



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

JAN 2 9 22 AM '98

HEARINGS OFFICE

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

In the Matter of)	PCH-97-7
)	
STANDARD ELECTRIC, INC.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW
)	AND DECISION
vs.)	
)	
CITY & COUNTY OF HONOLULU,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent,)	
)	
and)	
)	
JACK ENDO ELECTRIC, INC.,)	
)	
Intervenor.)	
)	
)	

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

I. INTRODUCTION

On October 8, 1997, Standard Electric, Inc. ("Petitioner") filed a request for an administrative hearing with the Department of Finance, City & County of Honolulu ("City"), to contest Respondent City's decision to reject Petitioner's bid submitted in conjunction with Respondent's Computerized Traffic Control System, Phase IV, Federal Aid Project No. CMAQ-0001(18). Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709 and Hawaii Administrative Rules ("HAR") §3-126-42.

On October 13, 1997, Respondent transmitted Petitioner's request for hearing to the Office of Administrative Hearings. The matter was thereafter set for

hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On November 5, 1997, the parties stipulated to permit Jack Endo Electric, Inc. ("Endo") to intervene in this matter as an additional Respondent. The parties also agreed to continue the hearing to November 26, 1997.

Responses to Petitioner's request for hearing were filed by Respondent Endo and Respondent City on November 4, 1997 and November 7, 1997, respectively.

On November 19, 1997, the parties filed Stipulated Facts, reserving the right to present evidence of additional facts at the hearing.

On November 26, 1997, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Petitioner was represented by David Schulmeister, Esq. and Jodi H. Shin, Esq.; Respondent City was represented by Cynthia Nojima, Esq.; and Respondent Endo was represented by Scott K. Collins, Esq.

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

II. FINDINGS OF FACT

1. Petitioner is a corporation incorporated under the laws of Hawaii. It has its principal place of business in Hawaii and is licensed to do business in Hawaii.
2. Petitioner has completed several City and County of Honolulu signal projects, including projects to upgrade, modify and install traffic signals.
3. Petitioner's most recent City and County project was Phase III of the Computerized Traffic Control System, which Petitioner completed for approximately \$3.4 million.
4. Respondent Endo is a corporation incorporated under the laws of Hawaii. It has its principal place of business in Hawaii and is licensed to do business in Hawaii.
5. Roy K. Amemiya, Jr. ("Amemiya"), is a natural person and is a resident and a citizen of the State of Hawaii. Amemiya is the current Director of Finance for the City and County of Honolulu.

6. On November 8, 1996, the Department of Finance for the City and County of Honolulu ("DOF"), issued a Notice to Bidders, seeking sealed proposals for the construction and installation of the Computerized Traffic Control System, Phase IV, Federal-Aid Project No. CMAQ-0001(18), Construction Contract No. F-93487 ("Project" or "Contract").

7. Petitioner, which has previously completed City and County traffic signal projects, submitted its proposal to DOF on December 5, 1996.

8. DOF opened the bids on the same day, and Petitioner's bid for \$3,399,772.00 was the low bid by approximately \$21,600.00.

9. On December 9, 1996, DOF informed Petitioner that the Purchasing Division was unable to locate Petitioner's notice of intention to submit an offer for the Project. As a result, DOF indicated to Petitioner that it intended to award the Project to the second lowest bidder, Respondent Endo.

10. In response, Petitioner sent a letter to DOF dated December 11, 1996, requesting DOF to exercise its express authority under HAR §3-122-108 and waive the requirement of the notice of intention to submit an offer and reconsider its bid for the Project. Petitioner explained that it believed the notice was submitted to the City, by U.S. Mail, on or about November 19, 1996 and enclosed the Affidavit of Susan Kitaoka dated December 11, 1996. Petitioner further emphasized that the purpose of the notice is to give the procurement officer an opportunity to determine whether the prospective bidder has the experience and the competence in performing similar work.

11. DOF also could not locate Petitioner's tax clearance certificate. On December 27, 1996, prior to the award of the Contract, Petitioner provided DOF with a tax clearance certificate.

12. Because Petitioner was the low bidder by approximately \$21,600.00, DOF elected to waive the notice requirement as it pertained to Petitioner's bid. Thus, in a letter dated December 26, 1996, Victor D. Guillermo, Jr. ("Guillermo"), the Acting Director of Finance at the time, notified Petitioner that DOF would conditionally award the Contract to Petitioner in the near future.

