



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	PCH-2003-11
)	
ROBISON CONSTRUCTION, INC.,)	HEARINGS OFFICER'S FINDINGS OF
Petitioner,)	FACT, CONCLUSIONS OF LAW AND
)	DECISION; APPENDICES "A" AND "B"
vs.)	
)	
BOARD OF WATER SUPPLY,)	
CITY & COUNTY OF HONOLULU,)	
Respondent,)	
)	
and)	
)	
HIGHWAY CONSTRUCTION)	
COMPANY, INC.,)	
Intervenor.)	
_____)	

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

I. INTRODUCTION

On April 28, 2003, Robison Construction, Inc. ("Petitioner") filed its request for administrative hearing to contest the Board of Water Supply, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest regarding Petitioner's status as the lowest responsive and responsible bidder entitled to award of the contract for Nanakuli 242' Reservoir, Nanakuli, Oahu, Hawaii, BWS Job No. 02-095. The matter was set for hearing and the Notice of Hearing and Prehearing Conference was duly served on the parties. On May 15, 2003, Highway Construction Company, Inc. filed a Motion to Intervene in Action.

At the prehearing conference held on May 16, 2003, and attended by Petitioner's attorney Erik D. Eike, Esq., Respondent's attorney Reid M. Yamashiro, Esq., and Highway Construction Company, Inc.'s attorney Anna H. Oshiro, Esq., the parties agreed to allow Highway Construction Company, Inc. to intervene and on May 27, 2003, the Hearings Officer issued an Order Granting Motion to Intervene.

On May 19, 2003, Respondent filed a Motion to Dismiss Petitioner's Petition for Administrative Review and Hearing ("Motion"). On May 22, 2003, Petitioner filed a Memorandum in Opposition to the Motion. On May 27, 2003, Respondent and Highway Construction Company, Inc. ("Intervenor") filed a Reply to Petitioner's memorandum. A hearing on the Motion was held on May 28, 2003. Petitioner was represented by Mr. Eike, Respondent was represented by Mr. Yamashiro, and Intervenor was represented by Ms. Oshiro. On June 3, 2003, the Hearings Officer issued an Order Denying Motion to Dismiss.

On June 9, 2003, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Mr. Eike, Respondent was represented by Mr. Yamashiro, and Intervenor was represented by Ms. Oshiro. At the close of the hearing, the parties agreed to submit written closing statements, which were filed on June 20, 2003. On June 10, 2003, Petitioner filed a Stipulation for Admission of Additional Exhibit. Replies to the written closing statements were filed by the parties on June 27, 2003.

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 a solicitation for Job 02-095, Nanakuli 242' Reservoir, Nanakuli, Oahu, Hawaii ("Project"). Bid opening was on December 19, 2002, and Intervenor was the lowest bidder at \$5,289,266.00. Petitioner was the second lowest bidder at \$5,557,926.00.

2. On December 20, 2002, Petitioner filed a protest with Respondent, contending that Intervenor's bid should be rejected because it did not possess a C-42 roofing specialty license, and did not list a subcontractor with a C-42 roofing specialty license. Petitioner also alleged that Intervenor failed to provide a legible listing of subcontractors from which

compliance with Hawaii Revised Statutes (“HRS”) 103D-302 could be determined. Petitioner requested that Intervenor’s bid be rejected and that Petitioner be awarded the contract as the lowest responsive and responsible bidder.

3. By a letter dated January 16, 2003 to Respondent, Intervenor responded to Petitioner’s protest by arguing that a C-42 license is not required, but if it were, Kaikor Construction Associates, Inc. (“Kaikor”), who was to provide all work relating to the water “tank” work, had a subcontractor Beachside Roofing, lined up to perform the waterproofing work before the job was bid.

4. By a letter dated February 20, 2003, Respondent asked the Contractors License Board, Department of Commerce and Consumer Affairs, for their assistance in determining whether a C-42 or C-55 license was required for the Project. Copies of the plans and specifications were included with this letter.

5. By a letter dated February 26, 2003, the Contractors License Board issued an informal opinion, which stated:

Based solely on the information provided in your letter, the general information in the February 19, 2003 fax from your Design Section and a cursory review of the project plans and specifications, the Board determined that the waterproofing work may be performed by contractors holding the C-42 Roofing, C42g Roof coatings and C-55 Waterproofing classifications.

