



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 APR -3 A 11: 50

HEARINGS OFFICE

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

In the Matter of)	PCH 2009-1
)	
HAWAIIAN DREDGING)	HEARINGS OFFICER'S FINDINGS OF
CONSTRUCTION COMPANY,)	FACT, CONCLUSIONS OF LAW AND
)	DECISION
Petitioner,)	
)	
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
GOODFELLOW BROS., INC.,)	
)	
Intervenor.)	

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

I. INTRODUCTION

On January 21, 2009, Hawaiian Dredging Construction Company, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Transportation, State of Hawai'i's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On January 29, 2009, a stipulation was filed to allow Goodfellow Bros., Inc. ("Intervenor") to intervene in this proceeding.

On February 4, 2009, Petitioner filed its Pre-Hearing Memorandum. On February 5, 2009, Intervenor filed a Motion to Strike Petitioner's Pre-Hearing Memorandum and a

Motion to Strike Claims Regarding Kiewit Pacific and Regarding Project Duration (“Motions”). On February 5, 2009, Respondent filed a Joinder to Intervenor’s Motions.

On February 6, 2009, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Keith Y. Yamada, Esq. and David F.E. Banks, Esq. Respondent was represented by Stella M.L. Kam, Esq. and Intervenor was represented by Robert T. Takamatsu, Esq. and Jeff A. Lau, Esq. As an initial matter, arguments were heard on Intervenor’s Motions. After hearing arguments from the parties, the Hearings Officer granted the Motions in part, and ordered that issues and arguments not raised in Petitioner’s initial protest or the request for hearing be stricken and not be considered at the hearing.

After the Hearings Officer’s ruling, the parties stipulated that Petitioner’s pre-hearing memorandum would be considered Petitioner’s second bid protest and that Respondent would issue a denial letter before the hearing concluded so that the issues raised in the second bid protest could be consolidated within PCH 2009-1 and considered at the hearing. By a letter dated February 6, 2009 and received during the hearing, Respondent denied Petitioner’s protest. On February 11, 2009, for procedural and administrative purposes, Petitioner filed a written request for hearing of Respondent’s February 6, 2009 denial of Petitioner’s second protest.

At the close of the hearing, the parties were directed to file written closing arguments as well as proposed findings of fact and conclusions of law. The parties agreed to file their closing arguments and proposed findings of fact and conclusions of law by February 13, 2009 and responses by February 18, 2009. Respondent and Intervenor filed their written closing arguments and proposed findings of fact and conclusions of law on February 13, 2009. Petitioner filed its written closing argument on February 13, 2009 and its proposed findings of fact and conclusions of law on February 17, 2009.

On February 18, 2009, the parties filed their responses to the pleadings filed earlier and Intervenor filed a Motion to Strike Petitioner’s Draft Findings of Fact, Conclusions of Law and Decision. Respondent joined in Intervenor’s Motion. On February 23, 2009, the Hearings Officer issued an order denying Intervenor’s Motion, but allowed Respondent and Intervenor to file supplemental memoranda by February 27, 2009. On February 27, 2009, Intervenor filed a supplemental memorandum.

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

As a preliminary matter, the proposed findings of fact and conclusions of law filed by the parties have been considered. To the extent that the proposed findings and conclusions submitted are in accordance with the findings and conclusions stated herein, they have been accepted, and to the extent they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as the Hearings Officer determined them to be not relevant or necessary to a proper determination of the material issues presented.

1. Respondent issued a Request for Proposals (“RFP”) for a design-build highway project in Kona. The RFP was entitled “Queen Kaahumanu Highway Widening Phase 2, Kealakehe Parkway to Keahole Airport Road, Federal Aid Project No. NH-019-1(38), District of North Kona, Island of Hawai’i (the “Project”). The Project involves the widening of Queen Kaahumanu Highway from an existing two-lane highway to a four-lane divided highway.

