

2007 DEC 12 A 10:32



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

In the Matter of)	PCH-2007-5
)	
TED'S WIRING SERVICE, LTD.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

On September 17, 2007, Ted's Wiring Service, Ltd., ("Petitioner"), filed a request for administrative review of the Department of Transportation, State of Hawaii's ("Respondent") September 6, 2007 decision to deny Petitioner's September 10, 2007 protest in connection with a project designated as *Statewide Maritime Identification Credentialing System, Job No. H.C. 90005, Port Security Grant Project No. 2322*. ("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 October 11, 2007, the matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Lyle K. Terayama, Esq. appeared for Petitioner; Stella M.L. Kam, Esq. appeared for Respondent¹.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments. Accordingly, on October 19, 2007, Petitioner filed its post-hearing brief and on October 26, 2007, Respondent filed its post-hearing brief. Petitioner's memorandum in response to Respondent's brief was filed on October 31, 2007.

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

II. FINDINGS OF FACT

1. In or about March 2006, Respondent issued a Notice to Bidders ("IFB") for the purpose of soliciting bids for the construction of the Project.

2. The Project generally involved the furnishing and installation of identification and access control equipment and associated electrical work.

3. The Project included painting work for which a C-33 specialty contractor's license was required². The General Notes of the IFB described the required painting work as, "Paint all exposed raceways and boxes with two coats two-part epoxy based primer and two coats polyurethane enamel finish to match surrounding surfaces."

4. Bids were originally due and scheduled to be opened on April 6, 2006. By addendum, the bid opening date was subsequently moved to April 5, 2007.

6. Three bids were submitted by the April 5, 2007 deadline.

7. Paul's Electrical Contracting, Inc. ("Paul's Electrical") was the apparent low bidder, having submitted a bid of \$1,207,000.00. Petitioner was the second lowest bidder, having submitted a bid of \$1,264,402.00.

¹ Petitioner's Exhibits 1 – 40 and Respondent's Exhibits 1 – 12 were received into evidence at the hearing. On November 27, 2007, the parties stipulated to the admission of Petitioner's Exhibit 42.

² Jamie Ho, Respondent's Construction and Maintenance Branch Chief, testified that the IFB permitted bidders to arrange to have the painting work performed "off-site". However, because the low bidder had indicated to Respondent that it intended to have the painting work performed on-site, a C-33 licensed contractor was required.

8. Paul's Electrical did not include or otherwise identify in its bid the name of a subcontractor holding a C-33 license. Petitioner, on the other hand, listed a C-33 subcontractor, LA Painting, Ltd., in its bid to perform "painting".

9. Integrated Construction, Inc. was the only subcontractor listed in Paul's Electrical's bid. Like Paul's Electrical, Integrated Construction, Inc. did not possess a C-33 contractor's license. Paul Adachi, Jr. of Paul's Electrical also serves as the President of Integrated Construction, Inc.

10. In its bid, Paul's Electrical described the nature and scope of Integrated Construction, Inc.'s work on the Project as, "Hire/coordinate carpentry, Painting & Lead Paint Abatement, Paving Contractors".

11. Prior to the bid submission deadline, LA Painting, Ltd. had provided Petitioner with a proposal to perform the painting work required on the Project for \$26,575.00, including labor and materials.

12. Following the opening of the bids, LA Painting, Ltd. received a request from Paul's Electrical for a proposal to perform the painting work on the Project.

13. LA Painting, Ltd. informed Paul's Electrical of the quotation it had previously provided to Petitioner. Paul's Electrical requested a proposal from LA Painting, Ltd. for \$11,500.00 or less with Paul's Electrical paying for the materials.

14. On or about April 12, 2007, LA Painting, Ltd. provided Paul's Electrical with a written proposal to perform the painting work on the Project for \$11,500.00. The Proposal stated in part:

All materials, subsistence which includes air fare, transportation, lodging, meal allowance and other related expenses shall be provided by Paul's Electric.
No other painting works involved except conduits only.
Delivery & pick-up of conduits to our shop shall be by others. Color samples to match shall be obtained by others.

15. On April 16, 2007 and April 17, 2007, LA Painting, Ltd. contacted Paul's Electrical and Petitioner, respectively, and withdrew its proposals³.

