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STATE OF HAWAII

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OFFICE OF THE CLERK OF THE COURT

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

In the Matter of	)	PCX 2009-2
	)	
CERTIFIED CONSTRUCTION, INC.,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW AND
Petitioner,	)	DECISION; APPENDIX "A"
	)	
vs.	)	
	)	
DEPARTMENT OF DEFENSE, STATE OF	)	
HAWAII,	)	
	)	
Respondent.	)	
_____	)	

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

I. INTRODUCTION

On September 9, 2009, Certified Construction, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Defense, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the pre-hearing conference held on September 15, 2009 and conducted by Senior Hearings Officer Rodney A. Maile, the parties agreed to reschedule the hearing from September 23, 2009 to October 2, 2009 and that dispositive motions would be heard on September 25, 2009. Senior Hearings Officer Maile issued a Pre-Hearing Order reflecting the matters and issues agreed upon by the parties.

On September 21, 2009, Respondent filed a Motion to Dismiss Request for Hearing and Petitioner filed a Motion for Summary Judgment. On September 23, 2009, the parties filed their respective memoranda in opposition to the motions filed.

A hearing on the motions was held on September 25, 2009. Petitioner was represented by Jeffrey W. Juliano, Esq. and Kristi L. Arakaki, Esq. and Respondent was represented by Michael S. Vincent Esq. The matters were taken under advisement. On September 25, 2009, the Hearings Officer issued an order denying both motions.

The hearing was convened on October 2, 2009. Petitioner was represented by Mr. Juliano and Ms. Arakaki and Respondent was represented by Mr. Vincent and Ryan Endo, Esq. By agreement of the parties, the issues raised in the parties' motions would not be considered at the hearing, but were preserved for appeal and the only issue to be addressed at the hearing was whether the value of the electrical work to be performed by Progressive Electrical Co., Inc. was less than one percent of the of the total bid amount.

By a letter dated October 7, 2009, the Hearings Officer informed the parties that she had decided that Petitioner failed to show that the determinations of the chief procurement officer were not in accordance with the Constitution, statutes, regulations and the terms and conditions of the solicitation and directed Respondent to submit proposed findings of fact, conclusions of law and decision for her review on or before October 16, 2009. On October 14, 2009, Respondent filed the requested proposed findings of fact, conclusions of law and decision and it is attached hereto and incorporated herein by reference as Appendix "A".

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

The Hearings Officer adopts Findings of Fact numbers 1-15 as provided in Appendix "A" and adds the following:

16. Although Progressive Electrical Co. Inc.'s ("Progressive") bid to Tory's Roofing & Waterproofing, Inc. ("Tory's") is dated August 25, 2009, Progressive provided the bid to Tory's on September 15, 2009. Tory's asked Progressive to date the bid August 25, 2009 because it wanted the bid price to reflect what Progressive would have bid on August 25, 2009.

17. At the time Tory's submitted its bid to Respondent, it did not have any bids from any electrical subcontractors, so for purposes of the bid it would be submitting to Respondent, it estimated that the "A/C Disconnection" would be \$6,400.00.

18. Progressive's bid states that it will "Provide electrical demo work for roof electrical equipment" and "removal of AC & other equipment by general contractor." This work encompasses item no. 5 on the list of work in Findings of Fact No. 7.

19. The electrical subcontractor listed on Petitioner's bid submitted a bid of \$22,500.00 to do all the work listed in Findings of Fact No. 7. Bids submitted by other electrical contractors for other bidders were \$15,840.00, \$19,368.00, \$25,759.00 and \$85,000.00. These electrical contractors' bids were based on doing all the work listed in Findings of Fact No. 7.

20. Section 2.7.3 of the Bidding and Execution of Contract Requirements and General Conditions states that "[a] joint contractor or subcontractor performing less than or equal to one percent of the total bid amount is not required to be listed in the proposal."

### III. CONCLUSIONS OF LAW

The Hearings Officer adopts the Conclusions of Law as provided in Appendix "A" and adds the following:

1. It was not disputed that acceptance of Tory's bid is in the best interest of the State.

2. Tory's was not required to have Progressive's bid at bid opening.

A procuring agency maintains the discretion to waive a subcontractor listing violation even where the bidder intentionally fails to list a required subcontractor in its bid (footnote omitted), opting instead to solicit bids from subcontractors after bid opening. So long as the value of the work to be performed by the subcontractor is equal to or less than one percent, the agency is authorized to waive violations of the subcontractor listing requirement. And, in determining whether acceptance of the bid is in the State's best interest, *Okada II* makes clear that the agency need not weigh the economic advantage to the State in accepting the low bid against the 'evils of bid shopping'.