2. Proposals were submitted by Petitioner, Intervenor and Kiewit Pacific Co. (“Kiewit”).

Traffic Impacts and Management

3. The Technical Provisions of the RFP state that “[t]he construction phasing and traffic control around the work areas shall contain...(2)-11 feet wide travel lanes minimum; ten feet wide paved shoulder on both sides for pedestrians and bicyclists...”

4. The Technical Provisions of the RFP set forth the breakdown of points for the design concept documents as: 20 maximum points for Traffic Impacts and Management, 20 maximum points for Project Duration, 20 maximum points for Project Understanding and 10 maximum points for Aesthetics of Design, Context Sensitivity (archeology/cultural history).

5. With respect to Traffic Impacts and Management, 11 points are given for “Standard—maintains the minimum of one lane of thru traffic in each direction of travel”; 12-15 points for “Project phasing allows early opening of travel lanes to decrease traffic queue; and 16-20 points for “Traffic control plan allowing safe, functional utilization of

additional travel lanes prior to completion of project or other method to decrease traffic queue or decrease travel time delays.”

6. Intervenor’s Design Concept documents, Section 8, Traffic Management and Work Zone Traffic Control state in part:

8.1.2 Work During Off Peak Hours

We plan to perform the work most disruptive to traffic at night during off-peak hours. This will include all work requiring temporary lane closures and alternating one lane traffic control[.]

8.2 Traffic Control Planning

...
A minimum of one northbound and one southbound travel lane will be provided at all times.

7. The Schematic Drawings submitted with Intervenor’s Best and Final Offer (“BAFO”) for day shift work state that “contra-flow lanes shall not be considered” and that “all night work shall be completed and traffic flow restored to RFP flow requirements for stated day time use.”

8. The Schematic Drawings submitted with Intervenor’s BAFO for night shift work specifically call for the use of “single-lane alternating traffic.” This is evidenced by signage warning drivers of a flag or stick man and a “one lane road”.

9. Page 21 of Intervenor’s BAFO Schematic Drawings states: “Night-work to commence only with DOT approval.”

10. Page 23 of Intervenor’s BAFO Schematic Drawings describing Typical Intersection closures calls for single lane alternating traffic with the notation that “two-way traffic will be maintained at all times during the day.”

11. According to Gary Iwamoto, Petitioner’s Project Manager, utilizing single lane alternating traffic for night work reduces the cost of construction and the duration of the Project.

12. Petitioner received 15 of 20 points for Traffic Impacts and Management, Intervenor received 13 of 20 points, and Kiewit received 10 of 20 points.

13. A spreadsheet prepared by Respondent that listed pros and cons for each proposal noted under “Cons” that Intervenor provided provisions for contra flow “only if necessary”. The spreadsheet also noted that Kiewit “did not provide 2 11-foot lanes at night.”

Project Duration

14. The Technical Provisions of the RFP states that the contract time “shall be a maximum of 900 calendar days from the date of Design Notice to Proceed to completion of all construction work items, or the duration shown in the Project schedule submitted as part of the Design Concept Documents...plus 30 calendar days, whichever is less.”

15. With respect to Project Duration, 0-10 points is given for “Project is completed within the allowed project duration”; 11-15 points for “Project is completed a minimum of 90 days less than the allowed project duration”; and 16-20 points for “Project is completed a minimum of 90 days less than the allowed project duration and the construction phasing results in a shorter construction duration than other qualified proposals.”

16. A spreadsheet prepared by Respondent that listed the pros and cons for each proposal noted that Petitioner had a 374 day construction phase with a 561 day project completion, Intervenor had a 541 day construction phase with a 751 day project completion and Kiewit had a 313 day construction phase with a 414 day project completion.

17. Petitioner and Intervenor received 15 points and Kiewit received 18 points for Project Duration. Kiewit was ranked number 1 and Petitioner and Intervenor were ranked number 2.

