

2009 DEC -3 A 11: 38



HEARINGS OFFICE

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

In the Matter of)	PCX 2009-5
)	
ABHE & SVOBODA, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION GRANTING PETITIONER'S
)	MOTION FOR SUMMARY JUDGMENT;
vs.)	APPENDIX "A"
)	
DEPARTMENT OF ACCOUNTING AND)	
GENERAL SERVICES, STATE OF)	
HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
RALPH S. INOUYE, LTD.,)	
)	
Intervenor.)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION GRANTING
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On October 22, 2009, Abhe & Svoboda, Inc. ("Petitioner") filed its request for hearing to contest the Department of Accounting and General Services, State of Hawai'i's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On November 2, 2009, the parties filed a Stipulation Re: Ralph S. Inouye's ("Intervenor") Intervention.

On November 9, 2009, Petitioner filed a Motion for Summary Judgment (“Motion”), Respondent filed a Motion to Dismiss and Intervenor filed a Motion to Quash Subpoenas Upon Ralph S. Inouye, Co. Ltd.’s Lance Inouye and Collin Leong or in the Alternative, Motion for Protective Order (“Motion to Quash”). On November 10, 2009, Master Sheet Metal, Inc. filed a Joinder to Intervenor’s Motion to Quash.

On November 12, 2009, Intervenor and Respondent filed memoranda in opposition to the Motion and Petitioner filed memoranda in opposition to the Motion to Dismiss and the Motion to Quash and a reply memorandum in support of its Motion.

Prior to the hearing on the merits, a hearing on the motions filed was held on November 12, 2009. Petitioner was represented by Jeffrey P. Miller, Esq., Blake W. Bushnell, Esq. and Daniel T. Kim, Esq. Respondent was represented by Patricia Ohara, Esq. and Intervenor was represented by Cid H. Inouye, Esq. and Kristi L. Arakaki, Esq.

After considering the evidence and arguments on the Motion to Dismiss, the motion was denied. The parties then presented arguments on the Motion and after considering the evidence and arguments presented, the Motion was granted and Petitioner was directed to prepare proposed findings of fact and conclusions of law and to file it within a week to one and one half weeks after the hearing. Intervenor withdrew their Motion to Quash.

On November 18, 2009, Petitioner filed the requested proposed findings of fact and conclusions of law and it is attached hereto and incorporated herein by reference as Appendix “A”. On November 23, 2009, Intervenor filed its objection to Petitioner’s proposed findings of fact and conclusions of law. On November 30, 2009, Respondent filed its proposed findings of fact and conclusions of law and order. On December 1, 2009, Petitioner filed a response to Respondent’s proposed findings of fact and conclusions of law and Intervenor’s objection to Petitioner’s proposed findings of fact and conclusions of law.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

The Hearings Officer adopts Findings of Fact numbers 1-19 as provided in Appendix "A" and amends those Findings of Fact as follows:

3. Specifications Section 07466 relates to the installation of metal siding and roof decking...

6. [Paragraph 6] Section 1.05(K)(6)(a) of the Instructions to Bidders on this Project states, in relevant part:

10. On September 29, 2009, Petitioner timely filed its protest with the State Comptroller Russ Saito, who is the chief procurement officer for Respondent. The grounds for protest included, inter alia, Intervenor's failure to list a roofing subcontractor who holds a C-42 roofing specialty contractor license classification, [and] Intervenor's failure to adequately describe the specific nature of the work to be performed by each subcontractor[.] In a discussion of Intervenor's failure to list complete names and adequately describe the work to be performed by each subcontractor, Petitioner also notes that Intervenor did not list a subcontractor for the installation of the aluminum roof decking described in section 07466 of the specifications.

11. On September 30, 2009, Gary Shimazu of Respondent sent electronic mail to Intervenor regarding Respondent's receipt of the bid protest. In the e-mail, Mr. Shimazu asked Intervenor, among other things, "some questions we have are, [w]ho is installing the roofing? What is the value of this work?"

