



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
Oct 20 12 30 PM '99
HEARINGS OFFICE

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

In the Matter of)	PCH-99-7
)	
STANDARD ELECTRIC, INC.,)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF
Petitioner,)	LAW AND DECISION; APPENDIX "A"
)	
vs.)	
)	
DEPARTMENT OF BUDGET AND)	
FISCAL SERVICES, CITY AND)	
COUNTY OF HONOLULU,)	
)	
Respondent,)	
)	
and)	
)	
C & C ELECTRICAL CONTRACTOR,)	
INC.,)	
)	
Intervenor-)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION; APPENDIX "A"

I. CHRONOLOGY OF CASE

On June 14, 1999, Standard Electric, Inc. ("Petitioner") filed its request for administrative hearing with Roy K. Amemiya, Jr., Director of Budget and Fiscal Services, City and County of Honolulu ("Respondent") to contest Respondent's decision to conditionally award Contract No. F-94818, Computerized Traffic Control System, Phase V to C & C Electrical Contractor, Inc.

The Office of Administrative Hearings, Department of Commerce and Consumer Affairs received Petitioner's request for administrative hearing on June 17, 1999. The matter was set for hearing and the Notice of Hearing and Prehearing Conference was duly served on the parties.

At the prehearing conference held on June 24, 1999, the parties agreed to allow C & C Electrical Contractor Inc. to intervene and on June 28, 1999, the parties filed a Stipulation Permitting C & C Electrical Contractor, Inc. to Intervene as a Respondent and Order.

On August 30, 1999, the parties filed a Stipulation Setting New Hearing Date; Order, which rescheduled the hearing in this matter to September 10, 1999.

On September 10, 1999, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by David Schulmeister, Esq. and David F.E. Banks, Esq. Respondent was represented by Gregory J. Swartz, Esq. C & C Electrical Contractor, Inc. ("Intervenor") was represented by Sean Kim, Esq. At the close of the hearing, upon Intervenor's request, the parties agreed to file proposed findings of fact and conclusions of law on or before September 24, 1999. All parties filed their proposed findings of fact and conclusions of law on September 24, 1999.

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.

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 they were inconsistent with established factual evidence and applicable legal authority or were otherwise irrelevant.

II. FINDINGS OF FACT

The parties have stipulated to Findings of Fact numbers 1 through 41.

1. Petitioner is a corporation incorporated under the laws of the State of Hawaii, with its mailing address at 99-1392 Koaha Street, Honolulu, Hawaii 96701. Petitioner has its principal place of business in Hawaii and is licensed to do business in Hawaii.

2. Petitioner is a licensed contractor under Chapter 444, Hawaii Revised Statutes ("HRS"), for the following classes: C-5 (cabinet, millwork and carpentry remodeling), C-13 (electrical), and C-62 (pole and line). Petitioner was a licensed contractor under the foregoing classifications during all relevant times herein.

3. Intervenor is a corporation incorporated under the laws of the State of Hawaii, with its mailing address at 1321 Moonui Street, Honolulu, Hawaii 96817. Intervenor has its principal place of business in Hawaii and is licensed to do business in Hawaii.

4. Intervenor is a licensed contractor under Chapter 444, HRS, for the following classes: A (general engineering), B (general building), C-13 (electrical), and C-62 (pole and line). Intervenor was a licensed contractor under the foregoing classes during all relevant times herein.

5. Respondent is an agency of the City and County of Honolulu, a municipal corporation of the State of Hawaii. Respondent is the successor agency to the City's Department of Finance with respect to procurement functions.

6. Roy K. Amemiya, Jr. is a natural person and is a resident and a citizen of the State of Hawaii. Mr. Amemiya was Director of the Department of Budget and Fiscal Services at all relevant times herein.

7. Jurisdiction of the hearings officer appointed by the Director of the Department of Commerce and Consumer Affairs pursuant to HRS § 26-9(f) is conferred by HRS § 103D-709(a).

8. The Hawaii Public Procurement Code, HRS § 103D-101 et seq. (the "Procurement Code"), which applies to every expenditure of public funds irrespective of their source by a governmental body subject to certain exceptions which are not relevant herein, was enacted on October 4, 1993. The various sections of the Procurement Code became effective on either October 4, 1993 or July 1, 1994.

