



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

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|--------------------------------|---|---------------------|
| In the Matter of |) | PCH-2005-6 |
| |) | |
| CC ENGINEERING & CONSTRUCTION, |) | HEARINGS OFFICER'S |
| INC., |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| Petitioner, |) | AND DECISION |
| |) | |
| vs. |) | |
| |) | |
| DEPARTMENT OF BUDGET AND |) | |
| FISCAL SERVICES, CITY AND |) | |
| COUNTY OF HONOLULU, |) | |
| |) | |
| Respondent, |) | |
| |) | |

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

I. INTRODUCTION

On July 25, 2005, CC Engineering & Construction, Inc. ("Petitioner"), filed a request for administrative review of the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") July 18, 2005 decision to deny Petitioner's January 14, 2005 protest in connection with a project designated as *East Honolulu Police Station, Job No. IV-03-05-C*. Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On September 30, 2005, the parties filed Stipulated Facts for Hearing. The parties also agreed to submit this matter to the Hearings Officer for decision based upon the stipulated facts, the exhibits¹ and oral argument.

The matter was heard on October 13, 2005. Petitioner was represented by its attorneys, Kale Feldman Esq. and Daniel T. Kim, Esq.; Respondent was represented by its attorney, Amy R. Kondo, Esq.

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 approves and adopts the Stipulated Facts for Hearing as the Hearings Officer's findings of fact, and renders the following conclusions of law and decision.

II. FINDINGS OF FACT

1. Respondent issued a Notice to Bidders soliciting bids for the construction of a project entitled East Honolulu Police Substation, Job No. IV-03-05-C ("Project").

2. The bid package for the Project included the following masonry work: Section 04220 - Concrete Unit Masonry ("CMU"); Section 04270 - Glass Unit Masonry; and Section 04410 - Cement Rubble Masonry ("CRM").

3. The term "masonry" work includes CMU work, glass block work and CRM work. CMU work is distinct and different from, and does not include glass block or CRM work.

4. The Specialty Contractor Classifications set forth in Hawaii Administrative Rules, Title 16, Department of Commerce and Consumer Affairs, Chapter 77, Contractors, specifies the specialty licenses required for masonry work. The descriptions for these classifications are as follows:

C-31 **Masonry contractor.** To lay brick and other baked clay products, rough or cast stone, marble, granite, or any decorative plaster, cut and dressed stone, artificial stone and brick veneer, CMU, and structural glass, brick or block, laid with or without mortar or adhesives, manufactured precast concrete facing and back-up panels and brick or block panel, installation of fire clay products and refractories,

¹ The parties stipulated to the admission of Respondent's Exhibits 1 thru 18 into evidence.

installation of grout, rubble work, caulking, tuckpointing, sandblasting, mortar, washing, and cleaning related to masonry construction, to place and finish cement concrete, and to drill, saw, and core concrete;

- C-31.a 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;
- C-31b Stone masonry contractor. To construct ornamental walls, veneer walls, and structural walls or columns from marble, granite, or any decorative plaster, stone, artificial stone, rough or cast stone, or veneer stone; to lay stone in a manner than an acceptable paved surface is obtained and to construct stone retaining walls with or without mortar, in conformance with building code requirements;

5. Petitioner submitted its bid of \$1,461,000.00 for the Project in advance of the bid opening.

6. Petitioner had an "A" general engineering contractor license, a "B" general building contractor license, and C-4, C-5a, C-17, 6-41, C-43, C-48 and C-48a specialty contractor licenses in the State of Hawaii at the time of its bid, and continues to hold those licenses.

7. In the list of subcontractors that Petitioner submitted as a part of its bid, Petitioner listed fourteen different subcontractors, including K Masonry, Inc. ("K Masonry"), and listed "CMU" as K Masonry's scope of work.

8. K Masonry held a C-31 specialty license as a masonry contractor at the time of Petitioner's bid, and K Masonry continues to hold such license. No other listed subcontractor had or has a C-31, C-31a or C-31b specialty license.

