



STATE OF HAWAII  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

2008 OCT -3 A 11: 17

OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of	)	PCH-2008-9
	)	
NAN, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	
_____	)	

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On June 30, 2008, Nan, Inc. ("Petitioner"), filed a request for administrative review of the Department of Transportation, State of Hawaii's ("Respondent") denial of Petitioner's protest in connection with Respondent's Invitation for Bids for the project designated as, "HNL EDS Integration Improvements, Phase II, Honolulu International Airport, Honolulu, Oahu, Hawaii, State Project No. AO1095-33" ("Project"). The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 16, 2008, the matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes ("HRS")

Chapter 103D. Petitioner was represented by its attorney, David B. Rosen, Esq.; Respondent was represented by its attorney, Stella M.L. Kam, Esq.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit proposed findings of fact and conclusions of law. Accordingly, on August 18, 2008, the parties filed their proposed findings and conclusions.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

II. FINDINGS OF FACT

1. In or about September 2007, Respondent issued a Notice to Bidders ("IFB") for sealed bids for the construction of the Project.
2. Bids were due on or before January 31, 2008.
3. The scope of work covered by the IFB was described as :

\* \* \* \*

an in-line Explosive Detection System (EDS) for outbound baggage including modifications/improvements to the existing Baggage Handling System (BHS) and facilities. Work also includes the improvements in the ticketing lobbies to accommodate the EDS system. The area of improvements shall include but not be limited to the overseas terminals, bag rooms, and selected areas of the ticketing lobbies.

\* \* \* \*

4. Page P-4 of the IFB ("P-4") required bidders to list the names of the joint contractors or subcontractors to be engaged by the bidder pursuant to HRS §103D-302:

In accordance with Section 103D-302, Hawaii Revised Statutes, the undersigned as bidder has listed the name of each person or firm, who will be engaged by the bidder on the project as Joint Contractor or Subcontractor and the nature of work to be done by each. Following the list below, but included as part of the requirements above, a separate joint/subcontractor listing for sections 14521 and 14522 shall be filled in entirety by undersigned bidder. It is understood that failure to comply with the aforementioned requirements may be cause for rejection of the bid submitted.

5. Page P-5 of the IFB (“P-5”) consists of two sections. The first section is entitled, “JOINT CONTRACTOR/SUBCONTRACTOR LISTING FOR SECTION 14521 - BAGGAGE HANDLING SYSTEM (LOBBIES 4 & 5). The second section is entitled, “JOINT CONTRACTOR/SUBCONTRACTOR LISTING FOR SECTION 14522 - BAGGAGE HANDLING SYSTEM (LOBBIES 7 & 8).

6. Both sections of P-5 required bidders to list the joint contractors and subcontractors the bidder intended to engage as its BHS Manufacturer, BHS Installer, Controls Integrator, and BHS O&M Contractor, for the work required under Sections 14521 and 14522 of the IFB.

7. The first section of P-5 required that the “Contractor shall list the names of the following Joint/Subcontractors who will be performing the work under items 14521.1, 14521.2, 14521.3, and 14521.4 . . . .”

8. The second section of P-5 required that the “Contractor shall list the names of the following Joint/Subcontractors who will be performing the work under items 14522.1, 14522.2, 14522.3, and 14522.4 . . . .”

9. Sections 14521 and 14522 of the IFB are the specifications for “BAGGAGE HANDLING SYSTEM (LOBBIES 4 & 5)” and “BAGGAGE HANDLING SYSTEM (LOBBIES 7 & 8)”, respectively.

10. Section 01352 of the IFB, entitled, “ESCROW PROPOSAL DOCUMENTATION (EPD)” states in part:

\* \* \* \*

1.02 ESCROW PROPOSAL DOCUMENTATION (EPD)

A. General. “Each bidder shall submit the EPD spread sheets in a sealed container, separate from the envelope containing the proposal, which shall contain the summary information and calculations used to determine the proposal for this project. *Within five (5) calendar days after the bid date, the three (3) lowest bidders shall submit to the Contracts Officer all supporting information and calculations used by the bidders to determine the proposal for this project.* This documentation is hereafter referred to as “Escrow Proposal Documentation” or EPD.