9. HRS § 103D-201(a) created "an autonomous state procurement policy board," effective October 4, 1993.

10. HRS § 103D-202 provides in part that:

Except as otherwise provided in this chapter, the policy board shall have the authority and responsibility to adopt rules, consistent with this chapter, governing the procurement, management, control, and disposal of any and all goods, services, and construction...The

policy board shall consider and decide matters of policy within the scope of this chapter including those referred to it by a chief procurement officer. The policy board shall have the power to audit and monitor the implementation of its rules and the requirements of this chapter, but shall not exercise authority over the award or administration of any particular contract, or over any dispute, claim, or litigation pertaining thereto.

11. Pursuant to its authority under HRS § 103D-202, the procurement policy board promulgated rules, including Section 3-122-21(a)(8) of the Hawaii Administrative Rules ("HAR"), governing the procurement, management, control and disposal of any and all goods, services, and construction, which became effective on December 15, 1995.

12. In June 1998, Respondent issued an Invitation for Bids ("IFB"), seeking sealed bids for the construction and installation of the Computerized Traffic Control System, Phase V, Federal-Aid Project No. CMAQ-0001(19), Construction Contract No. F-94818 (the "Project" or the "Contract").

13. Section 655 of the IFB Special Provisions ("IFB Section 655") describes the specifications for the "Traffic Surveillance and Monitoring System." Section 655.01 of the IFB Special Provisions ("IFB Section 655.01") provides in pertinent part as follows:

There shall be a locally based supplier of the CCTV system and fiberoptic hardware who shall have at least 3 (three) years experience from the project advertisement in installing and setting up of CCTV and fiberoptic systems over \$250,000 specifically for traffic-highway applications. The CCTV firm shall be responsible for testing all fiberoptic hardware and cables to provide documented optical budget loss analysis for each link to and from a hub station. The CCTV supplier will be responsible for all hook-up, assignments, dedication, testing, matching, and splicing of the fiberoptic cables. All fiberoptic splice points shall be spliced color for color whenever matching pairs are available. Pigtails shall be spliced on all fiberoptic members which attach to fiberoptic hardware and components with ST-connectors. The CCTV supplier shall be fully responsible for all splices, budget loss, attenuators, appropriate fiber hardware, accessories, and pigtail connections for a fully operational system. All other hardware, equipment, and labor necessary shall be considered incidental.

14. IFB Section 655.01 also provides in pertinent part as follows:

The Fiberoptic Contractor shall be a locally based installer who shall have at least 3 (three) years experience from the project advertisement in installing fiberoptic cables over \$250,000 specifically for outdoor overhead joint-pole and underground applications. The firm shall also track and document the installation data and tension measurements when installing the fiberoptic cables. Any tension measurements which exceeds the manufacturer's recommendations will be considered means for the cable rejection. The Fiberoptic Contractor shall be fully responsible for the quality and integrity of the installed cable and operability of the final fiberoptic cable product.

15. Paragraph 9 of the Instructions to Bidders of the IFB provides as follows:

9. LISTING OF JOINT CONTRACTORS AND/OR SUBCONTRACTORS. The bidders attention is directed to the Proposal where the names of all joint Contractors and/or subcontractors to be engaged in the work and the nature of work involved must be shown by completing the forms provided. Failure to comply will result in the rejection of the bid. If no joint Contractor or subcontractor is to be engaged, the bidder should complete the form by writing 'none' on the form. If left blank, the Department will interpret the contract as not using joint Contractors and/or subcontractors.

16. Paragraph 102.12 of the Special Provisions of the IFB provides in part as follows:

102.12 Disqualification of Bidders. The department may consider the following reasons for the disqualification of a bidder and the rejection of its proposal(s):

...

(5) Submittal of a proposal that fails to contain a listing of subcontractors or contains only a partial or incomplete listing of subcontractors[.]

17. Section 103D-302(b), HRS, of the Procurement Code provides as follows:

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 work to be performed by each. Construction bids that do not comply with this requirement may be accepted if the Chief Procurement Officer or rules of the policy office conclude that acceptance is in the best interest of the public and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount.

18. HAR § 3-122-21(8), a procurement policy board rule, provides as follows:

For construction projects, the bidder shall provide: (A) 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 (B) the nature and scope of the work to be performed by each. Construction bids that do not comply with the above requirements 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 percent of the total bid amount.

