



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DEC 10 8 44 AM '98
HEARINGS OFFICE

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

| | | |
|-----------------------------|---|------------------------|
| In the Matter of |) | PCH-98-9 |
| |) | |
| THE SYSTEMCENTER, INC. |) | HEARINGS OFFICER'S |
| |) | FINDINGS OF FACT, |
| Petitioner, |) | CONCLUSIONS OF LAW AND |
| |) | DECISION; APPENDICES |
| vs. |) | "A" THROUGH "C" |
| |) | |
| STATE OF HAWAII, DEPARTMENT |) | |
| OF TRANSPORTATION, |) | |
| |) | |
| Respondent. |) | |

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

I. CHRONOLOGY OF CASE

On October 21, 1998, The Systemcenter, Inc. ("Petitioner") transmitted its request for administrative hearing to Kazu Hayashida, Director, Department of Transportation, State of Hawaii ("Respondent") to contest Respondent's decision to reject Petitioner's bid to furnish and install vertical filing systems to the Highways Division, Department of Transportation. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") § 103D-709 and Hawaii Administrative Rules ("HAR") § 3-126-42.

The Office of Administrative Hearings, Department of Commerce and Consumer Affairs received Petitioner's request for administrative hearing on October 22, 1998. 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 November 6, 1998, Petitioner agreed to submit a statement meeting the requirements of HAR § 3-126-59 on or before 4:30 p.m. on November 9, 1998. However, Petitioner did not file its statement until 3:35 p.m. on November 10, 1998, and Respondent did not receive a copy of Petitioner's statement until about 4:00 p.m. on November 10, 1998.

On November 12, 1998, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Charles N. Naone, Petitioner's System Consultant. Bill Edwards, Petitioner's President and Stephan Edwards, Petitioner's Vice President assisted Mr. Naone. Respondent was represented by Bruce Y. Matsui, Esq.

As a preliminary matter, Respondent filed a Motion to Continue Hearing. After hearing arguments from the parties, Respondent's Motion was denied, and the hearing on the merits commenced.

At the close of Petitioner's presentation of its case, Respondent orally moved to dismiss the petition, on the basis that Petitioner failed to present credible evidence to show that Respondent had violated the procurement laws and rules. The motion was taken under advisement, and Respondent proceeded with its presentation. Having considered the arguments presented, the Hearings Officer denies Respondent's motion.

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

1. Respondent issued specifications entitled "Special Provisions, Specifications, Proposal and Contract for Furnishing and Installing Vertical Filing Systems to the Highways Division, Department of Transportation, Kapolei, Hawaii, Island of Oahu, Project No. HWY-0-02-99" (the "Project").

2. Petitioner submitted a bid proposal for the Project. On page PF-5 of Petitioner's bid proposal, Petitioner did not set forth the prices for furnishing and installing vertical filing systems for areas 1 through 4 or for areas 5 through 9, as requested on page PF-5. Petitioner did set forth the bid price for the "Sum of All Items" (\$171,859.38) with a handwritten notation that stated "ALL OR NOTHING". Note 2 on page PF-5 states:

Bids will be evaluated on the basis of the total amount bid and award made to the lowest responsible bidder. (Emphasis in original.)

A true and correct copy of page PF-5 of Petitioner's bid proposal is attached hereto and incorporated herein by reference was Appendix "A".

3. At bid opening, Petitioner's bid proposal was rejected because the spaces where Petitioner was to indicate the amounts for areas 1 through 4 and areas 5 through 9 were left blank.

4. Petitioner submitted a letter of protest, and by a letter dated October 14, 1998, Respondent reconfirmed its previous determination that D & D Industries, Inc. was the lowest responsible bidder. This letter also states:

Our decision is based in part on the fact that the Department of Transportation ("DOT") does not accept, and to my knowledge, has not accepted, a bid proposal containing blank unit bid prices which could not be ascertained from the remaining portion of the bid proposal. The DOT considers the unit bid prices essential because such prices provide a basis for calculating the cost of any: (a) extra work deemed necessary by the DOT under the contract and (b) work to be deleted from the contract in the event all of the bids received by the DOT exceed the amount of available funds, as permitted pursuant to § 103D-302, Hawaii Revised Statutes ("HRS"). Such costs can significantly impact the DOT's decision to request extra work or delete a portion of the planned work.