The EPD of the successful bidder will be held in escrow for the duration of the contract and will be used solely for the purpose of determining the Contractor’s proposal concept, if necessary, for price adjustments as provided in the contract or to resolve any claim by the Contractor.

\* \* \* \*

The apparent successful bidder agrees, as a condition of award of the contract, that the EPD constitutes all of the information used in the preparation of his bid, and that *no other bid preparation information shall be considered in evaluating disputes or claims.*

\* \* \* \*

*Failure to submit EPD will be cause for rejection of the proposal.*

D. Examination: The EPD of the apparent successful bidder will be examined by the Department in the bidder’s presence prior to award of the contract. At least one member of the bidder’s staff who is knowledgeable in how the bid was prepared shall be present. This examination is to ensure that the EPD is complete and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of contract documents. *Incomplete and/or missing data shall be promptly supplied, but in all cases prior to award of contract. Examination does not alter any condition or term of the contract.* After examination, the EPD will be resealed, in the presence of

both the Department and the bidder, and stored. Receipt of EPD will be acknowledged by the Department by return of the bidder of the countersigned affidavit as specified below.

\* \* \* \*

(Emphasis added).

11. Three bids were submitted and opened on January 31, 2008. Petitioner was determined to be the apparent low bidder, having submitted a bid in the sum of \$61,106,215.00. Bodell Construction Company (“Bodell”) submitted the second lowest bid in the sum of \$64,780,556.68. The other bid was submitted by Ralph S. Inouye Co., Ltd. (“Inouye”), and was in the amount of \$76,897,625.00.

12. P-4 of Petitioner’s bid identified “Horsley Company” as its subcontractor for the “Baggage Handling Systems” work. P-5 of Petitioner’s bid was left blank.

13. Petitioner did not submit its EPD to Respondent until February 7, 2008, after it received a call from Respondent on February 6, 2008. Bodell and Inouye submitted their EPD on February 5, 2008, five days after the bids had been opened.

14. By letter dated February 6, 2008 to Respondent, Bodell asserted, among other things, that Petitioner’s bid should be rejected because Petitioner’s P-5 “was submitted blank”, and Petitioner had failed to submit its EPD in a timely fashion as required by the IFB.

15. By letter dated March 27, 2008, Respondent informed Petitioner that its bid had been rejected as nonresponsive:

The rejection is based on your failure to 1) list your Joint Contractors or Subcontractors and the nature of work on page P-5 of the proposal as required on pages P-4 and P5; and [sic] 2) submit the Escrow Proposal Documentation (EPD) within the required five (5) calendar days after the bid opening as required in Section 01352 of the specifications.

\* \* \* \*

16. By letter dated March 27, 2008, Respondent notified Bodell that it had been awarded the contract for the Project. At the hearing, however, counsel for Respondent represented that the contract had not been awarded.

17. On April 4, 2008, Petitioner filed a protest with Respondent over Respondent's rejection of its bid as nonresponsive.

18. By letter dated April 11, 2008, Petitioner supplemented its bid protest with additional arguments concerning Respondent's nonresponsiveness determination.

19. By letter dated June 24, 2008 to Petitioner, Respondent denied the protest for the following reasons:

1. Nan, Inc. failed to complete the required joint contractor/subcontractor listing for Specification Section 14521 and 14522 indicated on pages P-4 and p-5 of the Proposal Schedule.

2. Nan, Inc. failed to submit the Escrow Proposal Documentation (EPD) within the required five (5) calendar days after the bid opening as stated in Specification Section 01352.

\* \* \* \*

20. On June 30, 2008, Petitioner filed the instant request for administrative review.

### III. CONCLUSIONS OF LAW

The grounds upon which Petitioner's bid was rejected were twofold. According to Respondent, Petitioner's bid was rendered nonresponsive because Petitioner failed to complete P-5 and submitted its EPD two days after the February 5, 2008 deadline.