9. The bid opening for the Project took place on December 9, 2004.

10. Petitioner was the low bidder at bid opening.

11. 57 Builders, Ltd. ("57 Builders") was the second low bidder at bid opening, with a bid of \$1,491,925.00.

12. By letter dated December 9, 2004, 57 Builders submitted a bid protest for the following reasons:

From the subcontractor list provided to us after bid opening, we found that the apparent low bidder failed to list a subcontractor to perform CRM and grouted rip rap per Specification Section 04410. We believe the apparent low bidder does not have the proper license to perform that scope of work. K Masonry, who was listed by the low bidder to perform CMU work only, does not perform CRM work. We have K Masonry's quotation for the referenced project as well (see attached).

57 Builders attached a copy of the bid quote 57 Builders received from K Masonry in the amount of \$88,800 which "[e]xcludes: Rockwork; mortar/grout/prism tests (cost of); work on existing bldg."

13. By letter dated December 20, 2004, Petitioner responded to the protest, and informed Respondent that K Masonry had a C-31 masonry contractor license which includes stone masonry work and attached a copy of K Masonry's proposal which included work for this Project for an additional cost.

14. Respondent sustained 57 Builders' protest and by letter dated December 28, 2004, Respondent notified Petitioner that its bid was rejected for "failure to list a specialty contractor to perform the concrete rubble masonry portion of the project." The letter further noted that Petitioner was not licensed as a C-31 or C-31b masonry contractor to perform the work.

15. On January 3, 2005, Petitioner submitted its bid protest and attached as Exhibit "1," K Masonry's December 27, 2004 letter to Petitioner. The letter states:

This will confirm that per our conversation of 12/09/04 regarding our bid proposal, we have agreed to include, at additional cost and based on quantities furnished by CC Engineering, the stone-work indicated for this project (which we are licensed to perform).

16. In its bid protest, Petitioner reiterated that its bid listed K. Masonry as a subcontractor, and that K. Masonry held a valid C-31 masonry contractor license to perform such work.

17. Petitioner sent a letter dated January 14, 2005 to supplement its bid protest by informing the City of the case of In re Oceanic Companies, Inc., PCH-2003-15 (July 3, 2003).

18. By letter dated July 18, 2005 and mailed by certified mail on July 19, 2005, Respondent denied Petitioner's protest on the grounds that:

The proposal by CC Engineering & Construction, Inc. did not sufficiently describe the nature and scope of the work to be performed by subcontractor K. Masonry, to include concrete rubble masonry work (CRM). The proposal only listed "CMU" work, which is different from and does not include CRM work. Accordingly, your bid protest on this matter is denied.

19. On July 25, 2005, Petitioner filed its request for administrative review of Respondent's July 18, 2005 denial of Petitioner's bid protest.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

This appeal requires the Hearings Officer to determine the propriety of Respondent's decision to reject Petitioner's bid because of Petitioner's "failure to list a specialty contractor to perform the concrete rubble masonry portion of this project." HRS §103D-302 provides in relevant part:

* * * *

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.

(Emphasis added).

Construed literally, HRS §103D-302(b) requires that bidders in a construction project include in their bids, the name of those subcontractors who are “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.” *Okada Trucking Co. v. Board of Water Supply*, 97 Haw. 544 (Ct. App. 2001). By requiring bidders to include this information in their bids, the Legislature sought to prevent bid shopping and bid peddling:

The listing requirement was based in part on the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have greater leverage in its bargaining with other potential subcontractors. *By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling.*

(Emphasis added). *Hawaiian Dredging Construction Company v. City & County of Honolulu*, PCH 99-6 (August 9, 1999).