13. In a letter dated December 27, 1996, Respondent Endo inquired about the status of the Contract and urged DOF to disqualify Petitioner because of Petitioner's alleged failure to submit a notice of intention to submit an offer and

untimely submission of a tax clearance certificate. Petitioner was not copied on Respondent Endo's letter.

14. After considering Respondent Endo's letter dated December 27, 1996, Guillermo conditionally awarded the Contract to Petitioner.

15. In a letter dated January 3, 1997, Guillermo informed Respondent Endo of DOF's decision to accept Petitioner's bid.

16. On January 10, 1997, Respondent Endo filed a protest to the award of the Contract to Petitioner based on Petitioner's failure to file its notice of intention to submit an offer and tax clearance certificate in a timely fashion. This letter was not copied to Petitioner.

17. In its protest letter, Respondent Endo stressed unfairness to other bidders and the need for "strict compliance" with the bid requirements.

18. DOF held a hearing regarding Respondent Endo's protest, following which Guillermo denied the protest via letter dated January 28, 1997. Guillermo explained in the letter that "contrary to your [Respondent Endo's] view that Section 3-122-108(a)(4) renders other subparts of the same section superfluous and contradictory, I believe that the rule exists for the procurement officer to apply if a waiver is determined to be in the City's best interest."

19. On February 14, 1997, Respondent Endo submitted its request for reconsideration of the DOF decision to Amemiya, Guillermo's successor as Acting Director of Finance. Petitioner was not copied on this letter.

20. In its request for reconsideration, Respondent Endo again stressed unfairness to other bidders and "past practices" which allegedly indicated a long-standing policy of DOF to summarily reject any bid which did not meet the notice of intention to submit an offer requirement.

21. In late March 1997, Amemiya acknowledged receipt of Respondent Endo's February 14, 1997 letter and informed Respondent Endo that Corporation Counsel would review it and DOF would provide Respondent Endo with a response in the near future.

22. In an effort to determine the current status of the Contract, Petitioner wrote to DOF for an update.

23. In response, Amemiya informed Petitioner that a protest and request for reconsideration had been filed in connection with the Contract and that DOF was awaiting a decision from Corporation Counsel regarding the matter. Amemiya did not, however, advise Petitioner of the arguments being advanced in support of Respondent Endo's protest, or offer Petitioner an opportunity to rebut them.

24. In a letter dated August 4, 1997, Respondent Endo inquired about the five-month delay in reconsidering Respondent Endo's protest and requested that DOF expedite its consideration of the same.

25. In late August 1997, Amemiya informed Petitioner that it had reconsidered the matter and decided to uphold Respondent Endo's protest and to cancel the conditional award of the Contract to Petitioner. At no time prior to this determination did Amemiya offer Petitioner an opportunity to be heard regarding the matters alleged by Respondent Endo in its protest.

26. Amemiya set forth the reasons underlying his decision in a letter to Respondent Endo dated August 26, 1997. Amemiya stated that "[i]t has consistently been the City's practice to reject bids submitted by contractors who had not timely filed a Notice of Intention to Bid." Further, he pointed out that "the sudden change in the City policy [to reject automatically bids submitted without a Notice] is unfair to other bidders and potential bidders."

27. On page 2 of his August 26, 1997 letter, Amemiya referred to a February 13, 1997 letter from the Subcontractor's Association of Hawaii and a March 24, 1997 letter from the Pacific Electric Contractor's Association.

28. Amemiya argued in his letter that the notice of intention to submit an offer and tax clearance certificate requirements, typically information relating to a bidder's "responsibility," rose to the level of being necessary for Petitioner's bid to be considered "responsive."

29. In response to Amemiya's decision to uphold Respondent Endo's protest and to cancel the conditional award of the Contract to Petitioner, Petitioner submitted to DOF its Notice of Protest or, in the Alternative, Request for Administrative Hearing, on September 5, 1997.

30. On September 15, 1997, Edward Kitaoka, President of Petitioner, along with counsel, appeared before DOF at the hearing regarding Petitioner's Notice of Protest.

