



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
2004 DEC 23 A 9 36

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

In the Matter of)	PCH-2004-16
)	
OCEANIC COMPANIES, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION GRANTING RESPONDENT'S
)	MOTION FOR SUMMARY JUDGMENT;
vs.)	APPENDICES "A" and "B"
)	
DEPARTMENT OF BUDGET & FISCAL)	
SERVICES, CITY AND COUNTY OF)	
HONOLULU,)	
)	
Respondent.)	

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

I. INTRODUCTION

On October 29, 2004, Oceanic Companies, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Prehearing Conference was duly served on the parties.

At the pre-hearing conference held on November 8, 2004, the parties agreed that they would file cross motions for summary judgment on or before December 10, 2004, and that oral arguments on the motions would be heard on December 17, 2004. The parties also agreed that the hearing would convene on November 18, 2004 for the sole purpose of taking care of matters relating to the subpoena duces tecum issued to Otis on November 8, 2004.

On November 18, 2004, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Jessica M. Horiuchi, Esq. and Respondent was represented by

Gordon D. Nelson, Esq. Keith Muraoka, Senior New Equipment Manager for Otis appeared on behalf of Otis, and pursuant to the subpoena duces tecum, produced a facsimile of a cost estimate which was given to the parties.

On December 10, 2004, Petitioner and Respondent filed their Motions for Summary Judgment. On December 15, 2004 the parties filed their memoranda in opposition to the respective motions. A hearing on the motions was held on December 17, 2004. Tim Sinn was present on behalf of Petitioner and Petitioner was represented by Terry E. Thomason, Esq. and Jessica M. Horiuchi, Esq. Respondent was represented by Amy R. Kondo, Esq. and Gordon D. Nelson, Esq. At the request of the Hearings Officer, the parties agreed to submit this matter for final disposition based upon the matters presented in their respective motions if the Hearings Officer finds that there are material issues of fact which would preclude granting either party's Motion for Summary Judgment.

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 granting Respondent's Motion for Summary Judgment.

II. FINDINGS OF FACT

1. On August 2, 2004, Respondent issued a Notice to Contractors, soliciting bid proposals to construct the Mililani Community Transit Center, (the "Project") Job No. DTS-2003-TC-03 (the "IFB"). Bid opening was to take place on August 19, 2004 at 2:00 p.m.

2. Bid opening took place as scheduled and T. Iida Contracting, Ltd. ("Iida") was the lowest bidder at \$4,198,000.00 and Petitioner was the second lowest bidder at \$4,206,286.00.

3. Iida does not have a C-16 elevator contractor's license, but Iida's bid did not list a C-16 elevator subcontractor for the elevator work that was required to be performed.

4. By a letter dated August 23, 2004, Petitioner filed a protest, stating that Iida's bid was non-responsive because it failed to list a specialty subcontractor for the elevator work.

5. Iida responded to the concerns raised by Petitioner's protest in a letter dated September 2, 2004 to Respondent. This letter states in part:

If awarded the contract, we intend to purchase an elevator as a purchase order for materials and to subcontract the installation work on site to Otis Elevator Company (License #C-1406); 793 S. Hotel Street, Honolulu, HI 96813 for \$19,007.00. It is our understanding that the State of Hawaii and the City & County of Honolulu allow addition of subcontractors to the contract so long as the subcontract amount is of a minor amount compared to the total contract.

With that letter, Iida also submitted a copy of a Labor Only Proposal from Otis, which was faxed to Iida on August 19, 2004 at 10:43 a.m. The cost of the elevator or the cost to ship the elevator to Hawaii was not included in Otis' proposal to Iida. A copy of this proposal is attached hereto and incorporated herein by reference as Appendix "A".

6. By a letter dated October 19, 2004 and postmarked October 26, 2004, Respondent denied Petitioner's protest. Respondent informed Petitioner that pursuant to Hawaii Revised Statutes ("HRS") § 103D-302, Respondent intended to waive Iida's failure to list a C-16 elevator subcontractor "on the basis that the value of the work is less than one percent (1%) of the proposed contract amount. We have determined that the waiver is in the best interest of the City and is permitted[.]"

7. On October 29, 2004, Petitioner filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs. Petitioner argued that HRS § 103D-302 required that Respondent include the cost of labor and materials when determining the "value of the work" and that if this is done, the value of the work would exceed one percent, and Iida's bid would be rejected as non-responsive.