Accordingly, bidders are required to disclose in their bids the work to be performed by each subcontractor and use the listed subcontractor to perform only the work previously disclosed in the bid. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH 2002-7 (August 2, 2002). “Of course, 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 allowed to do so unless authorized to do so pursuant to HRS §103D-302(g).*” (emphasis added). *Okada Trucking Co. v. Board of Water Supply, supra*. Moreover, strict compliance with these principles is required in order to effectuate the Legislature’s intent “to establish a process that would reduce the opportunity to bid shop or bid peddle” and “avoid the delays and expenses of an investigation into the existence of [bid

shopping and bid peddling] in a given case”². *Frank Coluccio Construction Company, supra*.

Here, Petitioner neglected to name any subcontractor to undertake the CRM work required on the Project.³ Having failed to do so in its bid, Petitioner cannot now rely on K Masonry to perform that work. Consequently, Petitioner’s bid is nonresponsive.⁴

Petitioner nevertheless urges the Hearings Officer to look beyond the literal application of the subcontractor listing requirement and instead, consider whether Petitioner’s use of K Masonry to perform the CRM work gives rise to an opportunity to bid shop. Petitioner cites this Hearings Officer’s decision in *Oceanic Companies, Inc. v. DOT, PCH-2003-15 (July 3, 2004)* as support for that proposition and contends that because K Masonry was the only subcontractor with a C-31 specialty contractor’s license listed in Petitioner’s bid, Petitioner would have no opportunity to bid shop.

Unlike the present matter, however, *Oceanic Companies* involved a bidder who had literally complied with the subcontractor listing requirement, having provided the names of the subcontractors it intended to engage together with the nature and scope of the work to be performed by those subcontractors. Notwithstanding that, because the bidder had listed two subcontractors to perform “site work”, there was still the possibility of the bidder bid shopping between those subcontractors. Indeed, the listing of multiple subcontractors for the same work appears to present a “loop hole” in the listing requirement by which an unscrupulous bidder could circumvent the clear intent of HRS §103D-302(b).⁵ As such, rather than reach an absurd result, the Hearings Officer in *Oceanic Companies* looked beyond

² This is policy choice by the Legislature. If the Legislature prefers a rule that would allow the procuring agency to waive a bidder’s noncompliance with the listing requirement where, for example, there is no indication of bid shopping or the opportunity to bid shop, they can so provide. Instead, HRS §103D-302 permits the agency to accept a bid that does not comply with the subcontractor listing requirement only in one limited instance: where acceptance of the bid would be in Respondent’s best interest and the value of the work is equal to or less than one per cent of the total bid amount.

³ There is no contention that Petitioner’s bid should nevertheless be accepted because acceptance of the bid would be in Respondent’s best interest and the value of the work is equal to or less than one per cent of the total bid amount. HRS §103D-302(b).

⁴ Neither does Petitioner hold a C-31 masonry contractor license.

⁵ HRS §103D-302(b) does not expressly prohibit bidders from listing more than one subcontractor for the same work.

the literal application of the listing requirement, to the underlying intent of HRS §103D-302(b) and considered whether the bidder had the opportunity to bid shop between the two subcontractors it had listed.⁶ *See Sierra Club v. Hawaii Tourism Authority ex rel. Board of Directors*, 59 P.3d 877 (2002); *Pacific Ins. Co. v. Oregon Auto Ins. Co.*, 490 P.2d 899 (1971)(even in absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act). In the instant case, because Petitioner failed to name any subcontractor for the CRM work, *Oceanic Companies* is inapposite and any departure from the literal construction of the subcontractor listing law is unwarranted.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that this matter be and is hereby dismissed and that each party bear its own attorney's fees, costs, and expenses.

NOV - 1 2005

Dated at Honolulu, Hawaii: _____



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

⁶ Generally, the listing of multiple subcontractors for the same work gives rise to an opportunity by the bidder to bid shop. In the *Oceanic Companies* case however, because only one of the listed subcontractors, Concrete Specialist, was properly licensed to perform the site work, the Hearings Officer concluded that the bidder's opportunity to bid shop was "both tenuous and remote."