31. At the hearing, Charles Katsuyoshi and Rosalie Toguchi, both of the Purchasing Division, and Amemiya claimed that "as long as we can remember" it has been the policy of DOF not to waive the submission of a notice of intention to submit an offer. Thus, it would be unfair to other bidders to change that policy.

32. In a letter dated September 30, 1997, Amemiya informed Petitioner of his decision to reject Petitioner's Notice of Protest.

33. Amemiya again emphasized DOF's "long-standing, publicly-stated policy to reject bids of those contractors who fail to file Notices of Intention to Bid." Likewise, Amemiya again stressed the unfairness to other bidders and potential bidders that would occur if DOF were to stray from its long-standing policy.

34. In a letter dated October 2, 1997, Petitioner notified DOF of its intention to file a Request for Administrative Hearing regarding DOF's decision to deny Petitioner's Notice of Protest. In the same letter, Petitioner requested that it be permitted to inspect and copy any and all documents referring or relating to the DOF's "long-standing, publicly-stated policy to reject bids of those contractors who failed to file notices of intention to bid" referred to in Amemiya's letter dated September 30, 1997.

35. On October 10, 1997, Amemiya responded to Petitioner's request for documents referring or relating to the DOF's "long-standing, publicly-stated policy to reject bids of those contractors who failed to file notices of intention to bid," in a cover letter of that date enclosing copies of notices of intent to bid "from prospective bidders who had filed their notices late and were so informed by telephone prior to the opening of bids."

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

A. Jurisdiction.

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*. The Hearings Officer therefore 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 Hawaii 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). In the instant case, the Hearings Officer must determine whether the rejection of Petitioner' bid as a result its failure to file a notice of intention to submit an offer pursuant to HAR §3-122-108, and a tax clearance certificate 10 days prior to bid opening, was proper and in accordance with the State Procurement Code ("Procurement Code").

B. Notice of Intention to Submit Offer.

HAR §3-122-108 states in pertinent part:

Qualification of bidders and offerors.

(a) Prospective bidders or offerors must be capable of performing the work for which offers are being called. Each prospective bidder or offeror must file a written or faxed notice of intention to submit an offer pursuant to section 3-122-9, subject to the following:

(1) The notice of intention to submit an offer shall be received not less than ten days prior to the date designated for opening.

* * * *

(4) The requirement for a notice of intention to submit an offer may be waived if the procurement officer concludes that acceptance of the bid will be in the best interest of the public. For this purpose, the procurement officer shall prepare a written determination setting forth the basis for the acceptance.

Although Petitioner presented testimony that the notice of intention to submit an offer was sent to Respondent City, there was no evidence that it was actually received. Indeed, the thrust of Petitioner's protest was not that the notice was received by Respondent City but rather, that the Project should have been awarded to it regardless of whether the notice was received. According to Petitioner, even if

Respondent City did not receive the notice of intention to submit an offer, that requirement should be and was properly waived pursuant to HAR §3-122-108(a)(4).

HAR §3-12-108(a)(4) provides the procurement officer with the authority to waive the notice requirement “if the procurement officer concludes that acceptance of the bid will be in the best interest of the public.” A plain and logical reading of HAR §3-122-108 leads to the conclusion that HAR §3-122-108(a)(4) was designed to ensure that the public interest would not be frustrated by a noncompliance with the requirement of HAR §3-122-108(a). Thus, under HAR §3-122-108(a)(4), the failure to file a notice of intention to submit an offer does not require or contemplate an **automatic rejection** of the lowest (and otherwise properly submitted) bid.

Petitioner contends that the waiver was in the public’s best interest because its bid was \$21,600.00 less than the second lowest bid submitted by Respondent Endo. Respondent City, through its acting Director of Finance, agreed, stating his belief that, “in this case, a waiver was in the best interests of the City¹ as the cost savings in the amount of \$21,000 justified the waiver” (Joint Exhibit “I”). Indeed, the public’s interest in securing the lowest bid to complete the Project is obvious. Accordingly, the Hearings Officer finds that the waiver of the required notice of intention to submit an offer was in the best interest of the public and therefore appropriate under the circumstances presented here.