*Parsons RCI, Inc. v. Department of Transportation, et al.*, PCH 2007-3 (July 13, 2007), citing *Okada Trucking Co., Ltd. v. Board of Water Supply, et al.*, 101 Hawai'i 68, 62 P.3d 631 (Hawai'i App. 2002).

3. The "value of the work" to be performed by Progressive (\$7,500.00) is less than \$11,041.61, one percent of Tory's bid amount of \$1,104,161.00. Petitioner's argument that the "value of the work" to be performed is more than \$7,500.00 because the other

electrical contractors' bids were \$15,840.00 to \$85,000.00 is not persuasive because the evidence presented showed that the scope of work to be performed by those electrical contractors was significantly different than the scope of work to be performed by Progressive.

4. Petitioner's argument that Section 2.7.3 of the General Terms and Conditions is a "derogation of the statute" is untimely as this issue relates to the content of the solicitation. HRS § 103D-701(a) provides that protests based on the content of the solicitation shall not be considered unless it is submitted in writing prior to the date set for the receipt of offers. Accordingly, the Hearings Officer does not have jurisdiction to address this issue.

#### IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that Petitioner failed to prove by a preponderance of the evidence that Respondent's denial of Petitioner's bid protest was improper and not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation. Accordingly, Respondent's denial of Petitioner's bid protest is affirmed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

If an appeal is filed, the parties are ordered to inform the Office of Administrative Hearings as to the outcome of the appeal so Petitioner's funds can be processed according to Hawai'i Revised Statutes § 103D-709(e).

OCT 22 2009

DATED: Honolulu, Hawaii, \_\_\_\_\_.

**/s/ SHERYL LEE A. NAGATA**

~~SHERYL LEE A. NAGATA~~  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
2009 OCT 14 PM 3:00  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of  
CERTIFIED CONSTRUCTION, INC.,  
Petitioner,

PCX-2009-2

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

vs.

DEPARTMENT OF DEFENSE, STATE OF  
HAWAII,

Respondent.

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

I. INTRODUCTION

On September 9, 2009, Certified Construction, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Defense, State of Hawai'i's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and pre-hearing Conference was duly served on the parties.

On September 10, 2009, the Notice of Hearing and Pre-hearing Conference was issued in this matter setting the Pre-hearing Conference for September 15, 2009 and the Hearing for September 23, 2009.

On September 15, 2009 the Pre-Hearing Conference was convened by Senior Hearing Officer Rodney A. Maile. Petitioner was represented by Jeffre W. Juliano and Kristi L. Arakaki. Respondent was represented by Deputy Attorney General Michael S. Vincent. During the Pre-Hearing Conference, the parties agreed to reschedule the Hearing to October 2, 2009. Dispositive motions were due on September 21, 2009 with reply memoranda due September 23, 2009, and the hearing on dispositive motions to be heard on September 25, 2009.

On September 21, 2009, Petitioner filed a Motion for Summary Judgment claiming for the first time that the successful bidder failed to identify two subcontractors who would be performing lead paint abatement and mechanical work.

On September 21, 2009, respondent filed a Motion to Dismiss, arguing that Petitioner did not file a proper protest of the award and that Petitioner did not file a timely request for an administrative hearing.

On September 23, 2009, Petitioner and Respondent filed appropriate memoranda in opposition to the motions filed September 21, 2009.

On September 25, 2009, the hearing on the dispositive motions was convened by the undersigned Hearings Officer. Petitioner was represented by Jeffrey W. Juliano and Kristi L. Arakaki. Respondent was represented by Deputy Attorney General Michael S. Vincent. Having reviewed and considered the evidence and arguments presented, together with the entire record of the proceeding at the time, the Hearings Officer denied both motions. Petitioner's Motion was denied because Petitioner made new arguments that it failed to make in the protest below. Respondent's motion was denied because the Hearings Officer found that Petitioner's protest was proper, but there was a question of fact as to when the denial of the protest was issued.

