



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:)	PCX-2010-5
)	
GLOBAL SPECIALTY CONTRACTORS, INC.,)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (1) DENYING
)	RESPONDENT'S MOTION FOR
Petitioner,)	SUMMARY JUDGMENT AND (2)
vs.)	GRANTING PETITIONER'S MOTION
)	FOR SUMMARY JUDGMENT
DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII,)	
)	
Respondent.)	
)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER (1) DENYING
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND
(2) GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On August 3, 2010, Global Specialty Contractors, Inc. (Petitioner"), filed a request for administrative review of the Department of Land and Natural Resources, State of Hawaii's ("Respondent") decision to deny Petitioner's protest in connection with a project designated as Job No. B08DH71A Honokohou Small Boat Harbor Improvements, Phase I, Kona, Hawaii ("Project"). Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On August 16, 2010, Petitioner and Respondent filed motions for summary judgment. Both parties submitted their memorandum in opposition to the other party's motion as well as reply briefs on September 3, 2010 and September 10, 2010, respectively.

Both motions came on for hearing before the undersigned Hearings Officer on September 16, 2010. Petitioner was represented by Blake W. Bushnell, Esq.; Respondent was represented by Rowena A. Somerville, Esq.

Having heard the argument of counsel, and having considered the motions and memoranda, along with the exhibits and declarations attached thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. On May 24, 2010, Respondent posted an invitation for bids ("IFB") for the Project.

2. On June 10, 2010, Respondent posted Addendum No. 1 to the IFB.

3. On June 17, 2010, Respondent posted Addendum No. 2 to the IFB.

4. The work required on the Project included, among other things, the installation and hookup of waterlines for a potable water system, the installation and hook up of a new fire hydrant to the potable water system, the installation and hook up of service laterals for the potable water system, the installation of a 4" galvanized steel pipe bollard, and the installation of a backflow prevention system for the potable water system. This potable water system was intended to service a comfort station located at the Honokohou Small Boat Harbor.

5. More specifically, the IFB, in Addendum No. 2, contained the following line item descriptions related to the plumbing installation work to be performed on the Project:

<u>Item No.</u>	<u>Description</u>
3.	New 8" Ductile Iron, class 52 Waterline with all necessary fittings, trench excavation and backfill and appurtenances , install and repair.

5. New 8” Ductile Iron, Class 53 Waterline with all necessary **fittings**, including concrete support blocks and air relief valve, in place complete.
7. New 6” Ductile Iron Waterline for Fire Hydrant service laterals with all necessary **fittings, trench excavation and backfill and appurtenances**, install and repair.
8. **Fire Hydrant Assembly, including fire hydrant, gate valve, valve box, concrete blocks, hydrant elbow, D.I. spool and appurtenances, concrete pad and roadway repair, in place complete.**
9. 4” Galv. Steel Pipe Bollard, Installed.
10. Connect to existing service lateral.
11. 8” RP Type Backflow Prevention Assembly, Installed.

(Emphasis in original).

6. The subcontractor listing section on page P-9 of Addendum No. 2 to the IFB stated in relevant part:

In completing the Joint Contractors or Subcontractors List, describe the specialty contractor’s nature and scope 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. On June 24, 2010, Respondent received a total of 8 bids for the Project. Bolton, Inc. (“Bolton”) submitted the apparent low bid of \$409,588.46 while Petitioner submitted the second lowest bid of \$591,450.00.

8. In its bid, Bolton designated the following subcontractors to perform the following items of specialty work required on the Project:

Pacific Concrete Coring	Saw Cut Concrete
South Pacific Steel	Rebar
Pural	Chlorination
Westside Electric	Electrical

9. Bolton did not list a subcontractor having a C-37 plumbing contractor's license or list itself as the contractor performing the work of a required specialty contractor.

10. At the time of bid opening, Bolton held "A" and "B" contractor licenses, but did not hold a C-37 plumbing specialty license.

11. In a letter dated July 7, 2010, Petitioner lodged a protest alleging that Bolton's bid was nonresponsive to the IFB.

12. In a letter dated July 22, 2010 and received by Petitioner on July 29, 2010, Respondent informed Petitioner that its protest was denied. In its decision, Respondent stated that, "[b]ased on our discussion with the Department of Commerce and Consumer Affairs, a contractor with a C-43 license can install said items outside the five (5) feet line from any building." The letter went on to state that because Bolton had an "A" license, which included the specialty classification C-43, it carried the appropriate licensing to perform this specialty work itself.