8. Iida also received a Bid for Complete Elevator Material Only from Otis on August 19, 2004 at 8:26 a.m. The cost of the elevator was \$21,202.00. The quoted price excludes all freight cost for shipping and trucking the elevator from the factory. This bid states in part:

The shipping shall be paid directly form (sic) the general contractor to the shipping company of their choice. They will have to make all necessary arrangements to get the equipment either delivered to the selected shipping company or have that company pick up the equipment from the Otis factory.

This is Otis' standard commercial arrangement for purchases of elevator equipment. A copy of this bid is attached hereto and incorporated herein by reference as Appendix "B".

9. The estimated cost of shipping the elevator to Hawaii is \$4,000.00.

10. The IFB required contractors to pay all employees the minimum basic wage rate in conformance with applicable federal and state laws.

11. The labor only proposal Iida received from Otis states in part: "Our bid does not meet HUD prevailing wage rates or Davis Bacon rates." According to Keith Muraoka of Otis, this statement was included in error, as it was developed for inclusion in bids at a time when Otis did not have an approved apprenticeship program that permitted it to utilize apprentice helpers

paid at less than journeymen hourly rates. However, at the time the proposal was submitted to Iida, there was an approved apprenticeship program in place that permitted Otis, in compliance with the Davis-Bacon Act, to use apprentice helpers paid at less than journeymen hourly rates.

12. Otis will use one journeyman mechanic and one apprentice helper on the Project, and they will be paid no less than the rates required under the Davis-Bacon Act.

13. Respondent attached a copy of Appendix "A" to its response to Petitioner's request for hearing ("Response"), which was filed on November 5, 2004. Although Petitioner had received the Response at the time of the pre-hearing conference on November 8, 2004, the issue of labor standards compliance was not raised at the pre-hearing conference, and was first raised in Petitioner's Motion for Summary Judgment, filed on December 10, 2004.

III. CONCLUSIONS OF LAW

A motion for summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH 96-9 (November 20, 1996).

Petitioner's Motion for Summary Judgment is based on the assertion that Iida is not a responsive bidder because: (1) it failed to list a joint contractor or subcontractor with a C-16 elevator contractor's license and that Respondent is not authorized to waive this defect because the value of the work to be performed is more than one percent of the total bid amount and (2) Otis' cost proposal is contrary to the IFB and the law. Respondent's Motion for Summary Judgment is based on its assertion that the requirement that Iida list a C-16 specialty contractor can be waived because the value of the work to be performed is less than one percent of the total bid amount and acceptance of the bid would be in Respondent's best interest. Hawaii Revised Statutes § 103D-302(b) provides:

§ 103D-302 Competitive sealed bidding.

...

(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.

It is not disputed that Iida was required to list a C-16 elevator contractor but failed to do so. It is also not disputed that Iida obtained a proposal, prior to bid opening, from Otis, a C-16 elevator contractor, to install the elevator for \$19,007.00 (labor only), and that it is less than one percent of \$4,198,000.00. Petitioner contends, however, that the “value of the work” to be performed by Otis is more than one percent of the total bid amount because Otis’ proposal for the cost of the elevator (\$21,202.00), and the elevator’s estimated shipping costs (\$4,000.00) should be included in calculating the one percent and that Respondent’s limitation of the “value of the work” to only labor costs is an artificial parceling, which was done in order to apply the exemption contained in HRS § 103D-302(b).

With respect to the argument that the cost of shipping should be included in the “value of the work” to be performed by Otis, it is clear that Iida was to pay that cost directly to the shipping company of its choice. Accordingly, the Hearings Officer finds that the shipping cost should not be included in the calculation of the one percent, and concludes that the value of the work to be performed by Otis (even if the cost of the elevator was included) is less than one percent of the total bid amount.¹

While there is a statutory prohibition against artificial parceling for procurements of less than \$25,000.00, (*See*, HRS § 103D-305) this section is not applicable to the case at bar, and HRS § 103D-302 does not prohibit Iida from soliciting separate proposals for labor and materials. Petitioner did not cite any legal authority to support its argument that the concept of parceling should be extended to competitive sealed bidding procurements or show that Iida or Respondent artificially divided the labor, materials and shipping in order to take advantage of the waiver provision contained in HRS § 103D-302. Based on these considerations, Petitioner’s argument is rejected.

