



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of)	PCH-2008-5
)	
PROMETHEUS CONSTRUCTION,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
UNIVERSITY OF HAWAII, OFFICE)	
OF PROCUREMENT AND REAL)	
PROPERTY MANAGEMENT,)	
)	
Respondent,)	
)	
and)	
)	
HI-TECH ROCKFALL)	
CONSTRUCTION, INC.,)	
)	
Intervenor.)	

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

I. INTRODUCTION

On or about April 3, 2008, Prometheus Construction ("Petitioner"), filed a request for hearing to contest Respondent University of Hawai'i, Office of Procurement and Real Property Management's ("Respondent") denial of Petitioner's protest in connection with Respondent's Invitation for Bids No. 08-062. The matter was thereafter set for hearing on April 16, 2008 and the Notice of Hearing and Pre-Hearing Conference

was duly served on the parties. The parties subsequently agreed to reschedule the hearing to April 21, 2008.

By letter dated April 9, 2008, HI-TECH Rockfall Construction, Inc. (“Intervenor”) requested leave to intervene in this proceeding. By order dated April 17, 2008, the Hearings Officer granted the request.

By letter dated April 17, 2008, Respondent requested that the hearing be continued. After hearing the argument of counsel on April 18, 2008, the Hearings Officer orally denied the request. An order denying Respondent’s request to continue the hearing was entered on April 21, 2008.

The matter came on for hearing before the undersigned Hearings Officer on April 21, 2008 in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D. Petitioner was represented by Neal K. Aoki, Esq.; Respondent was represented by Bruce Y. Matsui, Esq. and David W. Lonborg, Esq.; and Intervenor was represented by Michael D. Tom, Esq. The hearing continued and was concluded on April 24, 2008.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments and/or proposed findings of fact and conclusions of law. Accordingly, on May 2, 2008, Petitioner filed its proposed findings and conclusions and on May 9, 2008, Respondent and Intervenor filed their proposed findings and conclusions. Intervenor also filed a closing statement on the same date. A rebuttal memorandum was filed by Petitioner on May 14, 2008.

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 January 2008, Respondent issued Invitation for Bids No. 08-062 (“IFB”) for a project referred to as the “*Lower Campus Quarry Wall Stabilization, Phase I, University of Hawaii at Manoa, Honolulu, Hawaii*” (“Project”). Bids were due and were scheduled to be opened on February 20, 2008.

2. Among other things, the IFB required bidders to complete a Bid Form by furnishing (1) a Basic Bid and (2) unit prices for various estimated quantities of additional repair work items that may be needed on the Project. Those items were described in the Bid Form as: an anchored wire mesh system, wire mesh drape system, break-away wire ties, rock bolts, rock dowels, shotcrete swale, 8” HDPE drain pipe system, erosion mat, and excavation (“Unit Price Items”).

3. The Bid Form also provided in relevant part:

UNIT PRICES

In the event that additional quantities of repairs are required beyond what is shown on the Contract Drawings, adjustments shall be made based on the Contractor’s unit prices as given below. The description of Unit Price items is not intended to give a detailed description of all additional work required as only the principal features of such Unit Price item are listed. It is understood that the quantities listed below are estimated quantities. **The cost of all additional work required by the Unit Price item, even though not specifically mentioned shall be included in the Unit Price.** The undersigned agrees to decrease or increase, respectively, the Basic Bid in accordance with the following unit prices (emphasis in original).

* * * *

4. The estimated quantities in the Bid Form were the estimated total quantities that were called for in the Contract Drawings, including the Project plans and technical specifications (“specifications”), and covered under the Basic Bid.

5. The unit prices were to be used to determine any increases to the contract price in the event that Respondent increased the quantities that were called for in the specifications, and any deductions from the contract price in the event Respondent decreased the quantities that were called for in the specifications.