On October 2, 2009, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Jeffrey W. Juliano and Kristi L. Arakaki. Respondent was represented by Deputy Attorneys General Michael S. Vincent and Ryan Endo. By agreement of the parties, the issue of whether Petitioner filed a timely request for administrative review was not a subject of the administrative hearing and the only issue to be addressed was whether the value of the electrical work to be performed by Tory's Roofing & Waterproofing Inc. ("Tory's") was less than one percent (1%) of the total bid amount.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

1. Respondent issued an Invitation for Bids for the removal and replacement of the roof of Building 19 at Kalaeloa (the "Project"). The Project involved selective demolition and patching of the current roof, removal and disposal of non-hazardous materials, removal and disposal of asbestos and/or lead containing material, install bituminous membrane roof, and painting. As part of the work to be performed on the roof, numerous components of the air conditioning and ventilation system were to be removed in order to allow the work on the roof to

be completed. Some of the air conditioning and ventilation system components were to be relocated and re-installed while many of the components were to be disposed of as they had been previously abandoned.

2. Eight bids were submitted and opened on August 25, 2009. Tory's was awarded the contract, having submitted a quote in the sum of \$1,104,161.00. Petitioner submitted the second lowest quote of \$1,168,759.00. The other quotes were submitted by Maxum Construction of Hawaii in the amount of \$1,261,261.00, Brian's Contracting, Inc. in the amount of \$1,277,000.00, Ching Construction in the amount of \$1,337,360.00, Society Contracting, LLC in the amount of \$1,367,153.00, Beachside Roofing in the amount of \$1,443,964.00, and MRC, Inc. in the amount of \$2,018,570.00.

3. On or about August 25, 2009, Respondent awarded the contract for the Project to Tory's and notified the other offerors.

4. By letter dated August 26, 2009, Petitioner protested the awarding of the contract to Tory's. Petitioner's protest letter was transmitted to Respondent by facsimile transmission and received by Respondent on August 26, 2009. The protest stated in part:

Please be advised that the apparent low bidder, Tory's Roofing, . . . that bid on August 25, 2009, failed to list all of the necessary subcontractors on their offer form, page OF-11, specifically a licensed Electrical contractor for the work as detailed on Sheet #9 E-1 of the contract drawings.

5. By letter dated August 28, 2009, Respondent denied Petitioner's protest. The denial stated in part:

In the General Terms & Conditions section 2.7.3 it states – "A joint contractor or subcontractor performing less than or equal to one percent of the total bid amount is not required to be listed in the proposal. The Bidder shall be solely responsible for verifying that their joint contractor or subcontractor has the proper license at the time of the submitted bid.

According to our Project manager for this project, the State believes that the electrical portion of this project is less than one percent of the total bid amount, therefore, listing a subcontractor for the electrical portion is not necessary.

6. On September 9, 2009, Petitioner filed the instant request for administrative review. Petitioner's request stated in part that:

TORY failed to list an electrical subcontractor in its bid as required under both applicable law and the Notice to Bidders. Thus TORY is not a responsive bidder and its bid must be rejected. CCI is a responsible and responsive bidder with the

second lowest bid after TORY. Hence, the Project contract must be awarded to CCI.

7. The "ELECTRICAL NOTES: EXISTING/REMOVAL WORK" contained on Sheet #9 E-1 on the Project specification drawings states:

1. REMOVE EXISTING ELECTRICAL CONNECTION TO ACCU. RELOCATE EXISTING WIRING AS REQUIRED TO NEW ACCU LOCATION AND RECONNECT TO ACCU. RAISE INTERUNIT CABLES (LEADING TO FCU UNITS BELOW) ABOVE ROOF (SEE ARCH. AND MECH. NOTES).
2. REMOVE EXISTING ELECTRICAL CONNECTION TO AHU. DISCONNECT AND REMOVE EXISTING DISCONNECT SWITCH AND MOTOR STARTER AND ALL WIRING BACK TO ELECTRICAL PANEL.
3. REMOVE EXISTING ELECTRICAL CONNECTION TO A/C UNIT. DISCONNECT AND REMOVE EXISTING DISCONNECT SWITCH, TRANSFORMER AND ALL WIRING BACK TO ELECTRIC PANEL.
4. REMOVE EXISTING ELECTRICAL CONNECTION TO "ROOF VENTILATOR" DISCONNECT AND REMOVE EXISTING DISCONNECT SWITCH/SWITCH AND ALL WIRING.
5. REMOVE WIRES FROM CIRCUIT BREAKERS FEEDING ROOF EQUIPMENT BEING REMOVED. REMOVE RACEWAYS CONNECTED TO PANEL THAT FEED EQUIPMENT BEING REMOVED. SEAL ALL UNUSED HOLES.