6. By a letter dated March 19, 2003, Respondent denied Petitioner’s protest, based on its determination that the work that Petitioner claimed needed to be done by a C-42 license may be done with a C-55 license, and that Respondent was able to verify all of Intervenor’s subcontractors through their license numbers.

7. On March 25, 2003, Respondent received by facsimile a letter dated March 25, 2003 to Petitioner from the Contractors License Board which stated in part:

This is to advise you that, pursuant to your request, the Contractors License Board (“Board”) revisited the issue of whether a C-42 Roofing or a C-55 Waterproofing license was required to perform the roofing/waterproofing work for the above-referenced project.

Based solely on the information provided in your letter, as well as a cursory review of Section 5.3 Roofing of the project specifications, and sheets 72 and 77 of the plans relating to this project, the Board determined that the performance of the

roofing/waterproofing work required the C-42 contractor classification.

This was an informal opinion from the Contractors License Board.

8. On March 27, 2003, Petitioner filed a Petition for Administrative Review of Respondent's March 19, 2003 denial of its protest.

9. On April 7, 2003, Respondent sent Petitioner a letter stating in part:
Based on the March 25, 2003 informational interpretation by the Contractors License Board, the BWS will reopen the case to reexamine RCI Construction Group/Pacific's bid protest regarding the Project.

10. Based on Respondent's April 7, 2003 letter, Petitioner withdrew its Petition for Administrative Review on April 9, 2003.

11. By a letter dated April 22, 2003, Respondent informed Petitioner that it determined that:

(1) the work that RCI claims requires a C-42 contractor license may be done by Beachside Roofing LLC a second-tier subcontractor, based on Frank Coluccio Construction Company v. Department of Budget and Fiscal Services, City and County of Honolulu, PCH-2002-7 (August 2, 2002), pp 14-16; and (2) although the subcontractor names and work listed in Highways bid were difficult to read, the BWS was able to verify all subcontractors from the legible subcontractor license numbers provided.

12. On April 28, 2003, Petitioner filed a Petition for Administrative Review of Respondent's April 22, 2003 denial of its protest. Petitioner contended that it was the lowest responsive and responsible bidder and that Intervenor's bid should be rejected because Intervenor does not hold a C-42 specialty license and it failed to list a subcontractor with a C-42 specialty license. Petitioner also contended that Intervenor failed to legibly and/or sufficiently identify its subcontractors and the work being subcontracted.¹

13. Kaikor was listed on the bid proposal as the C-31a cement concrete subcontractor and the nature and scope of the work Kaikor was to do was described as

¹ At the prehearing conference, Petitioner stated that it would not pursue the issue regarding the legibility of the subcontractor list.

“tank”. A copy of page 6 of the bid proposal submitted by Intervenor is attached hereto and incorporated herein as Appendix "A".

14. Exhibit “A” to Hawaii Administrative Rules Title 16, Chapter 77, “Contractors” describes the scope of work of a C-31a contractor as:

Cement concrete contractor. To mix aggregates, cement, and water in order to make acceptable concrete; to place and finish concrete including the setting of screeds and forms; to do tuckpointing and caulking of concrete block and pre-cast stone; to caulk metal to concrete and masonry; to cut, drill, saw, core, and pressure grout concrete; to do sandblasting, waterblasting, cleaning, sealing, and epoxy injection of concrete; and to perform spall repair[.]

15. The description of Item No. 106 of the Proposal states:

Two million gallon prestressed concrete reservoir and appurtenances, including roofing, painting, piping and jackets measured to outside edge of reservoir footing, installation of brass survey disk, in place complete.

16. The description of Item No. 108 of the Proposal states:

Instrument House, including roofing and painting, in place complete.

17. Intervenor and Kaikor are both licensed as an “A” general engineering and “B” general building contractor. Kaikor also holds a C-55 waterproofing specialty license.

18. Kaikor received an estimate from Beachside Roofing, LLC (“Beachside Roofing”) on December 19, 2002 at 6:51 a.m. Beachside Roofing’s estimate was \$173,953.20. A copy of the estimate is attached hereto and incorporated herein by reference as Appendix “B”.

