



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 MAR 24 A 10:59

HEARINGS OFFICE

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

In the Matter of)	PCH 2008-21
)	
P.B. SULLIVAN CONSTRUCTION, INC.,)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION; APPENDIX "A"
)	
Petitioner,)	
)	
vs.)	
)	
DEPARTMENT OF FINANCE, COUNTY OF MAUI,)	
)	
Respondent,)	
)	
and)	
)	
GOODFELLOW BROS., INC.,)	
)	
Intervenor.)	

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

I. INTRODUCTION

On December 15, 2008, P.B. Sullivan Construction, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Finance, County of Maui's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On January 9, 2009, a stipulation was filed to allow Goodfellow Bros., Inc. ("Intervenor") to intervene in this proceeding.

On January 12, 2009, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Daniel T. Kim, Esq., Respondent was

represented by Cheryl Tipton, Esq. and Intervenor was represented by Robert T. Takamatsu, Esq. At the pre-hearing conference the parties agreed to prepare a set of stipulated facts. The parties also agreed to a briefing schedule and that oral arguments would be conducted by telephone conference on February 19, 2009. The Hearings Officer issued a Pre-Hearing Order on January 13, 2009.

The Stipulation of Facts was filed on January 30, 2009. The parties filed their opening briefs on February 5, 2009 and reply briefs were filed on February 12, 2009.

On February 19, 2009, oral arguments were heard by the undersigned Hearings Officer. Petitioner was represented by Mr. Kim, Respondent was represented by Ms. Tipton and Intervenor was represented by Mr. Takamatsu. The matter was taken under advisement.

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.

II. FINDINGS OF FACT

The Hearings Officer adopts Findings of Fact numbers 1-17 as provided in Appendix “A”.¹

III. CONCLUSIONS OF LAW

Petitioner argued that its bid should not have been rejected because as the holder of an “A” general engineering contractors license, it may serve as a prime/general contractor to manage and coordinate all work on the subject project, including the construction of a scorekeeper’s and concession booth, dugout shelter and restrooms. Petitioner has the burden of proving by a preponderance of the evidence that Respondent’s determinations were not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Hawai’i Revised Statutes (“HRS”) § 444-7 provides in part:

¹ Declarations submitted with Respondent’s and Intervenor’s briefs are stricken and have not been considered. Exhibits “1” – “9” have not been included with this decision as they appear to be the supporting documents for Findings of Fact numbers 1-17.

§ 444-7 Classification. (a) For the purpose of classification, the contracting business includes any or all of the following branches:

. . . .

(b) A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects...parks, playgrounds and other recreational works...and trenching, paving and surfacing work and cement and concrete works in connection with the above mentioned fixed works.

(c) A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

It is not disputed that Petitioner and its subcontractors hold all of the specialty license classifications to perform the actual work on the subject project. The only issue to be resolved is whether, as an “A” general engineering contractor, Petitioner can perform the work of a general building contractor and manage and coordinate the construction of the structures that are a part of the subject project.

Although Petitioner may be qualified and fully able to manage and coordinate all the work on the subject project, HRS § 444-9 prohibits a person within the purview of HRS Chapter 444 to act or assume to act as a general building contractor (who also has the responsibility to “superintend”) without a license previously obtained under HRS Chapter 444. Accordingly, the Hearings Officer concludes that given the language of HRS Chapter 444, Petitioner’s argument that an “A” general engineering contractor can manage and coordinate all of the work on the subject project without also holding a “B” general building contractor’s license must be rejected.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearings Officer finds that Petitioner failed to prove by a preponderance of the evidence 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. Accordingly, Respondent's denial of Petitioner's bid protest is affirmed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, _____.

MAK 24 2009

/s/ SHERYL LEE A. NAGATA

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

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Attorneys for Respondent
DEPARTMENT OF FINANCE, COUNTY OF MAUI

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

In the Matter of)	PCH-2008-21
)	
P. B. SULLIVAN CONSTRUCTION,)	
INC.,)	STIPULATION OF FACTS;
)	EXHIBITS "1"- "9"
Petitioner,)	
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vs.)	
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DEPARTMENT OF FINANCE, COUNTY OF)	
MAUI,)	
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Respondent,)	
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and)	
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GOODFELLOW BROS. INC.,)	
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Intervenor.)	
)	
)	

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS
2009 JAN 30 P 3 47
HEARINGS OFFICE

STIPULATION OF FACTS

IT IS HEREBY STIPULATED by and between P.B. Sullivan Construction, Inc., the Department of Finance, County of Maui, and Goodfellow Bros., Inc., through their counsel, that:

1. The Department of Parks and Recreation of the County of Maui prepared a project manual dated September 30, 2008 with Bidding Documents and Specifications for Furnishing Labor and Materials for the South Maui Community Park Phase IA ("subject project"), Job No. P08/009, T.M.K.: 2-2-002:042, Kihei, Maui, Hawaii.

2. On or about October 3 and 5, 2008, a NOTICE To CONTRACTORS - Advertisement to Bid ("Bid Notice") on the subject project appeared in the Maui News. The Bid Notice stated:

All prospective bidders shall possess an "A" General Contractors License held in the State of Hawaii.