6. The Basic Bid covered the rock stabilization work along the Lower Campus Cliff face and generally consisted of clearing and grubbing, rock scaling, rock demolition, rock bolting, tree removal, tree trimming, shotcreting, installing tie back anchors, constructing grass swales, grouted rubble paving, concrete wall, drain inlet, installing erosion matting, wire mesh drape and anchored wire mesh systems, PVC, HDPE, and cast iron pipes, irrigation systems, grading, landscaping, General Contractor hired independent arborist, and testing agency qualified according to ASTM C 1077 and ASTM E 329, and related work, as called for on the specifications.

7. According to the IFB, the contract would be awarded to the responsible bidder “submitting the responsive bid with the lowest evaluated **BASIC BID PLUS THE TOTAL OF ALL EXTENDED ‘UNIT PRICES.’**” (emphasis in original)(“Total Aggregate Bid”). The extended unit prices refer to the product of the bidder’s unit price for each Unit Price Item multiplied by the corresponding quantity as provided in the Bid Form for each item.

8. According to the IFB, the contract price for the Project would be determined by the Basic Bid.

9. On January 28, 2008, Respondent issued Amendment No. 1 to the IFB. Amendment No. 1 incorporated various revisions to the specifications.

10. On January 30, 2008, Respondent held a non-mandatory pre-bid meeting which included a walk-through of the Project site and a solicitation of questions relating to the Project. Representatives from Petitioner and Intervenor, as well as two other contractors, attended the meeting.

11. The minutes of the January 30, 2008 pre-bid meeting included Respondent’s responses to questions and requests for clarifications from the contractors. In response to a request for Respondent’s construction estimate for the Project, Respondent indicated “\$5M to \$10M”.

12. On February 8, 2008, Respondent issued Amendment No. 2 to the IFB. Amendment No. 2, among other things, revised the quantities for Unit Price A from

5,000 square feet to 6,850 square feet, Unit Price B from 126,000 square feet to 124,500 square feet, and Unit Price H from 4,200 square feet to 6,100 square feet.

13. Petitioner and Intervenor submitted bids in response to the IFB. The two bids were opened on February 20, 2008.

14. Intervenor submitted the apparent low Total Aggregate Bid of \$9,277,335.00. Petitioner's Total Aggregate Bid totaled \$9,830,700.00.

15. Intervenor's bid included a Basic Bid of \$6,445,585.00 while Petitioner's Basic Bid was \$7,790,000.00.

16. By letter dated February 22, 2008, Petitioner submitted a protest to Respondent "to protest in advance any possible award of the contract to the non-responsive bidder, Hi-Tech Construction . . ."

17. By letter dated March 27, 2008, Respondent notified Petitioner that it had decided to cancel the solicitation for the Project, revise and clarify the specifications and resolicit bids for the Project. For those reasons, Respondent denied the protest as moot.

18. On April 3, 2008, Petitioner filed the instant request for administrative review.

19. Neither Petitioner nor Intervenor has complained about the format of the Bid Form. Similarly, Respondent has not received any complaints or requests for clarification of the Bid Form from any bidder or prospective bidder.

III. CONCLUSIONS OF LAW

The issue here is whether Respondent's decision to cancel the solicitation and resolicit bids for the Project was proper. The cancellation of solicitations is governed by HRS §103D-308 which provides:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the governmental body* which issued the invitation, request, or other solicitation, in accordance with rules adopted by the

policy board. The reasons therefore shall be made part of the contract file.

(Emphasis added).

In *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004)*, the Hearings Officer noted that HRS §103D-308 “reflects a policy of giving precedence to the government’s ability to cancel a solicitation over a bidder’s interest in having the solicitation go forward where the government’s ‘best interests’ would be served.”

In determining whether the cancellation of a solicitation after bid opening is in the government’s best interest, Hawaii Administrative Rule (“HAR”) §3-122-96(a)(2) provides in relevant part:

Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:

* * * *

(2) Cancellation after opening but prior to award:

- (A) The goods, services, or construction being procured are no longer required;
- (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;*
- (C) The solicitation did not provide for consideration of all factors of significance to the agency;*
- (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) All otherwise acceptable offers received are at clearly unreasonable prices;
- (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or
- (G) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.*

* * * *

(Emphasis added).