The DOT considers SI's bid proposal to be incomplete because the unit bid prices for the following areas were not designated: (1) areas 1-4 and (2) areas 5-9. Since SI failed to fill in either unit bid

price, there is no way for the DOT to determine the amounts that should have been filled in (even if the DOT was inclined to permit such correction).

Further, one of the primary reasons the DOT requested unit bid prices for individual areas was because the DOT desired a certain degree of assurance as to the minimum value and quality of the filing systems for each area. However, based on SI's bid proposal alone, there is no way the DOT could verify or be assured of the minimum value and the quality of the filing systems for each individual area. Consequently, as the DOT was authorized under § 2.2 of the project specifications to reject incomplete bids, the DOT rejected SI's incomplete bid proposal[.]

A true and correct copy of Respondent's letter is attached hereto and incorporated herein by reference as Appendix "B".

5. Section 10.10 of the specifications for the Project ("Specifications") outlines the type and amount of media that needs to be stored in each area. A true and correct copy of section 10.10 is attached hereto and incorporated herein by reference as Appendix "C".

6. Section 2.2 of the Specifications states in part:

2.2 REJECTION OF PROPOSALS CONTAINING ALTERATIONS, ERASURES OR IRREGULARITIES - Proposals may be rejected if they show any alterations of form, additions not called for, conditional bids, incomplete bids, erasures, or irregularities of any kind[.]

7. Section 3.1 of the Specifications states in part:

3.1 AWARD OF CONTRACT - The State reserves the right to reject any and all proposals and to waive any defects as may be deemed to be in the best interest of the public[.]

8. Petitioner's bid proposal was \$28,000.00 less than the next lowest bid proposal.

III. CONCLUSIONS OF LAW

Petitioner contends that Respondent's rejection of its bid proposal based on Respondent's determination that the bid proposal was incomplete was improper. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's conduct was not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation or contract.

The evidence presented established that Petitioner did not designate amounts for areas 1 through 4 and for areas 5 through 9 as requested, although it did submit an amount for the sum of all items. The evidence presented also established that Respondent rejected Petitioner's submission on the basis that Petitioner's bid proposal was not responsive to the solicitation because it was incomplete. Petitioner argued that its failure to fill in the two blank lines constituted a mistake which should be allowed to be corrected or waived pursuant to HAR § 3-122-31 which provides in relevant part:

§ 3-122-31 Mistakes in bids. (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of the other bidders.

...

- (c) Corrections to bids after opening but prior to award may be made under the following conditions:

...

- (2) If 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 proof of evidentiary value which demonstrates that a mistake was made.

The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:

- (A) Typographical errors;
 - (B) Transposition errors;
 - (C) Failure of a bidder to sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound.
- (3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or for the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake[.]

The Procurement Code prescribes strict procedures for the procurement of goods and services by state agencies for the purposes of:

- (1) providing fair and equitable treatment of all persons dealing with the government procurement system, (2) fostering broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency, and (3) increasing public confidence in the integrity of the system.

Carl Corp. v. State Department of Education, 85 Haw. 431 at 459 (1997).

The specifications for the Project do not require that proposals be rejected if they are incomplete or conditional¹. In addition, while Respondent

¹ Arguably, Petitioner's notation on its bid proposal that it was "all or nothing" made its bid proposal conditional. However, this was not a basis for Respondent's rejection.

reserved the right to reject any and all proposals, it also reserved the right to waive any defects "as may be deemed to be in the best interest of the public."