It is well-settled that bid responsiveness refers to the question of whether a bidder has promised in the precise manner requested by the government with respect to price, quality, quantity, and delivery. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. On the other hand, a bid that contains a material nonconformity

must be rejected as nonresponsive. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999)*.

The salient facts are not in dispute. Three bids were submitted in response to the IFB and opened on January 31, 2008. Petitioner submitted the apparent low bid in the sum of \$61,106,215.00. On P-4 of its bid, Petitioner listed all of its subcontractors, including “Horsley Company” for the “Baggage Handling Systems” work specified in sections 14521 and 14522 of the IFB. P-5 of Petitioner’s bid was left blank. With respect to the EPD, the IFB required bidders to submit their EPD “[w]ithin five (5) calendar days after the bid date.” On February 5, 2008, Bodell and Inouye submitted their EPD to Respondent. Petitioner did not submit its EPD until February 7, 2008.

According to Respondent, P-5 was “an effort . . . to avoid the prior phase’s problems, which were due, in part, because bidders were not required to identify the subcontractors or joint contractors for the specific categories of work on the baggage handling systems. By identifying the subcontractors or joint contractors who will perform the specific categories of work, the awardee cannot later substitute another company that may be inexperienced or unqualified to perform the work.” P-5 was therefore designed to preclude bid shopping in connection with the baggage handling systems work, by preventing a contractor from substituting a subcontractor with an unqualified one. P-4, however, already required bidders, pursuant to HRS §103D-302<sup>1</sup>, to list all of the subcontractors it intended to engage for the Project, and to describe the nature and scope of their work, in order to prevent bid shopping. *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999)*; *Okada Trucking Co., Ltd. v. Board of Water Supply, et. al, 97 Hawaii 544 (App. 2001)*. Accordingly, once a bidder names a subcontractor, that subcontractor cannot be substituted, unless substitution is permitted pursuant to HRS §103D-302(g). Conversely, if a bidder does not name a subcontractor for specialty work and the bidder subsequently wishes to use a subcontractor to perform such work, the bidder will similarly not be

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<sup>1</sup> HRS §103D-302(b) provides that “[i]f the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each.”

allowed to do so unless authorized to do so pursuant to HRS §103D-302(g). *Okada Trucking Co. v. Board of Water Supply, et. al, supra.*

Here, Petitioner listed Horsley Company as the only subcontractor it intended to engage to perform the baggage handling systems work. Having done so, Petitioner was precluded from substituting Horsley Company with another subcontractor for the specified work. Moreover, Respondent does not dispute that neither P-5 nor the applicable law requires the listing of second-tier subcontractors. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)(there is no requirement that bidders list subcontractors below the first tier).* Indeed, Respondent acknowledges that Petitioner would have satisfied the requirements of P-5 by listing Horsley Company for each of the listed categories, in addition to its listing of Horsley Company on P-4<sup>2</sup>. Under these circumstances, the evidence clearly established that Respondent's concern over the substitution of one subcontractor for another, less qualified subcontractor, was already addressed by P-4. In other words, P-5 required information that was already required by P-4 and as such, served no useful purpose<sup>3</sup>. Therefore, Petitioner's failure to complete P-5 can only be construed as an immaterial deviation of form over substance<sup>4</sup>, and as such, cannot justify a finding that Petitioner's bid was nonresponsive to the IFB.

The rejection of Petitioner's bid was also based on Respondent's conclusion that Petitioner's late submittal of its EPD rendered its bid nonresponsive.