19. Beachside Roofing is licensed as a C-42 roofing specialty contractor and a C-55 waterproofing specialty contractor.

III. CONCLUSIONS OF LAW

Petitioner contends that Respondent should reject Intervenor’s bid proposal because Intervenor did not list a C-42 roofing specialty contractor, which Respondent has deemed to be required for this Project. Respondent and Intervenor contend that Intervenor’s bid proposal need not be rejected because second-tier subcontractors are not required to be listed

in the bid proposal and Intervenor's subcontractor Kaikor, had a C-42 roofing specialty subcontractor (Beachside Roofing) lined up prior to bid opening.

In *Frank Coluccio Construction Company v. Dept. of Budget & Fiscal Services*, PCH 2002-7 (August 2, 2002), the Hearings Officer concluded that there was no requirement in the Procurement Code that bidders list subcontractors below the first tier. Accordingly, a bidder is not required to list subcontractors that its listed subcontractors intended to engage. Based on *Coluccio*, the Hearings Officer concludes that Intervenor was not required to list Beachside Roofing in its bid proposal, as that is a subcontractor Kaikor intended to engage.

Next, it must be determined whether Intervenor "adequately and unambiguously disclose[d] the nature and scope of the work to be performed" by Kaikor, because a failure to do so may allow Intervenor to circumvent the subcontractor listing requirement and the narrow exception permitted by the Legislature. Accordingly, Kaikor may subcontract the roofing/waterproofing work to Beachside Roofing only if it was within the nature and scope of Kaikor's work, as described by Intervenor in its bid proposal. Where it is unclear whether certain items of work are included in the nature and scope of the subcontractor's work as described in the bid, the Hearings Officer must "look to the plain language of the disclosure and construe any ambiguity against the bidder." *Coluccio, supra*, at page 16.

Petitioner contends that the roofing/waterproofing work required for the Project is not within the nature and scope of Kaikor's work, as described in Intervenor's bid proposal. Kaikor is listed as the C-31a cement concrete contractor, and the nature and scope of its work is described as "tank". As such, the plain language of the bid proposal provides that Kaikor is only to perform the tank's cement and concrete work, as roofing and/or waterproofing is not included within the scope of a C-31a cement concrete specialty license. While Intervenor argued that the bid proposal listed Kaikor to provide all the work on the "tank", that is not what is indicated in the bid proposal. Accordingly, the Hearings Officer finds that Intervenor's description of the nature and scope of Kaikor's work to be ambiguous at best, and concludes that the roofing/waterproofing work that requires a C-42 license was not within the nature and scope of Kaikor's work, as described by Intervenor in its bid proposal, and therefore, Kaikor may not subcontract that work to Beachside Roofing.

Because Intervenor did not list a C-42 subcontractor in its bid, its bid must be deemed to be nonresponsive unless it can establish that (1) acceptance of the bid is in the best interest

of Respondent and (2) the value of the work is equal to or less than one percent of the total bid amount. *See*, HRS § 103D-302(b).

IV. DECISION

Based on the foregoing, the Hearings Officer orders that this matter be remanded to Respondent for reevaluation of Intervenor's bid consistent with this decision. Respondent may waive Intervenor's failure to comply with the subcontractor listing requirement if it determines in writing that: (1) acceptance of Intervenor's bid is in the best interest of Respondent and (2) the value of the roofing work is equal to or less than one percent of the total bid amount.

DATED: Honolulu, Hawaii, [August 14, 2003] .

/s/ SHERYL LEE A. NAGATA

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

required to complete a particular construction project, that contractor must list subcontractors with the appropriate licenses in its bid.

The following is a list of the contractor's licenses that the Board of Water Supply anticipates are required to complete this particular project; however, this list is not all inclusive and additional licenses may be required. It is the sole responsibility of the contractor to review the requirements of this project and determine the appropriate licenses that are required to complete the project.

