



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 MAY -6 P 12: 26

HEARINGS OFFICE

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

In the Matter of)	PCH 2009-8
)	
KAUAI BUILDERS, LTD.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION; APPENDIX "A"
)	
vs.)	
)	
COUNTY OF KAUAI, WALLACE)	
REZENTES, JR. Director of Finance, in his)	
capacity as Chief Procurement Officer,)	
)	
Respondent,)	
)	
and)	
)	
UNLIMITED BUILDERS, LLC,)	
)	
Intervenor.)	
)	

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

I. INTRODUCTION

On March 11, 2009, Kauai Builders, Ltd. ("Petitioner") filed its request for administrative hearing to contest Wallace Rezentes, Jr., Director of Finance, County of Kauai's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On April 7, 2009, a stipulation was filed to allow Unlimited Builders, LLC ("Intervenor") to intervene in this proceeding.

On March 20, 2009, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Ernest H. Nomura, Esq., Respondent was

represented by Mona W. Clark, Esq. and Intervenor was represented by Todd Y. Hirai, 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 take place on April 15, 2009 if necessary. The parties also agreed to address the Motion to Dismiss (“Motion”) filed by Petitioner on March 20, 2009. The Hearings Officer issued a Pre-Hearing Order on March 27, 2009.

The parties filed their opening briefs on April 6, 2009 and reply briefs were filed on April 14, 2009. The Stipulation of Facts was filed on April 15, 2009. The parties agreed that oral arguments would not be necessary.

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 1-25 as provided in Appendix “A”.¹

III. CONCLUSIONS OF LAW

Respondent argued that Petitioner’s request for hearing should be dismissed because the protest was not filed “five working days after the aggrieved person knows or should have known of the facts giving rise thereto[.]” Respondent argued that its protest was timely because it was filed “within five working days after the posting of award of the contract[.]” See, Hawai’i Revised Statutes (“HRS”) § 103D-701.

Motion to Dismiss

It is not disputed that Intervenor’s bid was submitted in an envelope with a preprinted mailing label which stated a return address of Unlimited Construction Services, Inc. (“UCS”) and that UCS did not submit a Notice of Intent to Bid. It is also not disputed that on December 3, 2008 (the day of bid opening), after the deadline to submit bids, but prior to opening the bids, Respondent conferred with Intervenor’s representatives, in front of

¹ Exhibits “A” – “M” have not been included with this decision as they appear to be the supporting documents for Findings of Fact numbers 1-25.

Petitioner's representative and representatives of the other bidders, that the bid contained in the envelope with UCS's return address was from Intervenor and that the bid opening was permitted to proceed. Petitioner argued that Intervenor's bid should have been rejected at bid opening as non-responsive. Because Petitioner's representative was present at bid opening, Petitioner's protest, as to this issue, should have been filed on or before December 10, 2008, five working days after Petitioner knew that Intervenor's bid had not been rejected at bid opening. Accordingly, the Hearings Officer concludes that Petitioner's protest of this issue was untimely and Respondent's Motion is granted as to this issue.

Respondent also argued that Petitioner's request for hearing should be dismissed because it did not meet the requirements of Hawai'i Administrative Rules ("HAR") § 3-126-59. While Petitioner's request for hearing was technically defective because it did not state the laws and rules involved, the Hearings Officer finds that the attachment of the protest letter and response from Respondent gave sufficient notice of the issues raised. Accordingly, Respondent's Motion is denied as to this issue.

Contractor License Number

Petitioner also argued that Intervenor's bid should be rejected because the license number stated on the Notice of Intent to Bid is Intervenor's responsible managing employee's license number and not Intervenor's license number. Respondent contends that pursuant to HAR § 3-122-31(d) the mistake may be corrected because it would be unreasonable not to allow the mistake to be remedied. It is not disputed that Intervenor holds contractor license number ABC-27106 and was so licensed at the time it submitted the Notice of Intent to Bid and through the present time. It is also not disputed that the license number listed in the bid is Intervenor's license number.

Hawai'i Administrative Rules § 3-122-31(d) provides:

§ 3-122-31 Mistakes in bids.

...