Petitioner also argued that Respondent’s denial of Petitioner’s protest was contrary to the IFB and the applicable law because the documents Iida provided Respondent after Petitioner’s protest put Respondent on notice that the labor rates Otis would pay its workers were in violation of the IFB, and that this precluded Respondent from waiving defects in Iida’s bid. Respondent

¹ One percent of the total bid amount is \$41,980.00. The cost of labor and materials (the elevator) is \$40,209.00.

argued that Petitioner's attempt to raise this issue is invalid because Petitioner did not file a protest on this issue.²

Hawaii Revised Statutes § 103D-701 required Petitioner to submit a written protest to the chief procurement officer or a designee, within five working days after Petitioner knew or should have known of the facts giving rise to the protest, and HRS § 103D-709 provides that parties aggrieved by a determination of the chief procurement officer pursuant to HRS § 103D-701 may request an administrative hearing to review that determination. Because Petitioner did not file a protest on the issue of Otis' labor costs on or before November 15, 2004, five working days after the pre-hearing conference on November 8, 2004,³ the Hearings Officer concludes that Petitioner is precluded from raising the issue of Otis' labor costs in this proceeding.

Petitioner did not dispute that the acceptance of Iida's bid, if in compliance with HRS § 103D-302, would be in Respondent's best interest.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer denies Petitioner's Motion for Summary Judgment and grants Respondent's Motion for Summary Judgment. Accordingly, Respondent's denial of Petitioner's protest is affirmed.

DATED: Honolulu, Hawaii, DEC 23 2004



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

² Petitioner's argument that this is not a "protestable issue" is rejected.

³ Although the Response was filed on November 5, 2004, it is unclear from the certificate of service whether the document was hand-delivered or mailed to Petitioner. However, it was established at the pre-hearing conference that Petitioner had received the Response.

Otis Elevator Company

North American Area
793 South Hotel Street
Honolulu, HI 96813



Otis

A United Technologies Company

August 19, 2004

Mr. Hank Iida
T. Iida Contracting, Ltd.
45-558 C Kamehameha Highway
Kaneohe, Hawaii 96744

Reference: Mililani Community Transit Center- Mililani, Hawaii
Labor Only Proposal To Install One (1) 2 Stop Hydraulic Passenger Elevator

Dear Mr. Iida:

We will furnish labor to install One (1) holeless hydraulic passenger elevator for the above project as covered by Pages 14220-1 through 14220-16 of the Architect's specifications dated November 2002 and as shown on the Architect's Drawing Nos. A5.0, A5.1, & A3.1 dated November 18, 2002 with any clarifications noted below and in accordance with our standard terms & conditions for the sum of **NINETEEN THOUSAND SEVEN AND NO/100 DOLLARS, INCLUDING STATE OF HAWAII TAX (\$19,007.00)**.

This proposal is submitted with the understanding that any contract resulting therefrom will be subject to review and mutual acceptance of all terms and conditions contained therein. It is conditioned on neither party being liable to the other for any loss, damage or delay due to any cause beyond your or our reasonable control, including but not limited to acts of government, strikes, lockouts, fire, explosion, theft, floods, riot, civil commotion, war, malicious mischief or act of God. Under no conditions, shall either party be liable for special, indirect, or consequential damages in contract, tort, including negligence, warranty or otherwise, notwithstanding any indemnity provisions to the contrary.

The above quotation is based on all work being performed during our regular working hours and on the job-site conditions outlined in the section, "Preparatory Work By Others" prevailing at the beginning and during installation of the elevator equipment. The section "Preparatory Work by Others" begins on page five (5) of this proposal.

In addition to the above the following clarifications apply:

1. The equipment may require a hoistway with the following dimensions: 8'-6" wide x 5'-9" front to back, a pit 4'-0" deep and a minimum 12'-4" overhead.
2. The equipment requires a machine room 5'-9" wide x 7'-4" front to back and a minimum 7'-6" overhead clearance. The door is to have a 3'-0" clear opening.
3. The timely furnishing of a completed hoistway (well way) for uninterrupted use, approvals & power with permanent characteristics.
4. Please allow 2-3 weeks installation after the elevator shaft, machine room and 3 phase power is made available for our uninterrupted use.
5. If hoistway and machine room is not ready for us to install the elevator, on-site storage, approximately 25' x 25' (per elevator) adjacent to the hoistway at bottom landing is required. If Otis is to re-locate the elevator equipment, a \$2,500.00 charge will be assessed for any double handling or retransportation of elevator material required by the general contractor/owner or agent thereof.
6. If off-site storage is necessary and Otis is requested to re-locate or handle equipment, charges will be assessed at a charge of \$2,500.00 for double handling and transportation, plus monthly storage.
7. The work shall be performed for the agreed price plus any applicable state use and/or sales tax.
8. Our bid does not meet HUD prevailing wage rates or Davis Bacon rates.
9. A twenty-five (25) percent down-payment is required upon issuance of a subcontract and letter of intent. Ninety (90) percent of the contract price is due upon delivery of elevator materials to job site. Final payment shall be due thirty (30) days after final acceptance of the elevator installation.