8. The Project specifications did not contain a separate section for electrical and specified that "Division 16—Electrical" of the Requirements and Specifications to Construct Building 19 were "Not Used."

9. The air conditioning and ventilation equipment removal and/or reinstallation portion of the Project as designed for Respondent included the following work and estimated costs:

<b>AIR CONDITIONING AND VENTILATION EQUIPMENT</b>	<b>\$59,310</b>
Remove & dispose Ventilation Equipment	\$21,540
Remove & reinstall A/C Equipment	\$24,500
Plumbing work—Disconnect & Reconnect of Mech Equipment	\$4,520
Electrical Work—Disconnect & Reconnect of Mech. Equipment	\$8,750

10. The Electrical portion of the Project that was not included as part of the air conditioning and ventilation equipment removal and/or reinstallation portion of the Project as designed for Respondent included the following work and estimated costs:

<b>ELECTRICAL—(Electrical Panel—Disconnect Breakers)</b>	<b>\$9,320</b>
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11. Tory's estimate used in compiling its bid to be submitted in response to the solicitation for the Project for the electrical work that was not incidental to the air conditioning and ventilation equipment removal and/or reinstallation portion of the Project was \$6,400.

12. The practice of splitting work on a project among various subcontractors is not uncommon. Additionally, air conditioning work frequently, but not always, has a subcontractor perform the electrical work incidental to the air conditioning work either directly or by hiring a contractor to perform the associated electrical work.

13. As part of the work to be performed by one of Tory's subcontractor on the Project, the electrical work incidental to the removal and/or reinstallation of the air conditioning and ventilation equipment was to be performed by a subcontractor, or subcontractors, retained by the sheet metal subcontractor.

14. The amount quoted Tory's for the electrical work remaining to be done that was not part of the electrical work incidental to the removal and/or reinstallation of air conditioning and ventilation equipment was seven thousand five hundred dollars (\$7,500) which is less than the cost of such work estimated by the Respondent's designer for the electrical work.

14. Testimony of Petitioner's electrical subcontractor confirmed that seven thousand five hundred dollars (\$7,500) was more than a fair price for the subject work.

15. The seven thousand five hundred dollars (\$7,500) amount is less than one percent (1%) of the total bid amount which is eleven thousand forty one dollars and 61/100 (\$11,041.61).

### III. CONCLUSIONS OF LAW

The only issue to be resolved is whether the value of the electrical work to be performed by Tory's under the contract that is not being performed by a subcontractor is equal to or less than one percent of the total bid amount. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's determinations were not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Hawaii Revised Statutes ("HRS") § 103D-302(b) provides:

#### **§103D-302 Competitive sealed bidding.**

(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If 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. Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.

The Project specifications require the removal of air conditioning and ventilation equipment from the roof in order for the contractor and subcontractors to complete the Project. The Project specifications require the disposal of a large portion of abandoned air conditioning and ventilation equipment that is to be removed from the roof. The Project specifications require the relocation and reinstallation of a portion of the air conditioning system. The Project specifications require some high and low voltage electrical related work incidental to the removal and reinstallation of the various air conditioning and ventilation system units on the roof. The designer of the Project envisioned electrical work to be performed incidental to the removal and reinstallation of air conditioning and ventilation equipment on the roof. There is no dispute that work on the Project under Tory's bid is to be performed by a subcontractor that has itself hired at least one contractor or subcontractor to perform the related electrical work incidental to the removal and reinstallation of the air conditioning and ventilation equipment on the roof.

The electrical work remaining on the Project is at the electrical panel and consists of removal of wires from circuit breakers feeding the roof equipment being removed, removal of raceways connected to the panel that feed equipment being removed, and similar equipment. The evidence clearly shows that the value of this electrical work, whether the amount estimated by the Respondent's designer or Tory's, the amount quoted to Tory's, or the amount agreed with by Petitioner's electrical contractor, is less than one percent (1%) of the bid amount.

Based on the evidence presented in this case, the Hearings Officer finds that the value of the electrical work to be performed by Tory's under the contract that is not being performed by a subcontractor is less than one percent of the total bid amount.

IV DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer finds that Petitioner failed to prove by a preponderance of the evidence that Respondent's denial of Petitioner's bid protest was improper and not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation. Accordingly, Respondent's denial of Petitioner's Bid protest is affirmed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, \_\_\_\_\_.

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SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
And Consumer Affairs