19. Respondent opened the sealed bids on July 30, 1998, and the bid of \$3,010,782.00 by Petitioner was the second lowest bid. Intervenor submitted the lowest bid of \$2,972,300.00.

20. Petitioner did not possess the requisite fiberoptic specialty experience as a Fiberoptic Contractor referenced in IFB Section 655.01. The value of the fiberoptic specialty work required to be performed under IFB Section 655 exceeds one percent (1%) of Petitioner's bid for the Contract. Petitioner's bid listed Bell Atlantic Federal Integrated Solutions ("Bell Atlantic") as its subcontractor for fiberoptic cable work.

21. Intervenor's bid did not list a subcontractor for fiberoptic cable work.

22. By letters dated August 4, 1998 and September 1, 1998, Intervenor submitted additional information to Respondent regarding its qualifications and experience pertaining to the installation of fiberoptic cables in reference to both underground and overhead fiberoptic systems.

23. By memorandum dated September 9, 1998, Cheryl Soon, Director of the City's Department of Transportation Services, advised Mr. Amemiya that Intervenor

“does not have the required fiberoptic specialty experience required in accordance with Section 655.01” and recommended award of the Contract to Petitioner.

24. By memorandum dated October 5, 1998, Mr. Amemiya advised Cheryl Soon that there were insufficient reasons to reject Intervenor’s bid. In response to Ms. Soon’s recommendation as to the Contract award, Mr. Amemiya’s October 5, 1998 memorandum stated:

After review of your memorandum and discussion with C & C Electrical Contractor, Inc., we have determined that there are insufficient grounds to reject the bid for failure to meet qualification requirements. C & C Electrical Contractor, Inc. apparently meets the qualification requirements as written in Section 655.01 of the bid proposal document. (Emphasis added.)

25. On October 7, 1998, Petitioner sent a letter to Respondent inquiring as to the status of the bid results opened July 30, 1998. Petitioner advised Respondent that the apparent low bidder, Intervenor, did not list a subcontractor as required by IFB Section 655.01.

26. Petitioner asked to be informed in writing of Respondent’s decision regarding the Contract award. Respondent did not respond to Petitioner’s letter dated October 7, 1998, in writing or otherwise.

27. On December 11, 1998, Petitioner’s counsel sent a letter to Respondent inquiring as to the status of the Contract. The letter stated that “[t]he purpose of this letter is to place you on notice that Standard Electric intends to protest any award of the above-referenced contract to C & C Electrical.” The letter further stated that “[i]f a decision has already been made to award the Contract to C & C Electrical Contractor, Inc., the courtesy of a response to this letter is requested in order that Standard Electric may lodge and proceed with its protest, or you may treat this letter as Standard Electric’s notice of protest.”

28. By letter dated December 21, 1998, Respondent responded to counsel for Petitioner, stating that any protest by Petitioner would not be timely under HAR § 3-126-3 (which requires that a protest be filed within five working days after the protester knows or should have known the facts leading to the filing of the protest). According to Respondent, each bidder’s subcontractor listing was available to Petitioner immediately after the bid opening on July 30, 1998, and the deadline for filing a protest had expired.

29. By letter dated December 30, 1998, Petitioner, through its counsel, indicated that it was filing a notice of protest pursuant to HRS § 103D-701 and HAR § 3-126-3. The letter indicated that "it is being filed in response to [Mr. Amemiya's] letter...dated December 21, 1998, received on December 23, 1998."

30. In the letter dated December 30, 1998, counsel for Petitioner addressed the timeliness of the "notice of protest" and the reason for the protest. According to Petitioner's counsel:

Standard Electric's protest is grounded upon the non-responsiveness of C & C Electrical's bid, as discussed in more detail below. The basis for a protest grounded upon non-responsiveness of another bid, in addition to the alleged non-responsiveness itself, is the protestor's knowledge that the government has awarded, or intends to award the contract to a non-responsive bidder. Prior to that time, a protest would be premature since the government could well reject the offending bid. In other words, the adverse action being protested is the government's acceptance of a non-responsive bid, not merely the offeror's submission of such a bid. See, e.g., GTE Hawaiian Telephone Company Incorporated v. Department of Finance, County of Maui, PCH-98-6 (December 9, 1998).