The Hearings Officer adds the following Finding of Fact:

20. No contract has been awarded in this solicitation.

III. CONCLUSIONS OF LAW

The Hearings Officer adopts Conclusions of Law numbers 1-14, 16-18 and 20-21 as provided in Appendix "A" and amends those conclusions of law as follows:

18. Intervenor did not clearly and unambiguously list any subcontractors to undertake the roofing work on the Project, which renders Intervenor's bid nonresponsive. The nature of the work to be performed by the subcontractor should be apparent on the face of the subcontractor listing. The nature of the work to be performed by Intervenor's

listed subcontractors are described as (1) structural steel, (2) painting, (3) sheet metal, (4) electrical and (5) scaffolding. Intervenor's bid is ambiguous because Intervenor listed two subcontractors whose respective specialty classifications indicate that each was capable of performing the roof work and it was not clear from the bid which subcontractor was intended to perform that work.

21. The listing of two subcontractors for the same scope of work, without more, is ambiguous and creates the opportunity to bid shop and renders Intervenor's bid nonresponsive. *Kiewit Pacific Co., supra.*

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that Respondent's denial of Petitioner's bid protest was improper and not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation and grants Petitioner's Motion for Summary Judgment. Accordingly, it is hereby ordered that: (1) Respondent's October 15, 2009 denial of Petitioner's protest is vacated, (2) Intervenor's bid is rejected as nonresponsive, (3) the matter is remanded to Respondent for award to the responsive low bidder and (4) the parties shall bear its own attorney's fees and costs incurred in this matter.

If an appeal is filed, the parties are ordered to inform the Office of Administrative Hearings as to the outcome of the appeal so Petitioner's funds can be processed according to Hawai'i Revised Statutes § 103D-709(e).

DATED: Honolulu, Hawaii, **December 3, 2009**_____.

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

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of

ABHE & SVOBODA, INC.,

Petitioner,

vs.

DEPARTMENT OF ACCOUNTING AND
GENERAL SERVICES, STATE OF
HAWAII,

Respondent,

and

RALPH S. INOUE CO., LTD.,

Intervenor. ,

CIVIL NO. PCX-2009-5

PETITIONER'S PROPOSED FINDINGS
OF FACTS AND CONCLUSIONS OF
LAW and ORDER; CERTIFICATE OF
SERVICE

Date: November 12, 2009

Time: 10:00 a.m.

Admin. Hearings Officer: Sheryl Lee A.
Nagata

APPENDIX "A"

PETITIONER'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner Abhe & Svoboda, Inc., by and through its attorneys, Bushnell & Miller and Wong, Feldman & Kim, hereby submits its proposed Findings of Fact and Conclusions of Law.

I. INTRODUCTION

On October 22, 2009, Abhe & Svoboda, Inc. ("Petitioner") filed its request for administrative hearing to contest Department of Administrative and General Services, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On November 2, 2009, a stipulation was filed to allow Ralph S. Inouye Co., Ltd ("Intervenor") to intervene in this proceeding.

On November 2, 2009, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Jeffrey P. Miller and Daniel T. Kim, Respondent was represented by Patricia T. Ohara, and Intervenor was represented by Cid H. Inouye. At the pre-hearing conference the undersigned Hearings Officer and the parties agreed to a November 9, 2009 deadline for the filing of dispositive motions by any of the parties, and it was confirmed that the hearing would occur on November 12, 2009 at 10:00 a.m.

On November 9, 2009, Petitioner filed its motion for summary judgment and supporting declaration and exhibits. On November 12, 2009, Respondent and Intervenor filed separate memoranda in opposition to Petitioner's motion for summary judgment. Also on November 12, 2009, Petitioner filed its reply memorandum in support of its motion for summary judgment.

On November 12, 2009, oral arguments were heard by the undersigned Hearings

Officer. Petitioner was represented by Jeffrey P. Miller, Daniel T. Kim and Blake W. Bushnell, Respondent was represented by Patricia T. Ohara, and Intervenor was represented by Cid H. Inouye and Kristi L. Arakaki. Upon the conclusion of oral arguments by the parties, and having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the undersigned Hearings Officer granted Petitioner's motion for summary judgment, and now hereby renders the following findings of facts, conclusions of law and decision.

II. FINDINGS OF FACT

1. Respondent solicited closed sealed bids on a project entitled Aloha Stadium, Replace Metal Roof Deck & Transformers (Sec. LL to QQ, R & S, & L to Q), DAGS Job No. 12-10-0598 ("Project").

