed not responsible and proposal rejected if:

~~—The Bidder in the opinion of the Contracting Agency is not qualified for the work NOTE TO JPA: ADD HERE of the bid, or to the extent that the bid exceeds the authorized prequalification amount as may have been determined by a prequalification of the Bidder.;~~

~~—An unsatisfactory performance records exists based on past or current Contracting Agency work or for work done for others, as judged from the standpoint of conduct of the work; workmanship; progress; affirmative action; equal employment opportunity practices; or disadvantage business enterprise, minority business enterprise or women's business enterprise utilization; JPA TO ADD~~

~~—Owner defines Bidder as not responsible;~~

~~—Any other state or local law requirements are not met;~~

Completion of a Similar Project, Bidder

~~The Bidder shall submit a single project from its work history of similar size and scope to this project. For the purposes of meeting this criterion, the Owner has determined "similar size and scope to this project" means a project that has the following characteristics:~~

~~—Completed in the last five years from the Bid Opening date of this project;~~

~~—A minimum Construction cost of \$3 million;~~

~~—Construction of a new, stand alone structure;~~

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Comment [MP13]: I think this example is too specific, and reads like the bidder must have completed the exact same project already for the agency. While we might take this example and try to turn it into a more acceptable criteria, we don't have the details of the project at this point and thus, I think it's better to just drop this from the Guidelines.

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Suggested Guidelines for Bidder Responsibility

~~— A new building of 5,000 square feet or larger which includes mechanical and electrical systems;~~

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~~— Associated site work including site clearing; accurate rough and fine grading; layout of site structure and utilities from survey points;~~

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~~— Creation and monthly management of a computer-generated construction progress schedule using Microsoft Project software (or equivalent software e.g., Primavera, etc.) utilizing a network analysis system generally known as the Critical Path Method (CPM). At a minimum, the construction progress schedule must have fifty (50) or more individual interdependent tasks;~~

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~~— Execution of contracts with and direct management of fifteen (15) or more subcontractors excluding sub-tier contractors and material suppliers. For purposes of this subsection "Management" means the Bidder (Company) must certify that the work of the individual subcontractors was planned and integrated into an overall project CPM schedule;~~

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~~— Working with Jurisdictions Having Authority on obtaining proper construction permits and construction inspections.~~

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~~The Bidder shall provide information about one example project, including the:~~

~~— Owner's name and contact information for the owner's representative;~~

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~~— Awarded contract amount;~~

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~~— Final contract amount;~~

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~~— A description of the scope of the project and how the project is similar to the project identified in these project documents, including, but not limited to the elements identified in 0021 OO.1.14.A.6.i.a., together with the CPM schedule.~~

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~~[Agreed change/criticisms of examples subject to group input]~~

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

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Suggested Guidelines for Bidder Responsibility

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 3.0.04.320, 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.

Supplemental Bidder Responsibility Criteria

Suggested Guidelines for Bidder Responsibility

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 ~~responsive~~ bidder submitting a responsive bid must submit the following documentation to the Owner within 48 hours¹⁶ of the bid submittal deadline~~the bid submittal deadline the Owner requesting it~~. 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 paragraphs ~~A and/or~~ 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 hours¹⁷ 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 days¹⁸ 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

Comment [MP14]: Bids are responsive, bidders are responsible, and thus I've deleted Nancy's addition of "responsive" modifying "bidder."

Comment [d15]: GA typically wants to make sure the bidder is responsive and meets the mandatory criteria before requesting the supplemental information from the bidder. Also, the low bidder may not be known until the Owner determines which alternates can be accepted.

Comment [MP16]: I think the practice Guidelines should state submission within x hours from the bid submission deadline. GA and others are free to adapt this language as Nancy has done above, but not all owners will want to add this extra step in of requesting the documentation from the bidders.

Comment [MP17]: There is no appeal process for failing to meet the mandatory criteria. The appeal process in the RCW only relates to supplemental criteria.

¹⁶ 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.

¹⁷ 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.

¹⁸ This two day period of time may not be reduced. It is required in RCW 39.04.350 (d).

Suggested Guidelines for Bidder Responsibility

should 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:
Contractor and Plumber Infraction List – http://www.lni.wa.gov/tradeslicensing/contractors/hirecon/infractions/	
Is Bidder on Infraction List? Yes <input type="checkbox"/> No <input type="checkbox"/>	
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:

Comment [MP18]: Nora has commented that the checklist in Appendix D and E seem lengthy and complicated. They have been in effect now for more than 4 years and many agencies are using it. It's a helpful instructional tool and should be retained in its current form. Nora also commented that the Guidelines should not "recommend that a copy be maintained of all the site." I disagree. The State Auditor's Office routinely issues audit findings because an agency cannot document compliance with a requirement, such as debarment. Documentation of compliance with RCW 39.04.350 falls into the same category. Because these are only Guidelines, individual agencies are free to adopt whatever practices they believe are appropriate, but the Guidelines should be conservative in attempting to protect the interests of agencies.

Comment [MP19]: No required by RCW as a mandatory criterion.

Suggested Guidelines for Bidder Responsibility

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:
Contractor and Plumber Infraction List – http://www.lni.wa.gov/tradeslicensing/contractors/hirecon/infractions/	
Is Subcontractor on Infraction List? Yes <input type="checkbox"/> No <input type="checkbox"/>	
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/	
<u>Electrical</u> : If required by Chapter 19.28 RCW, does the Subcontractor have an Electrical Contractor's License? Yes <input type="checkbox"/> No <input type="checkbox"/>	<u>Elevator</u> : 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:

Comment [MP20]: Not required by RCW.

Suggested Guidelines for Bidder Responsibility

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.

Comment [MP21]: If it's decided to use the checklist, it should be added here in Appendix F, but I don't want to go through all the formatting efforts of that if the decision is not to use it.