31. By letter dated January 25, 1999, Respondent made a conditional award of the Contract to Intervenor.

32. By letter dated January 26, 1999, Intervenor submitted additional information to Respondent regarding its fiberoptic experience.

33. By letter dated April 15, 1999 (and received on April 17, 1999) Respondent responded to Petitioner's letter dated December 30, 1998. Respondent stood by its earlier position that Petitioner's protest was not timely. Respondent also took the position that there were insufficient grounds to reject the bid by Intervenor as non-responsive.

34. Regarding the responsiveness of Intervenor's bid, Respondent stated that "[i]t is the City's established practice that only contractors or subcontractors licensed as required by H.R.S. Chapter 444 need be listed as subcontractors for purposes of compliance with HAR 3-122-21(a)(8)." Respondent took the position that the State of Hawaii does not issue a specialty contractor's license for the fiberoptic cable work, and thus the fiberoptic cable subcontractor need not be listed in the bid.

35. By a letter dated April 28, 1999 (and received April 29, 1999), Petitioner submitted a request for reconsideration of Respondent's decision.

36. By letter dated June 2, 1999 (and received June 8, 1999), Respondent informed Petitioner that Respondent had reconsidered the matter and decided to uphold its previous decision.

37. By letter dated June 9, 1999 (and received the same date) Petitioner notified Respondent of its intent to file a request for an administrative hearing.

38. By letter dated June 14, 1999 (and received the same date) Petitioner filed its Request for Administrative Hearing Pursuant to § 103-D-709 of the Hawaii Revised Statutes with Respondent.

39. A representative of Petitioner was present at the bid opening on July 30, 1998.

40. Bell Atlantic has an A (general engineering), B (general building), C-13 (electrical), and C-62 (pole and line) licenses, the same as Intervenor. Bell Atlantic does not have a specialty contractor classification C-68 license.

41. The value of the fiberoptic cable work required to be performed under IFB Section 655 exceeded one percent (1%) of Intervenor's bid.

42. During the first week in December 1998, Charles Katsuyoshi, Respondent's Purchasing Administrator, told Petitioner's President, Edward Kitaoka, that the Contract would be awarded to Intervenor. Mr. Kitaoka informed his attorney of his conversation with Mr. Katsuyoshi the day the conversation took place, and believes that this is probably what prompted Petitioner's attorney to send Respondent the letter dated December 11, 1998, a true and correct copy of which is attached hereto and incorporated herein as Appendix "A".

III. CONCLUSIONS OF LAW

Petitioner contends that Respondent's conditional award of the contract to Intervenor was improper because Intervenor was not a responsive bidder by virtue of the fact that Intervenor failed to list a subcontractor for the fiberoptic cable installation contemplated by IFB Section 655.01. 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.

Timeliness of Protest

Respondent and Intervenor contend that Petitioner's protest was not timely because: (1) HRS § 103D-701(a) and HAR § 3-125-3 require that a protest relating to the low bidder's alleged non-compliance with subcontractor listing requirements be filed within five working days of bid opening because Petitioner knew at bid opening (July 30, 1998) that Intervenor did not list a subcontractor for the fiberoptic cable installation work, and (2) it was not filed within five working days after Petitioner knew that Respondent intended to award the contract to Intervenor. Petitioner contends that its protest is timely because it did not know and could not have known of the facts leading to the filing of the protest until it received Respondent's letter dated December 21, 1998, which Petitioner received on December 23, 1998.

Hawaii Revised Statutes § 103D-701(a) and HAR § 3-126-3(a), (c) and (d) provide in relevant part:

§ 103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or the head of a purchasing agency. The protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.

§ 3-126-3 Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate within five working days after the protestor knows or should have known of the facts leading to the filing of a protest. A protest is considered filed when received by the chief procurement officer or the head of a purchasing agency. Protests filed after the five-day period shall not be considered.

(c) To expedite the handling of protests, the envelope should be labeled "Protest" and either served personally or sent by registered or certified mail, return receipt requested, to the chief procurement officer or head of a purchasing agency. The written protest shall include as a minimum the following:

- (1) The name and address of the protestor;
- (2) Appropriate identification of the procurement, and, if a contract has been awarded, the contract number.
- (3) A statement of reasons for the protest; and
- (4) Supporting exhibits, evidence, or documents available within the filing time in which case the expected availability date shall be indicated.