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APPENDIX "A"

10. Price includes naming other parties on an Owners' and Contractor's Protective Liability Insurance Policy in lieu of naming other parties as additional insureds. We do not waive our, or our insurer's rights of subrogation.
11. Price based on one mobilization to the jobsite. Additional mobilization will be billed to you at our normal billing rates.
12. Price based on the use of your trash removal facilities at the jobsite at no cost to Otis.
13. Price is based on one (1) State witnessed safety test which includes the final testing of the elevator(s) which also include the turnover of the unit(s) to the General Contractor. All additional re-tests or return and assist visits to the jobsite after we leave due to incomplete or additional sub-contractor work required to have elevator(s) certified and operation approval by the State of Hawaii, will be billed to you as an extra cost at our normal billing rates.
14. We will require the equipment to have a delivery access for the equipment to the building as close to the elevator hoistway as possible.
15. We shall stage the installation process at the ground floor fronting the elevator hoistway. Sufficient measures must be taken by the General Contractor to secure or cordon-off the immediate area surrounding the elevator hoistway (shaft) from the general public for safety reasons.
16. A sump pump pit shall be required within the elevator hoistway pit area. This sump pump must be located center and adjacent to the rear wall. This sump pump pit and sump pump shall be provided by others. It shall also require either a fluid containment or oil separator system that must be incorporated with this sump pump. This containment or separator system shall be provided by others as well.
17. A hoist beam (by others) is required at the top of the elevator hoistway and shall be above the minimum clear overhead of 12'-4" requirement, with 2" minimum space between the top of beam to the shaft ceiling.
18. All patching, painting, grouting, etc. at all levels shall be done by others, not Otis.
19. Finish flooring material for the elevator shall be provided and installed by others, not by Otis.
20. If all General Contractor or sub-contractor related work for the elevator installation is not completed or if either temporary and (or) permanent power is unavailable and we must leave the project because we cannot continue or complete the installation of the elevator, a re-mobilization cost of \$2,500.00/ each re-mobilization will be charged to the General Contractor at our normal billing rates.
21. A pre-action panel for smoke detection is required and this panel cannot be located within the elevator machine room per National and State code requirements. At a minimum, a smoke sensor is required within the elevator machine room. Special Emergency Service operation or Fireman's Service shall be a part of the elevators feature.
22. Our installation cost does not include labor for a remote machine room condition. If there is a change to the machine room location, there will be an increase in labor cost necessary to install hydraulic oil plumbing and necessary wiring between the elevator hoistway and machine room.

This quotation is valid for sixty (60) days, and is predicated upon completion of work prior to December 31, 2005 contingent on timely receipt of contract and approvals.

We appreciate the opportunity to submit this quotation and look forward to working with you.

OTIS ELEVATOR COMPANY



Keith Mirsola
Sr. Account Manager

9.7.04
Date 11-7-04

Otis Elevator Company

North American Area
793 South Hotel Street
Honolulu, HI 96813



Otis

A United Technologies Company

August 19, 2004

Mr. Hank Iida
T. Iida Contracting, Ltd.
45-558 C Kanehameha Highway
Kaneohe, Hawaii 96744

Reference: Mililani Community Transit Center
Bid For Complete Elevator Material Only- One (1) 2-Stop Holeless Hydraulic Passenger Elevator

Dear Mr. Iida:

As requested, we shall furnish the elevator material complete for One (1) holeless hydraulic 2-stop passenger elevator ONLY, for the above project as covered by Pages 14220-1 through 14220-16 of the Architect's specifications dated November 2002 and as shown on the Architect's Drawing Nos. A5.0, A5.1, & A3.1 with any clarifications noted below and in accordance with our standard terms & conditions for the sum of TWENTY ONE THOUSAND TWO HUNDRED TWO AND NO/100 DOLLARS, INCLUDING STATE OF HAWAII TAX (\$21,202.00). (EXCLUDING ALL FREIGHT COST FOR SHIPPING AND TRUCKING OF THE ELEVATOR MATERIAL FROM THE FACTORY, THIS SHALL BE BILLED AND PAID DIRECTLY TO THE GENERAL CONTRACTOR ADDRESSED ABOVE).