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<sup>2</sup> It is worth noting that although Respondent required Petitioner to list Horsley Company as its baggage handling systems subcontractor in both P-4 and P-5, it did not require Bodell and Inouye to similarly list their baggage handling systems subcontractors in both forms. For instance, the Hearings Officer notes that none of the subcontractors listed in Bodell's P-5 are listed in its P-4. As a matter of fact, Bodell's P-4 does not list any subcontractor for any aspect of the baggage handling systems work. Both P-4 and HRS §103D-302, require the listing of *each* subcontractor to be engaged by the bidder.

<sup>3</sup> Lyle Oda, the project manager, expressed a concern that without the information required by P-5, Respondent would not know who the subcontractors would be for the various categories of baggage handling systems work listed on P-5. However, Petitioner's P-4 already identified Horsley Company as the only subcontractor it intended to engage for all aspects of the baggage handling work. Beyond that, Respondent acknowledged that P-5 did not require the listing of second-tier contractors and that Horsley Company had been prequalified to perform the baggage handling systems work.

<sup>4</sup> For these reasons, it is unclear how the bidder in the earlier phase of the Project was able to substitute the baggage handling systems subcontractor with another subcontractor, as Oda claimed at the hearing. The Hearings Officer found Oda's testimony, to be generally evasive, argumentative and his explanation for P-5 in light of P-4 to be nonsensical.



Thus, the Hearings Officer must determine whether Petitioner's late submittal of its EPD constitutes a material nonconformity with the requirements of the solicitation.

It is axiomatic that bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally *at the time of bid opening*. *Environmental Recycling v. County of Hawaii, supra*. (*emphasis added*). Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. Notwithstanding that, the IFB required that only the three lowest bidders submit their EPD and only *after* the bids were opened. The IFB also provided that examination of the lowest bidder's EPD could occur anytime prior to the awarding of the contract. These considerations alone are sufficient to conclude that Petitioner's submittal of the EPD in this solicitation was not a matter of responsiveness.

Additionally, Section 01352 of the IFB expressly provided that the EPD would be used "solely for the purpose of determining the Contractor's proposal concept, if necessary, for price adjustments as provided in the contract or to resolve any claim by the Contractor." Section 01352 also provided that the EPD and no other information "shall be considered in evaluating disputes or claims; and that the EPD may be reviewed "in conjunction with settling disputes, claims or change orders."<sup>5</sup> Accordingly, it was clear from the IFB that the sole purpose of the EPD was to establish a reliable basis upon which to resolve disputes, claims or change orders that may arise once the contract was awarded and performance had commenced. For this reason, Petitioner's submittal of its EPD on February 7, 2008, rather than on February 5, 2008, did not affect any material term of the IFB and the submission of the EPD within five days from the bid opening was not material to establishing whether Petitioner was legally obligated to perform in accordance with the terms of the IFB. There is also little, if any, possibility that any other bidder would be prejudiced or that the integrity of the procurement process would be undermined by Petitioner's filing of its EPD<sup>6</sup> on February 7, 2008, under the circumstances presented here. On this record, the Hearings Officer concludes that

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<sup>5</sup> Jamie Ho, Respondent's contracts engineer, explained that the EPD was also designed to prevent a contractor from jacking up a "unit price just so that he can get a windfall during change orders." Ho acknowledged that the EPD was not aimed at checking the overall bid price.

<sup>6</sup> In apparent recognition of this, the IFB in Section 01352, provides that "[i]ncomplete and/or missing data shall be promptly supplied, but in all cases prior to award of the contract."

Petitioner's February 7, 2008 submittal of its EPD constituted a minor informality which should have been waived pursuant to Hawaii Administrative Rule §3-122-31(c)(1)(B)<sup>7</sup>.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. Respondent's March 27, 2008 denial of Petitioner's protest is hereby vacated;

2. This matter is remanded to Respondent for further evaluation of Petitioner's bid consistent with this decision. Respondent shall thereafter award the contract pursuant to HRS §103D-302; and

3. Each party shall bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: OCT - 3 2008

/s/ CRAIG H. UYEHARA

CRAIG H. UYEHARA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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<sup>7</sup> That section provides that "[i]f the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting documentation that demonstrates a mistake was made."