Respondent's reasons for rejecting Petitioner's bid were based on Respondent's apparent need for "unit bid prices", which were essentially two prices, one for areas 1 through 4, and the other for areas 5 through 9. Respondent considered these unit bid prices to be essential in order to provide a basis for calculating the cost of extra work deemed necessary by Respondent, and to determine what work would be deleted if all the bids received exceeded the amount of available funds.² Unit bid prices were also deemed necessary so that Respondent could "verify or be assured of the minimum value and quality of the filing systems for each individual area". Based on the evidence presented, the Hearings Officer finds that Respondent's request for bid prices for areas 1 through 4 and areas 5 through 9 would not assist Respondent in providing a basis for calculating the cost of extra work, or work to be deleted, as the amounts requested were not "unit" prices, but prices for four or five areas combined. The requested bid prices cannot be used to ascertain the minimum value and quality of the filing systems "for each individual area" when one bid price was requested for areas 1 through 4 and another bid price for areas 5 through 9. Had Respondent requested "unit bid prices" for each individual area (so that there were nine blanks to be filled in by potential bidders) Respondent's reasons for rejection of Petitioner's bid, as contained in its October 14, 1998 letter, would be more persuasive. Accordingly, the Hearings Officer concludes that Respondent's reliance on the lack of "unit bid prices" as a basis for rejection of Petitioner's bid to be unreasonable under the circumstances of this case.

In reviewing Petitioner's bid, Respondent should determine whether waiver of the defect would affect price, quantity, quality, delivery or contractual conditions in order to determine whether waiver of the defect would

²There was no evidence that extra work would be needed or that work needed to be deleted because all bids received exceeded the amount of available funds.

PROPOSAL SCHEDULE

FURNISHING AND INSTALLING VERTICAL FILING SYSTEMS
TO THE HIGHWAYS DIVISION, DEPARTMENT OF TRANSPORTATION,
KAPOLEI, HAWAII
ISLAND OF OAHU
PROJECT NO. HWY-O-02-99

Following is the itemized Proposal:

| Item No. | Item | Unit Price | Amount |
|-------------------|---|------------|---------------------|
| A. | Furnish and Install Vertical Filing Systems - Areas 1 through 4 | Lump Sum | \$ _____ |
| B. | Furnish and Install Vertical Filing Systems - Areas 5 through 9 | Lump Sum | \$ _____ |
| Sum of All Items: | | | \$ <u>71,859.38</u> |

All or Nothing

- NOTE:
1. Bidder's bid price shall be inclusive of all direct and indirect costs and taxes.
 2. Bids will be evaluated on the basis of the total amount bid and award made to the lowest responsible bidder.

PER JERRY YAMADA 9/17/98 11:08 AM

"DO NOT ADD \$9,000 / PENALTY (\$1000 PER DAY/MAX 9 DAYS)
APPENDUMS MADE AFTER BID OPENING DATE TO PUSH BACK
PRODUCTION/INSTALLATION AFTER NOV 19TH" ADD PENALTY AFTER

HWY-O-02-99
DP-5



STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

IN REPLY REFER TO:

CON
5.6472

October 14, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Bill Edwards
President
The Systemcenter, Inc.
2230A Alahao Place
Honolulu, Hawaii 96819

Dear Mr. Edwards:

Re: Furnishing and Installing Vertical Filing Systems to
the Highways Division, Project No. HWY-O-02-99
("project")

We are in receipt of the letter of protest submitted by
The Systemcenter, Inc. ("SI") dated September 24, 1998, in
connection with the project. Upon review, we have reconfirmed
our previous determination that D & D Industries, Inc. ("D&D"),
as the lowest responsible bidder, should be awarded the project
contract.

Our decision is based in part on the fact that ~~the~~
~~Department of Transportation ("DOT") does not accept and to my~~
~~knowledge has not accepted a bid proposal containing blank~~
~~unit bid prices which could not be ascertained from the~~
~~remaining portion of the bid proposal.~~ The DOT considers the
unit bid prices essential because such prices provide a basis
for calculating the cost of any: (a) extra work deemed
necessary by the DOT under the contract and (b) work to be
deleted from the contract in the event all of the bids received
by the DOT exceed the amount of available funds, as permitted
pursuant to §103D-302, Hawaii Revised Statutes ("HRS"). Such
costs can significantly impact the DOT's decision to request
extra work or delete a portion of the planned work.