This proposal is submitted with the understanding that any contract resulting therefrom will be subject to review and mutual acceptance of all terms and conditions contained therein. It is conditioned on neither party being liable to the other for any loss, damage or delay due to any cause beyond your or our reasonable control, including but not limited to acts of government, strikes, lockouts, fire, explosion, theft, floods, riot, civil commotion, war, malicious mischief or act of God. Under no conditions, shall either party be liable for special, indirect, or consequential damages in contract, tort, including negligence, warranty or otherwise, notwithstanding any indemnity provisions to the contrary.

The above quotation is based on all work being performed during our regular working hours and on the job site conditions outlined in the section, "Preparatory Work By Others" prevailing at the beginning and during installation of the elevator equipment. The section "Preparatory Work by Others" begins on page five (5) of this proposal.

In addition to the above the following clarifications apply:

1. The equipment described here requires a hoistway with the following dimensions: 8'-6" wide x 5'-9" front to back, a pit 4'-0" deep and a minimum 12'-4" overhead.
2. The equipment requires a machine room 5'-9" wide x 7'-4" front to back and a minimum 7'-6" overhead clearance. The door is to have a 3'-0" clear opening.
3. Our bid is based on manufacturing lead-time of 16 - 18 weeks after approvals. Please allow 3-4 weeks shipping. **NOTE: THE SHIPPING SHALL BE PAID DIRECTLY FORM THE GENERAL CONTRACTOR TO THE SHIPPING COMPANY OF THEIR CHOICE. THEY WILL HAVE TO MAKE ALL NECESSARY ARRANGEMENTS TO GET THE EQUIPMENT EITHER DELIVERED TO THE SELECTED SHIPPING COMPANY OR HAVE THAT COMPANY PICK UP THE EQUIPMENT FROM THE OTIS FACTORY.**
5. Our bid is based on Otis' standard pre-engineered model cab design; plastic laminate (Wilsonart) & powder paint selections to be made from Otis' standard selection chart.
6. Our hoistway entrances do not require you to furnish steel angles to support each hoistway lobby sill. Otis uses an entrance arrangement eliminating the need for this angle and the associated material and labor costs. Our sill also do not require grouting under the sill, but may require grouting between the face of the sill and the finished floor (grouting by others).
7. The elevator equipment shall be sold for the agreed price plus any applicable state use and/or sales tax.

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August 19, 2004

Otis Elevator Company

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11. The term of this equipment sale shall require the full price to be due and paid in full to Otis within thirty (30) days after the elevator material order is placed. There shall be no retainage percentage for this material in any way.
 12. Price includes naming other parties on an Owners' and Contractor's Protective Liability Insurance Policy in lieu of naming other parties as additional insureds. We do not waive our, or our insurer's rights of subrogation.
 14. The speed for this elevator unit we are bidding shall be at 100 feet per minute in lieu of the specified 125 foot per minute due to the additional clear over head required for a car speed of 125 feet per minute which is 12'-8" high, including an increase in pit depth of 4'-9" deep. The pit for this 100 fpm elevator we propose is at 4'-0" as specified in architects drawing.
 15. Finish flooring material for the elevator shall be provided and installed by others, not by Otis.
 16. Vandal resistant buttons shall be provided for both the car operating panel and the hall button fixtures. Standard buttons within the car cannot be mixed with vandal resistant buttons at the hall fixtures.
 17. We shall provide our standard on-board diagnostic system with this units controller. A hand held tool or laptop unit will not be provided with this elevator unit.
 18. The ADA phone shall be mounted integrally into the car operating panel complying to ADA height standards. A phone cabinet shall not be provided.
 19. A pre-action panel for smoke detection is required and this panel cannot be located within the elevator machine room per National and State code requirements. At a minimum, a smoke sensor is required within the elevator machine room. Special Emergency Service operation or Fireman's Service shall be a part of the elevators feature.
 20. We shall provide our special/standard satin stainless steel cylindrical hand rail design in lieu of the specified architects handrail.

This quotation is valid for sixty (60) days, and is predicated upon completion of work prior to December 31, 2005 contingent on timely receipt of contract and approvals.

We appreciate the opportunity to submit this quotation and look forward to working with you.

OTIS ELEVATOR COMPANY


Keith Muranka
Sr. New Equipment Manager