2. The work to be performed on the Project is described in Specification Section 01100 subsection 1.01(B) as follows: "The Work consists of replacement of the existing metal roof decking and replacement of and relocation of the existing transformers." Other work includes structural steel, sheet metal line gutters and painting.

3. Specifications Section 07466 relates to the installation of roof decking, and Section 07620 relates to sheet metal lined gutter work.

4. Bid opening occurred on September 24, 2009.

5. At bid opening, the low bidder was Intervenor, with a base bid of \$5,000,000. Petitioner was the second low bidder, with a base bid of \$5,615,000. BCP Construction of Hawaii and Primatch Construction also submitted bids.

6. Paragraph 6 of the Instructions to Bidders on this Project states, in relevant part:

6. Instructions to complete the Joint Contractors or Subcontractors List:

- a. Describe the specialty Contractor's nature of work to be performed for this project and provide the complete firm name of the joint Contractor or Subcontractor in the respective columns. If the bidder is a general Contractor and providing the work of the required specialty Contractor, fill in the Bidder's (general Contractor's) name and nature of work to be performed for this project.

7. In its bid, Intervenor listed the following subcontractors for the base bid work and described the nature of work to be performed by each such subcontractor:

Paradise Erectors, Inc.	Structural Steel
Murphy Ind. Coating Inc.	Painting
Master Sheetmetal Inc.	Sheetmetal
American Elec. Co., LLC	Electrical
ThyssenKrupp-Safway, Inc.	Scaffolding

8. In its bid, Intervenor did not designate itself or any listed subcontractor to perform "roofing" work.

9. At the time of bid opening, Intervenor held "A" and "B" contractor licenses, and did not hold a C-42 roofing specialty license.

10. On September 29, 2009, Petitioner timely filed its protest with the State Comptroller Russ Saito, who is the chief procurement officer for Respondent. The grounds for protest included, inter alia, Intervenor's failure to list a roofing subcontractor who holds a C-42 roofing specialty contractor license classification, Intervenor's failure to adequately describe the specific nature of the work to be performed by each subcontractor, and Intervenor's failure to identify which subcontractor would install the aluminum roof decking.

11. On September 30, 2009, Gary Shimazu of Respondent sent electronic mail

to Intervenor regarding Respondent's receipt of the bid protest. In the e-mail, Mr. Shimazu asked Intervenor, among other things, "some questions we have are, [w]ho is installing the roof? What is the value of this work?"

12. By Memorandum dated October 14, 2009 ("DAGS Memo"), Public Works Administrator Ernest Lau informed Mr. Saito that Intervenor "was asked to provide information and clarification for their bid and respond to the protest." Mr. Lau indicated that, on the issue of Intervenor's "[f]ailure to list a licensed roofing contractor with a C-42 license[,]" Intervenor responded as follows:

We will be using our listed sheet metal subcontractor, Master Sheet Metal, Inc. (MSMI) (contractor's license no. C-5392) to perform the sheet metal siding and roofing as well as the gutter work. Master Sheet Metal, Inc. holds the C-44 sheet metal contractor's license, which permits licensee to perform said work."

13. In the DAGS Memo, Mr. Lau also indicated that another bidder, Primatch Construction, who does not have a C-42 license, informed DAGS that it would install the roof "under their C-44 sheet metal or C-48 structural steel contractor license."

14. By letter dated October 15, 2009, Mr. Saito issued his final decision denying Petitioner's protest. The letter was mailed by Respondent and received by Petitioner on October 16, 2009. In the denial letter, Mr. Saito stated, in pertinent part:

We found that [Intervenor] will use Master Sheet Metal, Inc., their sheet metal subcontractor, to install the roof decking as well as the sidings and gutters. The C-44 sheet metal contractor license classification includes installation of pre-manufactured sheet metal products including metal siding and roofing.

* * * *

We found that [Intervenor's] subcontractor listing was sufficiently clear as to the name of the subcontractor and the nature of work to be performed. . . . We allow leeway in the listing of subcontractors so long as the identity of the contractor and nature of the work to

be performed can be ascertained.

15. At the time of bid opening, Intervenor-listed subcontractor Master Sheet Metal, Inc. held specialty contractor licenses in the following areas: C-44 (sheet metal) and C-52 (ventilating and air conditioning).