13. On August 4, 2010, Petitioner filed its request for administrative review of Respondent's denial of the protest.

III. CONCLUSIONS OF LAW

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

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, 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. State Dept. of Educ.*, 85 Haw. 431 (1997). And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

The gravamen of Petitioner's complaint rests on its allegation that a C-37, rather than a C-43, specialty contractor's license is required to undertake some or all of the work listed in Items 3, 5, and 7 through 11 of the IFB. And, because Bolton did not list a C-37 subcontractor as required under HRS §103D-302(b), and Bolton itself does not possess such a license, it is Petitioner's contention that Bolton's bid must be rejected as nonresponsive¹. Respondent, on the other hand, contends that while a contractor holding a C-37 specialty license can perform the work in question, the work may also be properly performed by one holding a C-43 specialty license. Thus, according to Respondent, the bid submitted by Bolton, who possesses a C-43 license by virtue of its "A" license², is responsive to the IFB³.

The scope of work of a C-43 specialty contractor's license is set forth in Exhibit "A" to Title 16, Chapter 77 of the Hawaii Administrative Rules ("HAR"):

Sewer, sewage disposal, drain, and pipe laying contractor. To construct concrete and masonry sewers, packaged sewer disposal plants, sewage lift stations, septic tanks, and appurtenances thereto; *to lay all types of piping for storm drains, water, and gas lines, irrigation and sewers, manholes in connection with the above work;* and repairing and reconditioning of the pipelines, including the

¹ The failure of a bidder to list its subcontractors results in the submission of a nonresponsive bid. *Okada Trucking Co., Ltd. v. Board of Water Supply*, PCH 99-11 (November 10, 1999).

² Under Hawaii Administrative Rules §16-77-32, licensees who hold an "A" general engineering contractor classification shall automatically hold, among other specialty classifications, a C-43 classification.

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

excavation, grading, trenching, backfilling, paving, and surfacing in connection therewith;

(Emphasis added).

Respondent relies on the broad language in the foregoing description “to lay all types of piping for storm drains, water, and gas lines, irrigation and sewers, manholes in connection with the above work”, and argues that that language encompasses *all* of the work included in Items 3, 5, and 7 through 11. Petitioner disagrees with this interpretation and, among other arguments, alleges that even assuming *arguendo* that some of the pipe-laying work may be included in the scope of the C-43 license, nothing in the description covers the installation of the various fixtures required by the IFB, including the installation of the air relief valve in Item 5, the fire hydrant assembly in Item 8, the tie-in to existing laterals in Item 10, and the backflow prevention assembly in Item 11.

After a careful review of the scope of work of the C-43 specialty contractor’s license as set forth in Exhibit “A” to HAR §16-77, the Hearings Officer agrees with Petitioner. The Hearings Officer can find no language, nor can Respondent point to any specific authority, that provides for the installation of those fixtures under a C-43 license. Moreover, Petitioner submitted uncontroverted evidence that the fire hydrant assembly installed as a part of a potable water system uses the water system to put out fires in nearby structures, while the backflow prevention assembly acts to prevent contaminants from back flowing into the city water system. Clearly, the proper installation of these fixtures directly affects public safety and, obviously, must be performed only by those qualified to do so. With this important consideration in mind, the Hearings Officer will not assume that such fixtures can be installed under a C-43 license unless clearly authorized by the applicable laws. Any other interpretation would be contrary to the underlying intent of HRS Chapter 444 and its implementing rules. *See, Jones v. Phillipson, 92 Haw. 117 (1999)(purpose of Chapter 444 is to protect public from poor workmanship by requiring that only contractors meeting minimum level of qualifications be licensed)*. For these reasons, the Hearings Officer concludes, as a matter of law, that the installation of these fixtures is not permitted

under a C-43 specialty contractor's license. Consequently, because Bolton does not possess a C-37 specialty contractor's license and did not list a C-37 subcontractor in its bid, the Hearings Officer further concludes that Bolton's bid is nonresponsive and must be rejected. Having arrived at this conclusion, the Hearings Officer need not address the other arguments raised by Petitioner.

IV. ORDER

Based upon the foregoing findings and conclusions, the Hearings Officer concludes that there are no genuine issues of material fact left for determination at hearing and that Petitioner is entitled to judgment in its favor as a matter of law. Accordingly, the Hearings Officer orders as follows:

1. Petitioner's Motion for Summary Judgment is hereby granted, and Respondent's July 22, 2010 denial of Petitioner's July 7, 2010 protest is reversed and this matter is remanded to Respondent for further evaluation of Petitioner's bid consistent with this decision. Thereafter, Respondent shall award the contract to the lowest responsive, responsible bidder pursuant to HRS §103D-302;

2. Respondents' Motion for Summary Judgment is denied;

3. Each party shall bear its own attorney's fees and costs incurred in this matter; and

4. As the prevailing party in this proceeding, Petitioner shall be entitled to the return of its bond pursuant to HRS §103D-709(e), within a reasonable time following the filing of an appropriate request.

Dated at Honolulu, Hawaii: OCT 15 2010



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

Hearings Officer's Findings of Fact, Conclusions of Law, and Order (1) Denying Respondent's Motion for Summary Judgment and (2) Granting Petitioner's Motion for Summary Judgment; In Re Global Specialty Contractors, Inc., PCX-2010-5.