Contractor License Type	Contractor Classification	Name of Joint Contractor or Subcontractor	License Number	Nature and Scope of Work
C-3	Asphalt Paving	Cross Pacific	5610	AC
C-13	Electrical	Panki 2d	11142	Electrical
C-17	Excavating, Grading			
C-27	Landscaping	Royal Palm	14300	Landscaping
C-31a	Cement Concrete	Kei Ka Const	17504	Work
C-33	Painting	A. Yamamoto Paints	4970	Painting
C-37b	Irrigation	Royal Palm	14300	Irrigation
C-37d	Chlorination	Purel	19053	Chlorination
C-41	Reinforcing Steel	Associated Steel	2225	Rebar

Paralela Zentree 14547 Gasline/airing
 by Mikami 8719 Trenching/graveling
 Takayama Muryu 5757 GLP
 Takeba Shintoku 5343 Lumber



" Revised "

Date: 19-Dec-02 To: General Contractor
 Project: Nanakuli 242' Reservoir (2.0 MG) Attn: Estimator

Section of Work:

Section: SP - 5.1C Wall Sliding Joint	\$	16,783.20
Section: SP - 5.3 Roofing	\$	143,370.00
Section: Type B Asphalt for the Below Areas	\$	-
Washout Line	\$	3,600.00
Over Flow	\$	1,600.00
Influent-Effluent	\$	1,600.00
Asphalt Fill	\$	7,000.00
Total Bid Price:		\$ 173,953.20

Included	Excluded	Conditions for Bid Proposal
<input checked="" type="checkbox"/>		All Labor for Completion of Work per bid proposal
<input checked="" type="checkbox"/>		All Materials For Complete Section Of Work Per Proposal
<input checked="" type="checkbox"/>		General Liability Insurance Coverage 2-Million
<input checked="" type="checkbox"/>		All work to be perform by Roofer & Carpenters Union
<input checked="" type="checkbox"/>		All Rabbish Cleaned Up
	<input checked="" type="checkbox"/>	Surface Preparation, Sand or Shot Blast, Set-up for Confined Space
	<input checked="" type="checkbox"/>	Sheet Metal Work
	<input checked="" type="checkbox"/>	Wood Work
	<input checked="" type="checkbox"/>	Removal
	<input checked="" type="checkbox"/>	Tapered Insulation
	<input checked="" type="checkbox"/>	Rigid Insulation
<input checked="" type="checkbox"/>		Waterproofing, Per Manufacturer Recommendations
<input checked="" type="checkbox"/>		Safety
	<input checked="" type="checkbox"/>	Hoisting of Roofing Materials As Needed
	<input checked="" type="checkbox"/>	Phased Schedule & Demobilization
	<input checked="" type="checkbox"/>	Walkway Pads
	<input checked="" type="checkbox"/>	Scaffolding, Safety Railing
	<input checked="" type="checkbox"/>	All Other labor & Materials in their entirety including ambiguities
	<input checked="" type="checkbox"/>	Painting, Stripping, or Exterior Finish System (EFS)
	<input checked="" type="checkbox"/>	Concrete, Spalling, Patch Cost, Expansion Joints & Backer Rods
	<input checked="" type="checkbox"/>	Protection of Completed Work Installed in Place Building Permits
	<input checked="" type="checkbox"/>	Builder Risk Insurance
	<input checked="" type="checkbox"/>	Earthwork & Drainage Mat
	<input checked="" type="checkbox"/>	Asbestos Removal
	<input checked="" type="checkbox"/>	Storage of Materials off jobsite
	<input checked="" type="checkbox"/>	Bond Fees Add 2%
	<input checked="" type="checkbox"/>	Dewatering & Barricade for Water Testing or Waterstops
	<input checked="" type="checkbox"/>	Provision for Water, Electrical, Toilets, Solar Removal, Plumbing & Mechanical
	<input checked="" type="checkbox"/>	Locally Available Aggregate
	<input checked="" type="checkbox"/>	Engineering, Calculations, Structural & Architectural, Metal Purlin or Base Plates
	<input checked="" type="checkbox"/>	Pre Existing Building Defects & Water Leakage,
	<input checked="" type="checkbox"/>	Liquidated Damage Assessment Over Completion Date Due To Delays By Others
	<input checked="" type="checkbox"/>	Notes:

Respectfully Submitted, Accepted By: _____
 Beachside Roofing LLC, Date: _____
George Aipa Company: _____
 Name: George Aipa Address: _____
 Title: Project Estimator Phone/Fax: _____
 Title: _____