(d) The notice of protest shall be deemed communicated and filed within forty-eight hours from the time of mailing, if mailed as provided in this paragraph, or communicated and filed when received personally by the chief procurement officer or the head of the purchasing agency[.]

In GTE Hawaiian Telephone Company, Incorporated v. Department of Finance, County of Maui, PCH-98-6 (Final Order December 9, 1998, affirmed by the Hawaii Supreme Court June 17, 1999) it was noted that:

...the basis for a protest grounded upon the non-responsiveness of another bid, in addition to the alleged non-responsiveness itself, is the protestor's knowledge that the government has awarded, or intends to award the contract to the non-responsive bidder. (Citation omitted.) (Emphasis in original.) Prior to that time, a protest would be premature since the government could well reject the offending bid. In other words, the adverse action being protested is the government's acceptance of an alleged non-responsive bid, not merely the offeror's submission of such a bid.

As to Respondent and Intervenor's first argument that Petitioner was required to file the notice of protest five working days after bid opening, the Hearings Officer finds the GTE Hawaiian Telephone case to be controlling, and concludes that Petitioner was not required to file its protest within five working days of bid opening (July 30, 1998), but within five working days of when Petitioner knew or should have known that Respondent awarded or intended to award the contract to Intervenor.

As to Respondent and Intervenor's second argument, the evidence presented established that Petitioner, through its President, was informed during the first week of December 1998 that Respondent intended to award the Contract to Intervenor. Even

assuming that Petitioner was informed by Mr. Katsuyoshi of Respondent's decision on December 4, 1998 (the last working day of the first week in December), the Hearings Officer concludes that Petitioner's protest was not timely, as Petitioner did not file its protest on or before December 11, 1998. Although Petitioner's letter to Respondent is dated December 11, 1998, no evidence was presented to show that Respondent received this letter on December 11, 1998, as required by HAR § 3-126-3(a).


As Petitioner's protest was untimely, it is unnecessary to determine whether Intervenor's bid was responsive to the IFB.

IV. DECISION

Based on the foregoing considerations, the Hearings Officer finds and concludes that Petitioner's protest was untimely. Accordingly,

IT IS HEREBY ORDERED that Petitioner's protest be dismissed.

DATED: Honolulu, Hawaii, OCT 20 1999.



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

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December 11, 1998

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Roy K. Amemiya, Jr., Director
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Re: Computerized Traffic Control System, Phase V
Federal Aid Project No. CMAQ-0001(19)

Dear Mr. Amemiya:

This firm represents Standard Electric, which bid on the above-referenced project. It is my understanding that the bid results were opened on July 30, 1998 at which time the apparent low bidder was C&C Electrical Contractor, Inc. It is also our understanding that Standard Electric was the second low bidder.

We have been provided with a copy of Standard Electric's October 7, 1998 letter to you in which Standard Electric brought your attention to the fact that C&C Electrical Contractor, Inc. did not list a subcontractor for specification Section 655, Traffic Surveillance and Monitoring System which requires a locally based installer with three years experience in installation of the fiber optic cables for the outdoor overhead joint pole and underground applications. Standard Electric's October 7, 1998 letter also directed your attention to the fact that the Notice to Bidders and the Special Provisions both indicate that a bidder who fails to list subcontractors will be disqualified, and its bid will be rejected.

We have been advised by Standard Electric that it has received no response to its letter to you dated October 7, 1998 regarding this matter. Standard Electric further understands that the contract has not yet been awarded.

The purpose of this letter is to place you on notice that Standard Electric intends to protest any award of the above-referenced contract to C&C Electrical Contractor, Inc. If a decision has already been made to award the contract to C&C Electrical Contractor, Inc., the courtesy of a response to this letter is requested in order that Standard Electric may lodge and proceed with its protest, or you may treat this letter as Standard Electric's notice of protest.

Appendix A

EXHIBIT 15

Roy K. Amemiya, Jr., Director
December 11, 1998
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Thank you for your prompt attention to this matter.

Very truly yours,



David Schulmeister
for

CADES SCHUTTE FLEMING & WRIGHT

cc: Standard Electric, Inc.

IMANTHONO:180100.1