In promulgating HAR §3-122-96(a)(2), the Procurement Policy Board (“Board”):

presumably was cognizant of the potentially serious adverse impact a cancellation might have on the integrity of the competitive sealed bidding system once bids are revealed. Among other things, the cancellation of a solicitation after bid opening tends to discourage competition because it results in making all bidders’ prices and competitive positions public without an award. With that in mind, the Board identified certain specific circumstances in HAR §3-122-96 (a)(2) where the cancellation of a solicitation *may* be in the best interests of the agency and therefore justified, even after bid opening. Such a determination, however, must be consistent with the underlying purposes of the Procurement Code, including, but not limited to, the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public’s confidence in the integrity of the system (footnote omitted).

Phillip G. Kuchler, Inc., supra.

Thus, although the procuring agency generally has broad discretion to cancel a solicitation, its determination that cancellation is in the best interests of the government must have a reasonable basis because of the potential adverse impact of cancellation on the competitive bidding system after the bids have been opened and the prices have been exposed¹. Accordingly, where it is determined that the specifications contained in a solicitation do not adequately describe the government's actual minimum needs, the best interests of the government require cancellation of the solicitation. On the other hand, the fact that a solicitation is defective in some way does not justify cancellation after bid opening if award of the contract would meet the agency’s actual minimum needs, and there is no showing of prejudice to the other bidders. As the party challenging the cancellation, Petitioner bears the burden of showing that the cancellation of the solicitation was not in the government’s best interests.

In deciding to cancel the solicitation, Respondent relied primarily on the contention that the method of bid evaluation set forth in the Bid Form overemphasized

¹ Cancellation of a solicitation also means that bidders have expended labor and incurred costs in the preparation of their bids without the possibility of acceptance.

the importance of unit prices for additional repair work that may never materialize and failed to provide for adequate consideration of the Basic Bid that reflected the actual contract price for the Project. Respondent was apparently concerned that using overstated estimated quantities of additional repair work to calculate the extended unit prices used to determine the Total Aggregate Bid distorted the “anticipated economies of the Project” and were much larger than reasonable estimates of additional work that might be required by change orders. This distortion, according to Respondent, could result in Respondent being required to award the contract to a bidder with a higher Basic Bid². And, in that event, because the contract price is determined by the Basic Bid, Respondent contends that it would end up overpaying for the work required on the Project unless there were a significant number of change orders. Based on these concerns, Respondent determined that the method of bid evaluation as set forth in the Bid Form was ambiguous and inadequate, did not take into consideration all factors of significance to Respondent, and was therefore contrary to the public’s and Respondent’s best interests.

Notwithstanding Respondent’s claim of ambiguity, there was nothing in the record to suggest that the method of bid evaluation set forth in the Bid Form was subject to different meanings. A specification is ambiguous if it is susceptible to more than one reasonable meaning when read in the context of the solicitation as a whole. On the contrary, the Bid Form clearly sets forth the method by which bids were to be evaluated and the basis upon which the contract was to be awarded. The fact that both bidders understood how the bids would be evaluated was also clear from the evidence. Moreover, the fact that Respondent received no questions or complaints regarding the Bid Form from any contractor only buttresses the conclusion that the Bid Form was sufficiently clear. Nor was the Bid Form inadequate. Specifications are inadequate when they do not state the government’s actual minimum needs. *Phillip G. Kuchler, Inc., supra*. In this case, Respondent sought and the Bid Form was designed to secure the lowest Basic Bid *as well as the lowest unit prices* in the event additional work on the

² As where the unit prices are “lowballed” to such an extent that the bidder’s Total Aggregate Bid turns out to be less than the other bidders.