(d) A mistake in a bid discovered after award of contract may be corrected or withdrawn if the chief procurement officer or head of the purchasing agency makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

Hawai'i Administrative Rules § 16-77-3 defines a "responsible managing employee" as "the individual who is a bona fide employee of the contracting entity that maintains a current contractor's license and who qualifies the contracting entity for a contractor's license in the licensed classifications held by the individual." As Intervenor qualifies for its license through its responsible managing employee, the Hearings Officer concludes that it was not "clearly erroneous, arbitrary, capricious or contrary to law" to allow the mistake to be corrected. *See*, HAR § 3-122-31(e).

IV. DECISION

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearings Officer grants Respondent's Motion as to the issue regarding Respondent's acceptance of Intervenor's bid despite being in an envelope with UCS's return address and denies the Motion as to the issue regarding the sufficiency of the request for hearing. As to all other issues raised, the Hearings Officer also 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.

MAY 6 2009

DATED: Honolulu, Hawaii, _____.

/s/ SHERYL LEE A. NAGATA

~~SHERYL LEE A. NAGATA~~
Administrative Hearings Officer
Department of Commerce
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DEPT. OF COMMERCE
 AND CONSUMER AFFAIRS

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HEARINGS OFFICE

Attorneys for Respondent
 COUNTY OF KAUA'I, WALLACE REZENTES, JR.

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

In the matter of)	PCH-2009-8
)	
KAUA'I BUILDERS, LTD.)	
)	STIPULATION OF FACTS; EXHIBITS
Petitioner,)	A - M
)	
vs.)	
)	Administrative Hearings Officer:
COUNTY OF KAUA'I, WALLACE)	Sheryl Lee A. Nagata
REZENTES, JR., Director of Finance, in)	
his capacity as Chief Procurement Officer,)	
)	
Respondent,)	
)	
UNLIMITED BUILDERS, LLC)	
)	
Intervenor.)	

STIPULATION OF FACTS

COMES NOW, RESPONDENT COUNTY OF KAUA'I, by and through its attorney, Mona W. Clark, Deputy County Attorney, and Petitioner Kaua'i Builders, Ltd., by and through its attorney, Ernest H. Nomura and Intervenor Unlimited Builders, LLC, by and through its attorneys, Anna H. Oshiro and Todd Y. Hirai stipulate to the following set of facts:

APPENDIX "A"

1. IFB No. 2849 was issued by the County of Kaua'i for the construction of the Keālia Fire Station.

2. The Notice to Contractors on IFB No. 2948 states that a Notice of Intent to Bid is to be submitted 10 day prior to the day designated for the opening of bids together with the bidder's certification that they are licensed to undertake the project.

3. The form for the Notice of Intent to Bid included in IFB No. 2948 included spaces for the bidder's contractor license number, Hawai'i State Specialty License Type and Classification and Hawai'i State Business License. A true and correct copy of the form of notice required by IFB No. 2948 is attached hereto as Exhibit A and incorporated herein by reference.

4. Unlimited Builders, LLC submitted a Notice of Intent to Bid, a true and correct copy of which is attached hereto as Exhibit B and incorporated herein by reference.

5. Jay Manzano is a Responsible Managing Employee for Unlimited Builders, LLC and holds contractor license no. ABC-27441.

6. A true and correct copy of Unlimited Builders, LLC's company resolution setting forth the authority of the person signing its bid and included with Unlimited Builders, LLC's bid is attached hereto as Exhibit C and incorporated herein by reference.

7. Kaua'i Builders, Ltd. submitted a Notice of Intent to Bid and a true and correct copy of which is attached hereto as Exhibit D and incorporated herein by reference.

8. A true and correct copy of Kauai Builders, Ltd.'s corporate resolution setting forth the authority of the person signing its bid and included with Kauai Builders Ltd.'s bid is attached hereto as Exhibit E and incorporated herein by reference.

9. Unlimited Construction Services, Inc. did not submit a Notice of Intent to Bid.

10. On December 3, 2008, five sealed envelopes containing bids were received.

11. It was later clarified that the bid submitted by Unlimited Builders, LLC was in the envelope with a preprinted mailing label which stated a return address of Unlimited Construction Services, Inc., a true and correct copy of the envelope is attached hereto as Exhibit F and incorporated herein by reference.

12. Randy Finlay is the Vice President of Unlimited Construction Services, Inc. and a member-manager of Unlimited Builders, LLC. Both companies are located at 1696 Haleukana Street, Puhi Industrial Park, Līhu'e, HI 96766. Some employees, including Kanani Kawamura and Kuulei Santos, are employed by Unlimited Construction Services Inc. and Unlimited Builders, LLC.