18. The spreadsheet also noted under “Cons” that Intervenor provided for provisions of contraflow “only if nec” and that Kiewit’s:

project schedule is predicated on using contraflow during nightwork to maximize productivity throughout the construction phase, however this does not meet RFP requirement to provide two 11-foot lanes and two 10-foot shoulders. See TP-3. The usage of contraflow specifically allows for increased productivity by increasing the available work zone footprint.

The spreadsheet listed other ways that Kiewit’s proposal failed to meet the RFP requirements.

19. Petitioner's price proposal was \$69,625,000.00 (price score 40), Intervenor's price proposal was \$77,199,999.00 (price score 36.1) and Kiewit's price proposal was \$80,662,235.00 (price score 34.5).

20. Petitioner's design concept score was 40, Intervenor's score was 44 and Kiewit's score was 41.

21. Petitioner's total score was 80, Intervenor's total score was 80.1 and Kiewit's score was 75.5. The total score is the sum of the design concept score and the price score.

22. The Technical Provisions provide that the project will be awarded to the contractor with the highest total of design concept score and price score. Respondent awarded the Project to Intervenor.

23. By a letter dated December 24, 2008, Petitioner protested the award to Intervenor, arguing that Intervenor's proposal was non-responsive because it included the use of contra flowed traffic and requested that Respondent recompute the scoring, allowing for only proposals meeting the minimum criteria.

24. By a letter dated January 14, 2009, Respondent denied Petitioner's protest stating in part:

Based on the Traffic Routing/Staging Diagrams of [Intervenor's] submittal, it was clear to the evaluation committee and the advisory board that [Intervenor's] construction phasing and traffic control plan around the work areas does contain the minimum (2)-11 foot wide travel lanes and 10-foot wide paved shoulders. [Intervenor's] proposal did also contain provisions for single-lane alternating traffic through several intersection areas for night shift work when transitioning existing traffic to traffic control areas. Even if deemed necessary to use single-lane alternating traffic under these conditions, [Respondent] does not believe the specifications prohibit such actions. In any case, such action would require [Respondent] approval, and this option would also be available to any other offeror with [Respondent] approval.

...

As indicated previously, it was clear to the evaluation committee and advisory board that [Intervenor's] construction phasing and traffic control plan around the work areas will contain the minimum (2)-11 foot wide travel lanes and 10-foot

wide paved shoulders. As such, [Intervenor's] score for the Traffic Impacts and Management criteria could exceed 11 points.

25. Petitioner filed its request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs on January 21, 2009.

III. CONCLUSIONS OF LAW

Petitioner argued that Intervenor's proposal should be rejected because it did not meet the requirements of the RFP by providing for single lane alternating traffic at night. Petitioner also argued that it should have been awarded the highest number of points for the category "Project Duration" because Kiewit's proposal, which received the highest number of points, should have been rejected because it did not meet the requirements of the RFP. 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") § 103D-303(g) provides:

§ 103D-303 Competitive sealed proposals.

. . .

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set for the in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract shall contain the basis on which the award is made.

Hawai'i Administrative Rules ("HAR") § 3-122-97(b) provides:

§ 3-122-97 Rejection of offer.

. . .

(b) A proposal may be accepted with modification or correction, unless the solicitation states otherwise.

(1) This allowance must be considered in determining whether reasons exist for rejecting all or any part of a proposal.

(2) A proposal shall be rejected for reasons including but not limited to:

(A) The offeror is nonresponsible as determined by subchapter 13;

(B) The proposal, after any opportunity has passed for modification or clarification, fails to meet the announced requirements of the agency in some material respect; or

(C) The proposed price is clearly unreasonable.

