

16, 2014 and a hearing on the motions filed would be held on April 17, 2014. A Pre-Hearing Order was issued on April 4, 2014.

On April 11, 2014, Petitioner filed Motions for Summary Judgment and Partial Summary Judgment and Respondent filed a Motion to Dismiss and a Motion for Summary Judgment. On April 16, 2014, the parties filed their memoranda in opposition to the motions filed. Respondent did not file a memorandum in opposition to Petitioner's Motion for Partial Summary Judgment.

On April 17, 2014, a hearing on the motions filed was held by the undersigned Hearings Officer. Petitioner was represented by Ms. Arakaki and Respondent was represented by Ms. Ng. The matters were taken under advisement. With respect to Petitioner's Motion for Partial Summary Judgment, the parties were to inform the Hearings Officer whether the parties will stipulate that the amount in controversy is over \$10,000.00 so that Petitioner could withdraw its Motion for Partial Summary Judgment.

By a letter dated April 21, 2014, the Hearings Officer notified the parties that Respondent's Motion to Dismiss would be granted, Petitioner's Motion for Summary Judgment would be denied, and that a written decision would be issued on or before May 12, 2014. The parties were asked about the status of Petitioner's Motion for Partial Summary Judgment.

On April 22, 2014, Respondent sent a letter stating that it agreed that the amount in controversy was over \$10,000.00 but did not agree with the arguments provided by Petitioner. Respondent suggested that the Motion for Partial Summary Judgment was moot and should be withdrawn because its Motion to Dismiss was going to be granted. By an email sent on April 22, 2014, Petitioner requested a ruling on its Motion for Partial Summary Judgment. Having considered the motions, memoranda, exhibits, affidavits 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

1. On December 24, 2013, Respondent issued a Proposal and Specifications ("Proposal") for ReRoofing for Fire Maintenance Shop and Fire Dispatch/Warehouse, Job No. B-4190 ("Project"). The purpose of the Proposal was to solicit sealed bids for the "new replacement roof, purlins, roof insulation, flashing, ventilators, gutters, downspouts,

structural steel, painting and related work in accordance with the plans and specifications and has an estimated cost of \$370,000.00. The Proposal also stated: “To be eligible to submit a bid, the Bidder must possess a valid State of Hawaii, General Contractor’s License ‘B’. **See Special Notice to Bidders for additional licensing requirements.**” (Emphasis in original.)

2. Respondent sent Petitioner a compact disc containing the Proposal documents on December 27, 2013. Respondent received Petitioner’s Notice of Intention to Bid on January 6, 2014.

3. The Special Notice to Bidders provides:

Each of the following specialty contractor classifications listed in the table below have been determined by the County of Hawaii as qualified to perform all of the work on this project based on the project’s scope and the County’s understanding of the State’s licensing requirements and specialty contractor classifications’ scopes of work. By way of the minimum licensing requirement stated for this project, no additional specialty contractor classifications are required to perform the work; however, the Bidder may list additional licensed subcontractors at its discretion. (Emphasis in original.)

The Special Notice to Bidders identified specialty contractor classifications C-33, C-44 and C-48 as the minimum licensing requirement and qualified to perform all of the work on the Project. The Special Notice to Bidders also provides:

In the circumstance where a specialty contractor classification license listed in the above table may be deemed unnecessary by the Bidder due to its intent to employ a plausible alternative means or method, the bidder shall in its Proposal clearly state such intent and provide a detailed plan that meets the satisfaction of the Director. The Director reserves the sole discretion and right to determine whether the Bidder’s proposed justification for not listing the required license is acceptable.

...

In the circumstance where the Bidder is licensed in one or more specialty contractor classifications required of the project (whether automatically as a general engineering contractor “A”, general building contractor “B” or outright) and it intends to perform all or some of the work

of those classifications using its own workforce, the Bidder shall, in its Proposal list itself accordingly and in consideration of the balance of the instructions herein provided.

...

Anyone who disagrees with the determination in the above table shall submit their written objection to the Director identifying the specialty contractor classification(s) in question and the justification(s) for such position at least 10 consecutive calendar days prior to bid opening. If no such written objections are received by the Director prior to such date, it will be presumed that all Bidders and affected parties are in agreement with the listing set forth above. No other specialty license will be required unless noted otherwise in an addendum.