13. Elmer Muraoka is the Assistant Chief Procurement Officer for the County of Kaua'i. His prior title was Purchasing & Assistant Contract Administrator. Mr. Muraoka is responsible for supervising the bid opening and currently has and, at the time of the bid opening had, the authority delegated to him by the Chief Procurement Officer set forth in the attached Exhibit G, a true and correct copy of which is incorporated herein by reference.

14. The bid opening was attended by Elmer Muraoka; Erwin Wright, Procurement and Specifications Specialist IV; Felizardo De Jesus of Kaua'i Builders Ltd.; Kanani Kawamura and Kuulei Santos of Unlimited Builders, LLC; Michael Masuda of Bodel Construction; and George Pritchard of Jacobsen Construction.

15. After the deadline to submit bids, but prior to the bids being opened on December 3, 2008, the fact that a bid envelope had been received which had an address label bearing the name "Unlimited Construction Services, Inc." was brought to the attention of Mr. Muraoka by Erwin Wright, Procurement and Specifications Specialist.

16. Mr. Muraoka requested clarification as to the identity of the party submitting the bid contained in the envelope. The two employees of Unlimited Builders, LLC clarified that the bid contained in the envelope was in fact from Unlimited Builders, LLC.

17. Mr. Muraoka wrote "Unlimited Builders LLC" on the return label of the bid envelope.

18. After Mr. Muraoka wrote on the bid envelope, the bid opening was permitted to proceed.

19. At all relevant times, including from the time of submitting the Notice of Intent to Bid through the present time, Unlimited Builders, LLC has held contractor's license no. ABC-27106. The County verified Unlimited Builders, LLC possession of this license through an online record search of the Department of Commerce and Consumer Affairs, Professional and Vocational Licensing's database.

20. Kaua'i Builders, Ltd. submitted a letter, dated January 13, 2009, to the County of Kaua'i, which raised the issue concerning the name, Unlimited Construction Services, Inc. appearing on the address label for Unlimited Builders, LLC's bid envelope. A true and correct copy of this letter is attached hereto as Exhibit H and incorporated herein by reference.

21. By letter dated January 16, 2009, the County denied Kaua'i Builders, Ltd.'s request that it reject the Unlimited Builders, LLC's bid. A true and correct copy of this letter is attached hereto as Exhibit I and incorporated herein by reference.

22. The County awarded the contract to Unlimited Builders, LLC on January 28, 2009. A true and correct copy of the award letter is attached hereto as Exhibit J and incorporated herein by reference.

23. Kaua'i Builders, Ltd. submitted a protest letter, dated January 30, 2009, which was faxed to the County on the same date, a true and correct copy of which is attached hereto as Exhibit K and incorporated herein by reference.

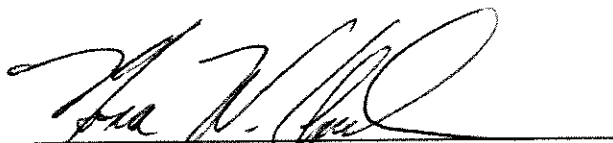
24. The County, by letter dated March 5, 2009, from the Chief Procurement Officer, Wallace G. Rezentes, Jr., to Richard Maeda, President of Kaua'i Builders, Ltd., denied the protest by Kaua'i Builders, Ltd. A true and correct copy of this letter is attached hereto as Exhibit L and incorporated herein by reference.

25. After Kaua'i Builders, Ltd. protested the award to Unlimited Builders, LLC, the County of Kaua'i's Chief Procurement Officer (CPO), Wallace G. Rezentes, Jr. issued an express determination that it would be unreasonable not to allow the misstatement of Unlimited Builders, LLC's contractor number to be remedied. The CPO determined that the remedy for the misstatement should be the waiver of this minor

mistake and that the award to Unlimited Builders, LLC was not to be affected by the misstatement of the contractor's license number on the notice of intent to bid. A copy of Mr. Rezentes declaration with the express determination is attached hereto as Exhibit M and incorporated herein by reference.

Dated: Līhu'e, Kaua'i, Hawai'i, April 15, 2009.

OFFICE OF THE COUNTY ATTORNEY



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Deputy County Attorney

Attorney for Respondent
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