16. The C-44 (sheet metal) specialty contractor license classification is described as follows:

Sheet Metal Contractor. To fabricate, assemble and install cornices, flashings, gutters, downspouts, kitchen and laboratory equipment, duct work, metal flues, and free standing fireplaces and chimneys; and to install pre-manufactured sheet metal products such as metal chutes, lockers, shelving, louvers, nonbearing metal partitions, metal siding and roofing, and other sheet metal items common to the trade, and facsimile items such as plastic skylights, fiberglass ducts and fittings, including installation of metal awnings, canopies, patio covers, and seamless metal gutters.

[emphasis added].

17. At the time of bid opening, Intervenor-listed subcontractor Paradise Erectors, Inc. held specialty contractor licenses in the following area: C-48 (structural steel).

18. The C-48 (structural steel) specialty contractor license classification is described as follows:

Structural steel contractor. To fabricate and erect structural steel shapes, bars, rods, and plates of any profile, perimeter, or cross-section, that are or may be used as structural members for buildings and structures; including riveting, bolting, welding, and rigging in connection therewith. Erection of metal buildings, passenger loading bridges, metal roofing and metal siding installed on steel framing, mechanical, overhead, sliding and roll-up steel doors, and grills and bars over windows.

[emphasis added].

19. On October 22, 2009, Petitioner timely filed its request for hearing from the denial of protest.

III. CONCLUSIONS OF LAW

1. Hawaii Revised Statutes (“HRS”) §103D-709(a) confers jurisdiction to the Hearings Officer “to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701, or 103D-702.”

2. The Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. Department of Educ.*, 85 Haw. 431 (Haw. 1997).

3. The Hearings Officer “shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate[.]” HRS §103D-709(f).

4. In an administrative proceeding of this nature, a motion for dismissal or other summary disposition may be granted as a matter of law when the legal contentions of the moving party justify such relief, and when the non-moving party cannot establish a material factual controversy even though the motion is viewed in the light most favorable to the non-moving party. *In re Stoneridge Recoveries, LLC*, PCH-2002-14 (Dec. 20, 2002) at 8-9 (citing *In re GMP Assocs. Inc.*, PCH-2001-5 (Jun. 18, 2001) at 5); *In re RCI Env'tl., Inc.*, PCH-2000-10 (Jan. 2, 2001) at 3.

5. The issue of whether the nature of the roofing work and whether the proper designation of which subcontractor would be performing that work was adequately described in the subcontractor listing section of Intervenor’s bid was raised in the September 29, 2009 bid protest, was addressed in DAGS October 15, 2009 decision to deny the protest, and was properly raised for decision in Petitioner’s request for hearing filed on October 22, 2009. In

addition, Respondent first raised the issue of Intervenor's assertion that Intervenor intended to engage Master Sheet Metal, Inc. to perform the roofing work as justification for denying Petitioner's bid protest and as such, consideration of issues relating to this assertion is proper. *See In re Access Service Corp.*, PCX-2009-3 (Nov. 16, 2009).

6. The listing of subcontractors in a bid on a public works construction project is a requirement under HRS §103D-302(b). HRS §103D-302(b) provides:

(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.

7. HRS §103D-302(b) requires that bidders on a construction project include 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 work to be performed by each.” *In re CC Eng’g & Constr., Inc.*, PCH 2005-6 (Nov. 1, 2005) at 6.

8. The primary purposes of the listing requirement are to prevent bid shopping and bid peddling. *In re Frank Coluccio Construction*, PCH 2002-7 (Aug. 2, 2002) at 15.

9. 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. *CC Eng’g & Constr.* at 6. 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. *Id.*

10. The failure to adequately and unambiguously disclose the nature and scope of work to be performed by each subcontractor may render a bid nonresponsive regardless of whether there is any evidence of bid shopping. *In re Kiewit Pacific Co.*, PCH-2008-20 (Feb. 20, 2009) at 10; *Coluccio, supra*.

11. Moreover, subcontractor listing issues relate to bid responsiveness. *See In re Parsons RCI, Inc.*, PCH 2007-3 (July 13, 2007); *CC Eng'g & Constr., supra*.