The Bidder may utilize subcontractors holding specialty contractor classifications' licenses in addition to those listed above to accomplish the Project; however, should it do so, its Proposal form shall identify those classifications and the name(s) of the respective company(ies).

4. Addendum No. 1, issued on January 14, 2014, added Specialty Contractor Classifications C-13 and C-19 to the list of specialty contractor classifications required to perform the work on the Project. Petitioner received Addendum No. 1 on January 17, 2014.

5. On January 29, 2014, Kevin Simpkins, Petitioner's President, sent Respondent's Project Coordinator James Imanaka an email requesting clarification of the extent of painting, as indicated on the drawings. Mr. Simpkins believed that Subparagraph 1.10 A & B was confusing. Pursuant to Mr. Simpkins' inquiry, on January 30, 2014, Addendum No. 2 was issued, clarifying that the extent of painting is for new work and all work affected by new work only. Petitioner received Addendum No. 2 on January 31, 2014.

6. There were no other communications to Respondent from Petitioner regarding the Proposal or Special Notice to Bidders prior to bid opening.

7. On February 6, 2014, bids were opened and evaluated. Petitioner was the low bidder with a bid of \$305,067.00. Petitioner's Listing of Responsible Entities ("Listing") only listed a sub-contractor for the C-13 electrical work. A copy of Petitioner's Listing is attached hereto and incorporated herein by reference as Exhibit "A". The listing also instructs bidders to list all joint contractors or subcontractors to be engaged by the bidder.

8. By a letter dated February 14, 2014, Respondent notified Petitioner that its bid was disqualified pursuant to Section 2.2-6 of the General Requirement and Covenants of the Department of Public Works, County of Hawaii dated July 1972 and Hawaii Administrative Rules § 3-122-33(d)(5). The letter states in part:

Your proposal fails to list a C-44-Sheet Metal subcontractor or to describe an alternate means and methods by which the work required of this project covered by this license class would otherwise be legally executed.

In accordance with Hawaii Administrative Rules § 3-122-21(8) and Hawaii Revised Statutes Section 103D-302(b) all subcontractors shall be listed in the bid proposal. Failure to list a subcontractor when required renders the bid nonresponsive, as noted in the Listing of Responsible Entities section of the Proposal and in the Special Notice to Bidders.

9. By a letter dated February 19, 2014, Petitioner filed a Bid Protest with Respondent. This letter states in part:

All work for the Project involving sheet metal can be performed by CCI under its C-42 roofing or C-44A gutters licenses pursuant to HRS Chapter 444 and HAR Title 16 Chapter 77, Exhibit "A".

...

However nothing in the Special Notice to Bidders, the Proposal sections of the bid specifications, or any other provision in the bid documents, state that a C-44 sheet metal contractor must be used.

...

This provision states only that the County of Hawaii believes that C-44 contractors are qualified to perform certain work for the project based on the County's understanding of the State's licensing requirements. However, that the county believes a certain type of construction work can be performed under a particular license in no way means that the same work cannot be performed under another specialty contractor license. Similarly, this statement about the County's understanding and interpretation of the licensing requirements is not a

requirement that a contractor with a certain type of license must necessarily be used for the Project.

10. By a letter dated March 11, 2014, Petitioner, by and through its attorney, requested a ruling from the Contractors License Board (“CLB”) clarifying that the installation of a metal roof with the appurtenant and incidental metal flashing and roof vents may be performed by a contractor holding (1) a “B” General Building, (2) a “C-42” Roofing License and (3) a “C-44A” Gutters License. With this letter, Petitioner included “Highlighted select pages/sections include Table of Contents, Notice to Bidders, Summary of Work, Manufactured Roof Panels and Sheet Metal Flashing and Trim”. Petitioner did not inform Respondent that it requested a ruling from the CLB or that the CLB would take up Petitioner’s request for a ruling at its March 21, 2014 meeting. Respondent did not know about Petitioner’s request to the CLB until Respondent received Petitioner’s request for hearing filed on March 28, 2014.