³ According to the evidence, LA Painting, Ltd. withdrew its proposals "to eliminate any suggestion of an unfair motive".

16. On or about April 18, 2007, a proposal from Akira Yamamoto Painting, Inc. to perform the painting required on the Project was sent to “Paul’s Electrical, (Attention: Mr. Paul Adachi, Jr.)” The proposal was for the sum of \$10,960.00⁴.

17. By letter dated May 17, 2007, Petitioner submitted a bid protest to Respondent, alleging that although the Project involved work for which C-19 and C-33 contractor’s licenses were required, Paul’s Electrical’s bid did not list any subcontractor possessing those licenses.

18. By letter dated June 18, 2007 from Paul’s Electrical, Paul Adachi informed Respondent in pertinent part:

* * * *

As noted in the bid, Paul’s Electrical Contracting LLC (“Paul’s”) disclosed that its subcontractor, Integrated Construction, Inc. (“Integrated”), would “hire/coordinate carpentry, painting and lead paint abatement, paving contractors.” I contacted LA Painting because I had worked with them in the past. When I contacted LA Painting to get a quote for the work, I did so in my capacity as president of Integrated. Although the Proposal from LA Painting was forwarded to Paul’s, the Proposal was directed to me. When LA Painting withdrew [its] both its proposals after the bid protest by Ted’s Wiring, I contacted another painting contractor that I had worked with in the past, Akira Yamamoto. The Akira Yamamoto Proposal was also forwarded to Paul’s but was directed to me and was in my capacity as President of Integrated. Thus, although the painting contractors may have assumed that the proposals were for Paul’s, the painting contractor would be subcontracted to Integrated and not Paul’s.

* * * *

19. By letter dated September 6, 2007, Respondent denied Petitioner’s protest:

* * * *

The Department of Transportation (“DOT”) has completed its evaluation of bids, and has determined that the bid

⁴ It was not altogether clear from the record whether the proposal included labor and materials or labor only.

submitted by Paul's Electrical Contracting, Inc. ("Paul's") was responsive and responsible, and that the DOT plans to award the Project to Paul's.

Your concerns regarding Paul's failure to have the appropriate license or to list any subcontractor to perform the lead abatement and painting work have been reviewed. Lead abatement work is not a licensed activity covered under Title 16, Chapter 77, Hawaii Administrative Rules ("HAR"). The C-19 Asbestos specialty license that you mentioned in your letter covers only asbestos abatement work⁵. The asbestos contractor license work in the Department of Commerce and Consumer Affairs' HAR reads as follows:

* * * *

As for Paul's failure to either have a C-33 Painting specialty license, or list a subcontractor to perform the painting work, the DOT has verified with Paul's that they intend to have their listed subcontractor Integrated Construction hire Akira Yamamoto ("Akira") to perform the painting work. The amount of work to be performed by Akira is less than 1% of Paul's total bid, and Akira does hold a valid C-33 specialty license. In accordance with Section 103D-302, Hawaii Revised Statutes ("HRS") and Section 8.1 of the Project specifications, the DOT has always allowed firms to add a subcontractor after bid opening if the value of the work to be performed is less than or equal to 1% of the total bid amount. In this case, the sub-bids from the painting contractors split their bid to show how much the labor portion of the painting work would be and the cost of materials separate. The DOT did not require bidders to list material suppliers for this Project, and would not reject a bid for failure to do so.

* * * *

20. On September 17, 2007, Petitioner filed its request for administrative review of Respondent's September 6, 2007 denial of Petitioner's bid protest.

⁵ Petitioner acknowledged at the prehearing conference that it was no longer pursuing its claim that a C-19 specialty contractor license was required to perform the lead abatement work called for in the IFB.

III. CONCLUSIONS OF LAW

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).

HRS §103D-302 provides in relevant part:

* * * *

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.*

(Emphasis added).

The evidence adduced at the hearing established that a C-33 specialty contractor license was required to perform the painting required on the Project. The evidence also proved that neither Paul's Electrical nor its only-listed subcontractor, Integrated Construction, Inc., held such a license.