Project was necessary. These needs were met by awarding the contract on the basis of the Total Aggregate Bid³ rather than on the Basic Bid alone.

The scope of Respondent's argument that the solicitation did not provide for consideration of all factors of significance to Respondent is not altogether clear from the record. It appears that Respondent was primarily concerned that the method of bid evaluation set forth in the Bid Form overemphasized unit pricing and thereby allowed bidders to "highball" their Basic Bid, "lowball" their unit prices, and still manage to win the contract. In that event, Respondent would end up overpaying for the Project, particularly if no additional work was required. This concern, however, was not supported by the evidence. Petitioner's President, Renee Tillotson, testified that Petitioner's bid strategy was to provide fair unit prices that were "straight up the middle" because it was unpredictable whether Respondent might issue additive or deductive change orders. Tillotson also noted that Intervenor was the low bidder on both the Total Aggregate Bid and the Basic Bid even though Petitioner had submitted lower total extended unit prices. Tillotson explained that Petitioner, as an experienced contractor, anticipated at bid time that many of the quantities of the Unit Price Items might go up and that field conditions were such that a contractor could very easily expect quantities to rise for all Unit Price Items except for Unit Price B – Wire Mesh Drap Systems – which extends the entire length of the quarry wall. Because the quarry wall is finite in length, there was no room for additional quantities of this item. Tillotson noted that Unit Price B is the most substantive Unit Price Item. A bidder trying to exploit the current Bid Form's format might try to "lowball" Unit Price B in anticipation of a deductive change order. Yet, there was no indication that either bidder attempted to engage in such a strategy. Based on this evidence, the Hearings Officer concludes that Respondent's claim that the solicitation did not provide for consideration of all factors of significance to Respondent is not reasonable.

Respondent also contends that the estimated quantities of additional repair work were overstated and must be corrected to reflect a reasonable estimate of additional repair work. According to Respondent, "canceling the solicitation, correcting the

³ The inclusion of the actual quantities called for in the specifications for each Unit Price Item also encouraged lower unit prices by allowing bidders to take into account the "economies of scale".

specifications, and re-bidding the project is the fairest and most equitable alternative available in this matter” and, as such, in the public’s interest. The Bid Form, however, made clear to all prospective bidders that those quantities were subject to increase or decrease by Respondent:

QUANTITIES

The quantities shown in the Bid Form are for bid purposes only and should not be considered firm. In the event that the University’s requirements for the items do not materialize in the estimated quantities, such event shall not constitute a basis for an equitable price adjustment under this contract. The University reserves the right to order additional quantities or decrease the quantities of each item at the unit prices (material and labor) quoted during the performance period of the contract.

On this record, the Hearings Officer finds and concludes that any perceived prejudice to bidders or prospective bidders or any adverse effect on “free and open competition”⁴ arising from the estimated quantities provided in the Bid Form is without any factual predicate that reasonably justifies Respondent’s decision that cancellation would be in the government’s best interest⁵.

Based on all of these considerations, the Hearings Officer concludes that Petitioner has proven by a preponderance of the evidence that Respondent lacked a reasonable basis for its determination that the cancellation of the solicitation was in the government’s best interests.

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 as moot is hereby reversed;

⁴ Respondent’s suggestion that revising the estimated quantities in the Bid Form may increase competition is speculative at best. There is nothing in the record that supports a conclusion that resolicitation will increase competition or, for that matter, that “other possible bidders . . . may have been affected by the problems with the specifications in deciding whether to bid”. Nor was there any evidence that the integrity of the bidding system was otherwise breached in this case.

⁵ All of the foregoing reasons also lead the Hearings Officer to conclude that the public’s interest does not justify the cancellation of the solicitation.

2. This matter is remanded to Respondent for evaluation of the bids from Petitioner and Intervenor consistent with this decision. Respondent shall thereafter award the contract pursuant to HRS §103D-302(h); and

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

Dated at Honolulu, Hawaii: MAY 28 2008

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