11. On March 21, 2014, Petitioner and its attorney appeared at the CLB meeting in support of its request for clarification. At its meeting, the CLB ruled that the installation of flashing, counter-flashing, metal edging, and splash guards could be performed under a C-42 roofing license and the installation of gutters and downspouts could be performed under a C-44A gutters/downspouts license. By a letter dated April 8, 2014, the CLB informed Petitioners of its determination regarding the types of licenses required, based on the information provided to the CLB in Petitioner’s March 11, 2014 letter and clarification provided by Petitioner and its attorney at the CLB’s March 21, 2014 meeting. This letter also stated that the interpretation is for informational and explanatory purposes only, is not an official opinion or decision, and thus not binding on the CLB.

12. Petitioner filed the request for a ruling with the CLB because Petitioner believed that it would be awarded the contract if the CLB determined that a C-44 sheet metal license was not required for the project. Petitioner’s understanding came from a conversation between Petitioner’s President and Respondent’s Project Coordinator after bid opening where it is Petitioner’s assertion that Respondent’s Project Coordinator informed Petitioner that Respondent would defer to a ruling or determination by the CLB as to whether a C-44 specialty contractor license was required for the Project. Respondent’s Project Coordinator denies that he told Petitioner that it would be awarded the contract if Petitioner received a favorable ruling from the CLB.

13. By a letter dated March 21, 2014, to Petitioner, Respondent informed Petitioner that it was upholding the disqualification of Petitioner's bid as being non-responsive and denying its protest of the bid disqualification. Respondent stated that Petitioner's bid was non responsive because (1) it failed to submit a bid that satisfied the solicitation requirements because it did not satisfactorily address four of the specialty contractor classifications set forth in the Listing of Responsible Entities section of the Proposal, and (2) it failed to properly propose in its bid documents that it was planning to use its C-42 and C-44(a) licenses, instead of the C-44 license listed by Respondent, to do all the sheet metal work for the Project. Respondent's decision to deny Petitioner's protest was made independent of any decision or opinion issued by the CLB.

14. Petitioner filed its request for hearing and a \$1,000.00 Procurement Protest Bond with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("DCCA") on March 28, 2014.

15. Respondent agrees that under HRS § 103D-709(d) the amount in controversy with respect to the work to be performed under the C-44 Sheet Metal license is over \$10,000.00 but does not agree with Petitioner's arguments in its Motion for Partial Summary Judgment to establish the amount in controversy.

III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH 96-9 (November 20, 1996).

At the outset, the Hearings Officer finds and concludes that Petitioner's Motion for Partial Summary Judgment is moot as Petitioner and Respondent agree that the amount in controversy is over \$10,000.00.

Respondent's Motion to Dismiss is based on the assertion that Petitioner's protest of its disqualification on the basis that it did not list a C-44 sheet metal subcontractor or an alternate means by which the work would be done was untimely because it is based on the contents of the solicitation. Petitioner asserts that its protest is timely because it was not based on the contents of the solicitation as the solicitation did not require that a C-44

subcontractor be used to perform work on the Project. Hawaii Revised Statutes (“HRS”) § 103D-701(a) provides:

§ 103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the acts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

The Special Notice to Bidders did not specifically say that a C-44 specialty contractor license was required for the Project, as was the case in *Ludwig Construction, Inc. v. County of Hawaii*, PCX 2009-6 (December 21, 2009), which held that the petitioner was barred from contesting the requirement in the solicitation calling for a C-37 specialty contractor when it did not challenge this requirement prior to bid opening. However, the Special Notice to Bidders identified the C-44 specialty contractor license as one of the “minimum licensing requirement stated for the project, and no additional specialty contractor classifications are required to perform the work” and provided that it would be presumed that “all Bidders and affected parties are in agreement with the listing set forth above” if written objections were not filed with the Respondent ten consecutive days prior to bid opening. Additionally, in allowing for the bidder to identify an alternate means or method to perform the work for a specialty classification license listed in the table, Respondent “reserve[d] the sole discretion and right to determine whether the Bidder’s proposed justification for not listing the required license is acceptable.” Taken as a whole, the Hearings Officer finds that the Proposal required a C-44 specialty contractor license for the Project. Accordingly, as in *Ludwig*, if Petitioner disagreed with Respondent’s assessment that a C-44 specialty contractor license was required and believed that the work could be done with its C-42 and C-44A specialty contractor licenses in lieu of the required C-44 license, it was incumbent upon them to file a