In subsequently rejecting Petitioner’s bid, Respondent City relied primarily on a “publicly stated” and “long-standing” policy of automatically rejecting bids in all cases where notices were not filed or not filed in a timely manner. In that regard, both Respondents contend that it would be unfair to other bidders and potential bidders to change this policy without prior notice “in the midst of the competitive bidding process.” According to Respondents, a waiver of this requirement would be unfair to prospective bidders who, knowing the City’s policy, may have refrained from submitting a notice of intent because they were unable to do so in a timely manner.² Respondents further assert that a waiver would create a perception of inequity that

¹ Although Respondent Endo correctly pointed out that the waiver in HAR §3-122-108(a)(4) is based on a determination that acceptance of the bid “will be in the best interest of the **public**”, rather than in the City’s best interest, the Hearings Officer can find no meaningful distinction between the two under the circumstances presented in this case.

² There was no evidence that other potential bidders had actually refrained from submitting bids in reliance on the City policy.

would damage the public's confidence in the procurement process and create the impression that the City was acting arbitrarily. For these reasons, Respondents urge the Hearings Officer to find that a waiver of the notice of intention to submit an offer requirement would not be in the best interest of the public.

The City's policy, however, flies directly in the face of HAR §3-122-108(a)(4), and for this reason does not provide a legitimate basis for the denial of a waiver. Any perceived unfairness to potential bidders who may have relied on the City policy cannot justify noncompliance or a delay in compliance with the Procurement Code, particularly at the expense of the public's interest in a \$21,000.00 cost savings. Moreover, it seems equally obvious that a saving of \$21,000.00 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of HAR §3-122-108(a) was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations.³ As such, the Hearings Officer finds and concludes that Respondent City's refusal to waive this deficiency was contrary to HAR §3-122-108(a)(4) and unreasonable under the circumstances of this case.

Respondent Endo also asserts that it would be prejudiced if Petitioner is excused from the notice of intent requirement because Petitioner would, in effect, have had more time to prepare its bid. Additionally, Respondent Endo argues that Petitioner would have an unfair advantage over the other bidders if excused from providing a notice of intention to submit an offer because it could later escape from its contractual obligations by claiming that it did not comply with the bidding process.

A review of the evidence, however, indicates that the time spent to prepare the notice of intent to submit an offer is minimal. Furthermore, it is unclear as to how Petitioner would be able to avoid its contractual responsibilities since the bid,

³ This conclusion appears to be consistent with the intent of the Procurement Code as expressed in the Senate Committee's Report:

This bill lays the foundation and sets the standards for the way government purchases will be made, but **allows for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State.**

S.Comm. Rep. S8-93, Spec. Sess., Senate Journal at page 39 (1993) (emphasis added).

once submitted, would generally constitute a binding offer to make a contract.⁴ See generally, *State v. Atlantic Audio-Visual Corp.*, 499 N.Y.S.2d. 995 (1986). Consequently, the Hearings Officer finds these arguments to be unpersuasive.

C. Tax Clearance.

Petitioner also asserts that its filing of its tax clearance certificate following bid opening but prior to the awarding of the contract, should not result in the rejection of its bid. Petitioner argues that the certificate is a matter of bidder responsibility and as such, may be provided up to the time the contract is awarded. The Notice to Bidders required that:

[a]ny person, firm or corporation that submits a Notice of Intention to Bid must provide the City and County of Honolulu with a current statement or certificate from the Director of Taxation to the effect that all delinquent taxes levied or accrued under State statutes against said person, firm or corporation have been paid, and any other evidence requested by and acceptable to the contracting officer to demonstrate that the prospective bidder is not in default of any obligations due to the State or any of its political subdivisions. The above information shall be received ten (10) days prior to bid opening.

(Joint Exhibit "W").

Respondents do not dispute that the tax clearance certificate requirement generally relates to the responsibility of the bidder and as such, may ordinarily be submitted at any time before the contract is entered into.⁵ Respondents, instead, argue that in this case, the information required from the tax clearance certificate rose to the level of being necessary for a bid to be considered "responsive."

In support of their argument, Respondents rely primarily on *Northeast Construction Company v. Romney*, 485 F.2d 752 (DC Cir. 1973). *Romney* involved an order of the Secretary of Labor implementing an Executive Order by prohibiting the issuance of any government contracts to bidders who failed to submit

⁴ Moreover, the withdrawal of bids after opening is strictly regulated under HAR §3-122-31(d).