The DOT considers SI's bid proposal to be incomplete
because the unit bid prices for the following areas were not
designated: (1) areas 1-4 and (2) areas 5-9. Since SI failed
to fill in either unit bid price, there is no way for the DOT

Appendix B

EXHIBIT "C"

Ex 2

Mr. Bill Edwards
October 14, 1998
Page 2

to determine the amounts that should have been filled in (even if the DOT was inclined to permit such correction).

Further, one of the primary reasons the DOT requested unit bid prices for individual areas was because the DOT desired a certain degree of assurance as to the minimum value and quality of the filing systems for each area. However, based on SI's bid proposal alone, there is no way the DOT could verify or be assured of the minimum value and the quality of the filing systems for each individual area. Consequently, as the DOT was authorized under §2.2 of the project specifications to reject incomplete bids, the DOT rejected SI's incomplete bid proposal.

While it is true that correction of bid proposal mistakes is permitted under certain limited circumstances, no such corrections may be allowed if it would be prejudicial to the public interest or fair competition. See §103D-302, HRS, and §3-122-31, Hawaii Administrative Rules ("HAR"). Permitting SI to fill in the unit prices after bid proposals were opened would be (i) prejudicial to the public interest in preserving the integrity of and promoting an equitable and accountable procurement process and (ii) unfair to the other bidders who properly completed their bid proposals.

Based on the foregoing, including our determination that SI's bid proposal was incomplete and that permitting correction after bid opening would be prejudicial to the public interest and unfair to the other bidders, we believe our rejection of SI's bid proposal remains justified and SI's protest is hereby denied.

Pursuant to §103D-701, HRS, and §3-126-8, HAR, SI may request that this decision be reconsidered. The written reconsideration request must be filed within ten working days after your receipt of this decision. If SI declines to request reconsideration, SI may request an administrative hearing pursuant to §103D-709, HRS, and §3-126-42, HAR. If SI desires to request an administrative hearing, pursuant to §3-126-8, HAR, SI must:

- (a) notify the State within five (5) working days after your receipt of this decision that SI intends to request an administrative hearing; and

Mr. Bill Edwards
October 14, 1998
Page 3

- (b) file the request for administrative hearing within seven (7) calendar days after your receipt of this decision.

Further, if SI desires to request an administrative hearing, SI must file a written request for hearing which meets the requirements of §3-126-59, HAR.

We appreciate your effort and initiative to bid on the project. We look forward to working with you in the future.

Very truly yours,



KAZU HAYASHIDA
Director of Transportation

1026(46)

lock bar to lock both top and bottom. Doors shall have locking capability.

Shelves shall be formed into a channel on all four side 0.22 ga., roll formed into box design, with 18 spot welds, 500-pound capacity on 36-inch wide shelves. Shelves punched on 3-inch centers for divider attachment. Holes for label holders are on one face only. Shelf to attach to uprights with corner reinforcement bracket at each of the four corners. Shelves shall have built-in label holder. Bin fronts and label holders secure to shelf by a self-tapping sheet metal screw. The roll formed, box edge acts as a reinforcing channel. It eliminates the need for a front reinforcing channel on lower shelves.

Corner reinforcement shall have extruded stud to exert into tapered slots in uprights, cross supporting and reinforcing shelf. Four required for each shelf.

Back panels shall attach to top shelf and bottom shelf with three sheet metal screws. Each center overlap is fastened together with 3-1/4 inch long bolts and nuts. Backs to be attached to each intermediate shelf in three places with quick-acting back panel clips.

Dividers shall adjust with quick acting speedy clips on three-inch centers.

Bin fronts shall have embossing to lock into tapered slots in upright for positive attachment. No bolting required.