Petitioner contends that under these circumstances, Paul's Electrical's bid was nonresponsive to the IFB and that Respondent cannot waive Paul's Electrical's failure to list a C-33 subcontractor in its bid because "the value of the work to be performed" by the painting subcontractor exceeds 1% of the total bid amount. For the purpose of applying the exception to the listing requirement, it is Petitioner's position that the value of the work necessarily consists of the value of *both* the labor and materials required to complete the painting work as specified in the project plans and specifications for that trade and that Paul's Electrical's intentional solicitation of labor-only sub-bids from LA Painting, Ltd. and Akira Yamamoto Painting, Inc. does nothing to change this.

On the other hand, Respondent contends that there is nothing in HRS Chapter 103D that (1) defines the "value of the work to be performed" as necessarily consisting of both labor and materials, or (2) otherwise prohibits a bidder from requesting and a subcontractor from providing a labor-only proposal to the bidder. On the contrary, Respondent argues that, the term, "work", as used in HRS §103D-302(b), is synonymous with "labor", and therefore can consist of labor costs only. According to Respondent, so long as the amount of the subcontract is equal to or less than 1% of the total bid amount and the acceptance of the bid is in the State's best interest, the failure to list a necessary subcontractor may be waived. Indeed, Respondent's position appears to be consistent with this Office's decision in *Okada Trucking Co., Ltd. v. Board of Water Supply, et al., PCH-99-11 (1999)(reversed on other grounds)*. There, the petitioner alleged that the Board of Water Supply's waiver of the non-responsive aspects of the low bidder's bid and the award of the contract to the low bidder was unlawful because, among other things, the plumbing subcontractor's proposal was for labor only and not for labor and materials as a package bid which would have resulted in a plumbing subcontractor's proposal that would have been in an amount that was more than one percent of the total bid amount. According to the petitioner, the award was unlawful because the subcontract amounts were reduced to fall below one percent of the total bid amount by "breaking up" the plumbing and reinforcing steel subcontractor's portions of work by separating the labor portion from the materials and

supplies portion and having the subcontractors submit proposals to provide only labor with the Board of Water Supply supplying all necessary materials and supplies, and, in the case of the plumbing subcontractor also providing labor for pipefitting as well. The Hearings Officer concluded that:

* * * *

although Petitioner had established that the general practice within the Honolulu contractor community was to request subcontractors to submit proposals which included all labor and materials needed to accomplish their portion of the project, it had not established that it was unlawful or even improper for a general contractor to limit the subcontractor's proposal to that of providing only the necessary labor with the general contractor providing all materials and supplies and unskilled labor, as the case may be, to perform the subcontractor's portion of the project. Consequently, the Hearings Officer further concludes that: (1) [the low bidder] had not acted unlawfully in having the subcontractors who were to do the plumbing and reinforcing steel work submit proposals for labor only; and (2) the proposals thus submitted amounted to less than one percent of [the low bidder's] total Project bid amount thereby qualifying [the low bidder] for Respondent's waiver of [the low bidder's] failure to list the plumbing, reinforcing steel and roofing subcontractors in its bid.

Notwithstanding the foregoing arguments, however, the preponderance of the evidence established that the painting subcontractor was to be hired by Paul's Electrical's listed subcontractor, Integrated Construction, Inc., rather than by the bidder. In that regard, this Office has previously determined that there is no requirement that bidders list subcontractors below the first tier. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)* (the listing requirement is aimed entirely at preventing the general contractor from bid shopping). HRS §103D-302(b), however, still requires that bidders disclose the nature and scope of the work to be performed by its listed subcontractor, and a subcontractor can only subcontract work that is included within the nature and scope of its work as disclosed in the bid. *Frank Coluccio Construction Company, supra.*

Here, the unchallenged evidence established that (1) Paul's Electrical's listed subcontractor, Integrated Construction, Inc., rather than Paul's Electrical, was to have subcontracted the painting work, and (2) the description of the nature and scope of Integrated Construction, Inc.'s work as set forth in the bid specifically and unambiguously included "painting". Under these circumstances, the Hearings Officer finds and concludes that the subcontractor listing requirement is inapplicable here, and that in any event, Paul's Electrical was not required to list a painting contractor in its bid. Having arrived at this conclusion, the Hearings Officer need not address the propriety of Respondent's intended waiver of Paul's Electrical's failure to list a C-33 painting subcontractor.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that Petitioner's request for administrative review be and is hereby dismissed and that each party bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: DEC 12 2007

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