Traffic Impacts and Management

There is no dispute that the RFP required that a proposal contain 2 11-foot wide travel lanes minimum and the maintenance of one lane of thru traffic in each direction of travel at all times. There was no indication in the RFP that this requirement could be waived for night work or upon Respondent's approval. The evidence presented established that Intervenor's proposal contained the minimum 2 11-foot wide traffic lanes and a statement that there would be a minimum of one lane of thru traffic in each direction at all times. However, it is clear that Intervenor's Design Concept documents also proposed night work using single lane alternating traffic, although its BAFO noted that night work would commence only with Respondent's approval.¹ Accordingly, the Hearings Officer finds that the preponderance of the evidence showed that Intervenor intended to seek Respondent's approval to use single lane alternating traffic at night. The Hearings Officer also finds that the use of single lane alternating traffic at night affects the price and project duration. This is supported by the undisputed evidence from Petitioner's engineer² that utilizing single lane alternating traffic for night work reduces costs, and by Respondent's evaluation spreadsheet, which specifically notes that "contraflow during nightwork...does not meet RFP requirement to provide two 11-foot lanes and two 10-foot shoulders" and that the usage of contra flow "allows for increased productivity." See, Findings of Fact No. 18. Based on these findings, the Hearings Officer

¹ There was no evidence presented at the hearing to support the notation on the spreadsheet that the night work would be done "only if necessary".

² Intervenor and Respondent did not call any witnesses at the hearing.

concludes that Intervenor's proposal failed to meet the requirements of the RFP in a material respect and pursuant to HAR § 3-122-97, should be rejected.³

Project Duration

In light of the findings and conclusions above, a determination of the issues raised by Petitioner regarding Kiewit's proposal is unnecessary.

Remedies

A. Ratification, Modification or Termination of the Contract

The remedies available to an aggrieved party following the award of the contract are set forth in HRS § 103D-707 and Hawaii Administrative Rules ("HAR") § 3-126-38 and provide in relevant part:

§ 103D-707 Remedies after an award. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interest of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination[.]

§ 3-126-38 Remedies after an award. (a) When there is no fraud or bad faith by a contractor:

(1) Upon finding after award that a state or county employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no

³ The Hearings Officer would also note that pursuant to the evaluation criteria, it is unclear how Intervenor received 13 points, as the scoring guidelines provide that a proposal receives the minimum 11 points if it "maintains the minimum of one lane of thru traffic in each direction of travel." As discussed above, Intervenor's proposal failed to do that.

finding of fraud or bad faith, the chief procurement officer or designee may ratify and affirm, modify, or terminate the contract in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.

(2) If the violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.

(3) If the violation cannot be waived without prejudice to the State or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is no time for resoliciting bids or offers, the contract may be amended appropriately, ratified and affirmed[.]

Based on the evidence presented, the Hearings Officer concludes that the violation cannot be waived without prejudice to Petitioner or Respondent as the violation directly affects price and project duration, material requirements under the RFP. Since the evidence did not establish that performance has begun and that there is no time for resoliciting offers, the Hearings Officer finds that the contract must be terminated.

B. Proposal Preparation Costs

When the contract has been awarded before the resolution of a protest, HRS § 103D-701(g) entitles a protestor to recover its proposal preparation costs if (1) the protest is sustained and (2) the protestor should have been awarded the contract but is not awarded the contract. *See also, Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 at 456-458. Petitioner has shown that Intervenor's proposal should have been rejected, and that Petitioner's point total was second to Intervenor's. Accordingly, Petitioner has shown by a preponderance of the evidence that the contract should have been awarded to Petitioner, and as such, the Hearings Officer concludes that Petitioner is entitled to bid preparation costs.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearings Officer hereby orders as follows:

(1) Petitioner's protest is sustained and award of the contract to Intervenor is terminated;

(2) Intervenor shall be compensated for actual expenses, if any, other than attorneys fees, that were reasonably incurred under the contract and a reasonable profit, with such expenses and profit calculated up to the time of termination;

(3) Petitioner is awarded proposal preparation costs, and

(4) Each party to bear its own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, APR - 3 2009.

/s/ SHERYL LEE A. NAGATA

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