10.10 FUNCTIONAL SPECIFICATIONS - These specifications outline the type and amount of media that needs to be stored in each branch (area). Refer to the attached drawing for the floor space allotted in each branch for mobile system.

AREA 1

Provide system designed to fit in the area provided according to the attached floor plan. The system must accommodate approximately 2,100 24" X 36" hanging drawings, 270 bankers boxes, 5,425 lineal inches of 12" deep X 12-3/4" clear height binder storage. All shelves to be adjustable to facilitate the branch's changing storage requirements. The system cannot exceed 72 inches in overall height, which includes the carriage and shelving.

AREA 2

Provide system designed to fit in the area provided in the attached floor plan. The system must accommodate approximately 2,400 sheets of 24" X 36" hanging drawings. 5,040 lineal inches of 9-3/4" clear height legal size end tab files, 940 inches of 12" deep X 12-3/4" of clear height binder storage. All shelves to be adjustable to facilitate the branch's changing storage requirements. The system cannot exceed

HWY-O-02-99

10-6

Appendix C

72 inches in overall height, including the carriage and shelving.

AREA 3

Provide system designed to fit in the area provided according to the attached floor plan. The system must accommodate approximately 5,250 sheets of 24" X 36" hanging drawings, 10,500 sheets of 11" X 18" reduced size hanging drawings, 3,900 inches of 12" deep X 12-3/4" of clear height book storage, 5,900 inches of 9-3/4" clear height legal size end table files. All shelves to be adjustable to facilitate the Section's changing storage requirements. The system cannot exceed 72 inches in overall height, which includes carriage and shelving.

AREA 4

Provide system designed to fit in the area provided according to the attached floor plan. The system must accommodate approximately 840 inches of 9-3/4" clear height legal size end tab files, 2,500 inches of 12" deep X 12-3/4" of clear height book storage. 1,750 sheets of 24" X 36" hanging drawings. All shelves to be adjustable to facilitate the Section's changing storage requirements. The system cannot exceed 72 inches in overall height, which includes the carriage and shelving.

AREA 5

Provide system designed to fit in the area provided according to the attached floor plan. The system must accommodate approximately 8,556 inches of 9-3/4" clear height legal size end tab files. All shelves to be adjustable to facilitate the branch's changing requirements. The system cannot exceed 72 inches in overall height, which includes the carriage and shelving.

AREA 6

Provide system designed to fit in the area provided according to the attached floor plan. The system must accommodate approximately 7,872 inches of 9-3/4" clear height legal size end tab files, 11,750 sheets of hanging 24" X 36" hanging drawings. All shelves to be adjustable to facilitate the Section's changing storage requirements. Enclosed cubbyhole storage for 768 openings measuring 6" X 6" X 30" and 429 openings measuring 3" X 3" X 36" deep are to be completely enclosed behind lockable doors to protect fragile rolled drawings. The system cannot exceed 72 inches in overall height which includes the carriage and shelving.

AREA 7

Provide system designed to fit area provided according to the attached floor plan. The system must accommodate approximately 192 banker boxes. Provide eight each 36"W X 18"D X 72"H lockable storage cabinets for equipment storage. Locks must be keyed differently, all eight cabinets and a master key must be provided. Storage cabinets shall have a minimum of four adjustable shelves, each capable of supporting up to 325 pounds. The system cannot exceed 72 inches in overall height.

AREA 8

Provide system designed to fit in the area provided according to the attached floor plan. The system must accommodate approximately 2,748 inches of 9-3/4" clear height legal size end tab files, 4,744 inches of 12"D X 12-3/4" of clear height book storage and 1,972 inches of 15"D X 12-3/4" clear height of miscellaneous storage. The system cannot exceed 72 inches in overall height, which includes the carriage and shelving.

AREA 9

Provide shelving to accommodate approximately 4,680 lineal inches of 12"D X 12-3/4" of clear height book storage. The shelving cannot exceed 72 inches in overall height.