12. A bid is responsive if it conforms in all material respects to the invitation for bids. Haw. Rev. Stat. §103D-104.

13. Bid responsiveness issues “must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of bid opening.” *Okada Trucking Co. v. Board of Water Supply*, 101 Haw. 68, 75, 62 P.3d 631, 638 (Haw. App. 2003).

14. A bid that is ambiguous is nonresponsive. *Southern Foods Group, L.P. v. State*, 89 Haw. 443, 457, 974 P.2d 1033, 1047 (1999).

15. The determination of whether Intervenor’s bid is ambiguous is a question of law for the Hearings Officer to decide. *See MPM Hawaiian v. World Square*, 4 Haw. App. 341, 345, 666 P.2d 622, 226 (1983).

16. Respondent was legally barred from considering any information outside of the four corners of Intervenor’s bid or any information which was not available to Respondent at the time of bid opening for the purpose of interpreting Intervenor’s bid. Thus, the facts that

Respondent ascertained following its post-bid opening inquiry to Intervenor were improperly considered in its evaluation of Petitioner's protest.

17. The Project scope includes the installation of roof decking as the title of the Project is "Aloha Stadium, Replace Metal Roof Deck & Transformers," the Project Specifications state that "[t]he Work consists of replacement of the existing metal roof decking and replacement of and relocation of the existing transformers," and the Project Specifications at Section 07466 relates to such roofing work.

18. Intervenor did not clearly and unambiguously list any subcontractors to undertake the roofing work on the Project, which renders Intervenor's bid nonresponsive. The nature of the work to be performed by the subcontractor be apparent on the face of the subcontractor listing. The nature of the work to be performed by Intervenor's listed subcontractors are described as (1) structural steel, (2) painting, (3) sheet metal, (4) electrical and (5) scaffolding. In Respondent's own October 14, 2009 memorandum, Respondent noted that it asked Intervenor "some questions [Respondent] have are, [w]ho is installing the roof?"

19. The "sheetmetal" nature of work that Intervenor listed for Master Sheet Metal, Inc., without any specific reference to the roofing work contemplated on the Project, is ambiguous at best since it appears to encompass Specification Section 07620 - SHEET METAL LINED GUTTER work only, and further renders Intervenor's bid nonresponsive.

20. Furthermore, both the C-44 (sheet metal) and the C-48 (structural steel) classifications include the installation of metal roofing and siding. Intervenor's listing of C-44-licensed Master Sheet Metal, Inc. to perform "sheet metal" work and C-48-licensed Paradise Erectors, Inc. to perform "structural steel" work leads to the conclusion, based on the face of

Intervenor's bid and information available to Respondent at the time of bid opening, that two subcontractors were listed to perform the roofing work.

21. The listing of two subcontractors for the same scope of work creates the opportunity to bid shop and renders Intervenor's bid nonresponsive. *Kiewit Pacific Co., supra.*

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner's Motion for Summary Judgment is granted, and

IT IS HEREBY ORDERED that: (1) Respondent's October 15, 2009 denial of Petitioner's protest is vacated, (2) Intervenor's bid is rejected as nonresponsive, (3) the matter be remanded to Respondent for award to the responsive low bidder, and (4) the parties shall bear its own attorneys' fees and costs incurred in this matter.

DATED: Honolulu, Hawaii, November 18, 2009.



BLAKE W. BUSHNEIL
JEFFREY P. MILLER
DANIEL T. KIM
Attorneys for Petitioner
ABHE & SVOBODA, INC.

APPROVED AND SO ORDERED:

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

OFFICE OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

STATE OF HAWAII

In the Matter of) PCX-2009-5
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ABHE & SVOBODA, INC.,) CERTIFICATE OF SERVICE
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DEPARTMENT OF ACCOUNTING AND)
GENERAL SERVICES, STATE OF HAWAII,)
)
 Respondent,)
)
 and)
)
RALPH S. INOUYE CO., LTD.,)
)
 Intervenor.)
_____)

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on the following parties by means of United States Mail on November 18, 2009.

MARK J. BENNETT, ESQ.
Attorney General of Hawaii

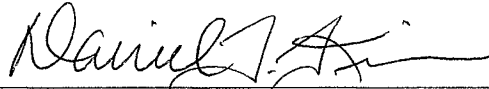
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DATED: Honolulu, Hawaii, November 18, 2009.



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