A true and correct copy of the language for the advertisement is attached as Exhibit "1".

3. Included in the subject project were soccer and softball fields, a scorekeeper's and concession booth, dugout shelter, two buildings for restrooms, and various other park infrastructure.

4. Section 1.05A of the instructions to bidders in the bidding documents and specifications states as follows:

QUALIFICATIONS OF BIDDER

Bidder shall certify that he is, at the time of bidding, and shall be, throughout the period of the contract, licensed in accordance with Chapter 444, Hawaii Revised Statutes, as amended, to do the type of work contemplated in the project manual. Bidder shall further certify that he is skilled and regularly engaged in the general class and type of work called for in the project manual.

A true and correct copy of Section 1.05A of instructions to bidders for the subject project is attached as Exhibit "2".

5. Section 2.03 of the general conditions in the bidding documents and specifications required

CONTRACTORS LICENSE REQUIRED

All bidders and their subcontractors shall be licensed in accordance with Chapter 444, HRS, and as required in the notice to bidders. It is the sole responsibility of the bidder to review the requirements of the project and determine the appropriate licenses that are required to complete the project.

A true and correct copy of Section 2.03 of the General Conditions for the subject project is attached as Exhibit "3".

6. Bids were submitted and opened on November 7, 2008. A true and exact copy to the bid summary is attached as Exhibit "4".

7. P.B. Sullivan Construction, Inc. ("PBSC") submitted the low bid of \$11,172,564.00. A true and correct copy PBSC's bid is attached as Exhibit "5".

8. PBSC held "A" and "C" licenses at the time it made its bid and on the date of the bid opening, but did not hold a "B" license.

9. None of the five subcontractors listed by PBSC in its bid held a "B" license.

10. At the request of the County of Maui's consultant, on November 14, 2008, PBSC provided a list of 17 subcontractors for the project whose value of work fell below 0.5% of PBSC's total bid amount and were not disclosed in PBSC's bid in accordance with the subcontractor listing requirements in the bid documents, and listed the 5 subcontractors who were identified in PBSC's bid. A true and

correct copy of the subcontractor list submitted by PBSC is attached as Exhibit "6".

11. Pursuant to the bid by PBSC, the building portions are valued at \$252,000.00 for each of two restrooms, \$200,415.00 for a scorekeeper's and concession booth, and \$23,040.00 for the dugout shelter.

12. On November 26, 2008, Kalbert Young, Director of Finance for the County of Maui, sent a letter notifying Lloyd Norquist, Vice-President of PBSC, that PBSC's bid was being rejected because PBSC did not have a "B" license and the County of Maui believed that a "B" licensed subcontractor needed to be listed on this bid to cover the management and coordination of the building portion of the project. A true and correct copy of the letter dated November 26, 2008 is attached as Exhibit "7". PBSC specifically reserves the right to object to and present arguments in response to the contents of the aforementioned Exhibit "7".

13. On December 3, 2008, PBSC filed a protest with Director Young. A true and correct copy of PBSC's protest letter is attached as Exhibit "8".

14. On December 8, 2008, Director Young denied the protest by reiterating that the rejection of the PBSC bid was based on the fact that PBSC does not hold a "B" license and did not list a subcontractor with a "B" license for the specific purpose of managing and coordinating the building portions of the project. A true and correct copy of Director Young's December 8, 2008 letter is attached as Exhibit "9". PBSC specifically reserves the right

to object to and present arguments in response to the contents of the aforementioned Exhibit "9".


15. On December 15, 2008, PBSC filed its appeal with the Department of Commerce and Consumer Affairs, Office of Administrative Hearings.

16. The appeal by PBSC was timely filed.

17. The parties waive the 21-day commencement of hearing requirement set forth in Hawaii Revised Statutes § 103D-709(b).

18. This Stipulation may be executed in any number of counterparts by the parties hereto, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

DATED: Honolulu, Hawaii, JAN 3 0 2009.



DANIEL T. KIM
Attorney for Petitioner
P.B. SULLIVAN CONSTRUCTION, INC.

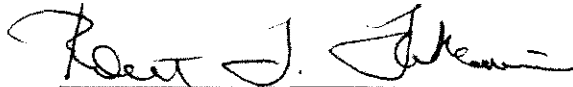
DATED: Wailuku, Maui, Hawaii, JAN 3 0 2009.

BRIAN T. MOTO
Corporation Counsel
Attorney for Respondent
COUNTY OF MAUI, DEPARTMENT
OF FINANCE

By 

CHERYL TIPTON
Deputy Corporation Counsel

DATED: Honolulu, Hawaii, January 30, 2009.



ROBERT T. TAKAMATSU
Attorney for Intervenor
GOODFELLOW BROS., INC.

APPROVED AND SO ORDERED:

/s/ SHERYL LEE NAGATA

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

In the Matter of P. B. SULLIVAN CONSTRUCTION, INC., vs. DEPARTMENT OF FINANCE, COUNTY OF MAUI and GOODFELLOW BROS. INC., Case No. PCH 2008-21, Stipulation of Facts