⁵ According to Respondent City, because the Project involved federal funds disbursed through the State, the Notice to Bidders required the filing of a tax clearance certificate with the Notice of Intention to Bid. The evidence, however, did not establish a connection between the involvement of federal funds in the Project, and the requirement in the Notice to Bidders for a tax clearance certificate 10 days prior to bid opening.

the required minority manpower utilization goals with their bids, and expressly providing that a bidder who failed to provide that information would not be deemed a responsive bidder. The court agreed with the comptroller general that in cases where the Congress or President directs the use of the procurement process as a device to implement important national economic or social policies and goals, and makes it clear that what was involved was information necessary for "responsiveness" of the bid, that directive "overrides any general concept that the characteristics of a bidder relate to responsibility rather than responsiveness." **Id. at 760.**

In the case at hand, there was no evidence of any directive or order requiring a tax clearance certificate **10 days before bid opening** for the purpose of implementing a social or economic policy.⁶ Nor does the Notice to Bidders inform bidders that a failure to provide that information in a timely manner would render their bid nonresponsive. On the contrary, the notice to bidders states in relevant part that, "[t]he City and County of Honolulu reserves the right to reject any or all proposals. . . ." This reservation buttresses the conclusion that the tax clearance certificate requirement relates to and remained a matter of responsibility rather than responsiveness. If the submission of this certificate was a material requirement of the solicitation, then it would have to be rejected. **Blount, Inc., 22 Cl.Ct. 221, 227 (1990).**

Accordingly, the Hearings Officer can find no rational basis on which to justify a departure from standard procurement principals in this case. Rather, the Hearings Officer finds and concludes that Petitioner was entitled to present the tax clearance statement after bid opening and up to the time of award,⁷ notwithstanding

⁶ Respondents also raised the argument that HRS §103-53(a), making the submission of tax clearance certificates a prerequisite to entering into government contracts, is the result of a state policy that contractors should be required to pay their state and federal taxes before being allowed to perform such contracts. That section, however, does not require the certificate to be submitted at least 10 days prior to bid opening. On the contrary, HRS §103-53(a) provides that all State and county officials making contracts on behalf of the State or county "shall require, as a **prerequisite to entering into these contracts**, tax clearances . . ." (emphasis added). This is consistent with the conclusion that the certificate is a matter of bidder responsibility and as such, may be submitted anytime prior to the awarding of the contract. Neither does HRS §103-53(a) provide that a bidder who fails to submit a certificate in a timely manner will be deemed to be nonresponsive.

⁷ See, **Blount, Inc. v. U.S., 22 Cl.Ct. 221 (1990)** (bidder may present evidence subsequent to bid opening but prior to award to demonstrate bidder's responsibility); **Appeal of Aquatel Industries, Inc., No. 1192 (MSBCA August 30, 1984)** (materials related to the determination of bidder's responsibility may be submitted after bid opening); **Appeal of Peninsula General Hospital Medical Center, No. 1248 (MSCBA August 19, 1985)** (information bearing on prospective contractor's ability to perform in accordance with the terms of the contract related to responsibility and might properly be received and evaluated after bid opening).

the requirement in the Notice to Bidders;⁸ and that Respondent City's rejection of Petitioner's bid on that basis was improper.


Petitioner also argues that the omission of the statement with the bid constituted a "minor informality" under HAR §16-122-31. Because Petitioner has established that it was entitled to submit the certificate after bid opening and prior to the award of the contract, it is unnecessary to address this alternative theory.

IV. DECISION

Based on the foregoing considerations, the Hearings Officer finds and concludes that Respondent City's rejection of Petitioner's bid as a result of Petitioner's alleged failure to file a notice of intention to submit an offer and late filing of a tax clearance certificate, was contrary to HRS §103D-302 and HAR §3-122-108(a)(4).

Accordingly, the Hearings Officer orders that Respondent City's rejection of Petitioner's bid and proposed award of the Contract to Respondent Endo are hereby vacated; and that Petitioner's bid be remanded back to Respondent City for reevaluation consistent with this decision. Upon remand, Respondent City shall reinstate its proposed award of the Contract to Petitioner, absolute award being conditioned upon concurrence of the award from the State Department of Transportation and Federal Highway Administration.

Dated at Honolulu, Hawaii: JAN - 2 1998



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

⁸ See, *Aquatel, supra*, where the board held that a matter of responsibility could not be made into a question of responsiveness by the terms of the solicitation.