

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION AND
PUBLIC FACILITIES**

SWANSON GENERAL CONTRACTORS, INC.)
)
v.)
)
DEPARTMENT OF TRANSPORTATION)
AND PUBLIC FACILITIES) OAH No. 10-0559-PRO
) Agency No. 51970

DECISION

I. Introduction

The Department of Transportation and Public Facilities (DOTPF) issued an Invitation to Bid (ITB) for installation of highway lighting on a portion of the Glenn Highway. DOTPF determined that Elcon Corporation (Elcon) was the lowest responsive bidder and it issued notice of intent to award the contract to Elcon.

Swanson General Contractors, Inc. (Swanson), another bidder, filed a protest. Swanson asserted that Elcon’s bid was not responsive because at the time the bid was submitted Elcon did not have a licensed electrical administrator assigned to it. The procurement officer denied the protest, and Swanson appealed. The matter was submitted for a decision on the record.

Because DOTPF did not err in finding that Elcon’s bid was responsive to the terms stated in the solicitation, Swanson’s appeal is denied.

II. Facts

In February, 2010, Elcon contacted the Division of Corporations, Business and Professional Licensing (Division), inquiring about the process for obtaining a license as an electrical contractor or general contractor in Alaska.¹ Division staff informed Elcon that “[b]efore you apply for a contractor license you will need to have an Electrical Administrator to assign to the license.”²

¹ Protest, Ex. 3, p. 2.

² Protest, Ex. 3, p. 1.

Donald Wilkins has been an employee of Elcon since August 30, 2004.³ In the spring of 2010, Elcon sent the Division Mr. Wilkins' application to be licensed as an electrical administrator, but in order to avoid incurring bonding costs prematurely Elcon held off on submitting an application for registration as a general contractor.⁴ The Division issued Mr. Wilkins a license as an electrical administrator, effective June 3, 2010, in an unassigned status.⁵

DOTPF advertised the Glenn Highway South Birchwood to Eklutna Lighting Project for bids on August 11, 2010. The project is federally-funded, and it provides for extension of the continuous lighting system along the Glenn Highway from South Birchwood to Eklutna. The work includes installation of lighting fixtures and guardrail, and the majority of the work is electrical.

Generally, federal law forbids a state from requiring a contractor to obtain a state license prior to submitting a bid on a federally-funded project.⁶ However, in 2002 Alaska was granted a waiver from that federal condition for electrical projects,⁷ and in 2003 DOTPF adopted a special bid provision for use on federally-funded projects where the electrical work constitutes the majority of the cost.⁸ The special bid provision (S 88) adopted in 2003 stated:

You must be registered as an Electrical Administrator, or must employ a person whose Electrical Administrator's license is assigned to you, under AS 08.40 at the time designated for bid opening.^[9]

The same language is contained in DOTPF's most recent compilation of standard statewide special bid provisions, adopted in March, 2010 (ES 08).¹⁰

³ Swanson Motion, Ex. 5, p. 4.

⁴ Protest, Ex. 6.

⁵ Protest Decision, Attachment F (showing unassigned status as of September 13, 2010). The statutes and regulations governing electrical administrators do not refer to "assignment" of a license. AS 08.40.130 provides that "[a] person may not qualify for or operate as an electrical administrator for more than one registered contractor." 12 AAC 32.920 provides that an electrical administrator must notify the department "within 15 days after a change in electrical administrator employment or company affiliation." The term "assignment" of a license, as used by the Division, comes from the Division's license application and renewal forms.

⁶ See 23 CFR §635.110(c).

⁷ See 23 CFR §635.110(a); Protest, Ex. 14, p. 4.

⁸ See Protest, Ex. 14.

⁹ Protest, Ex. 14, pp.4-7.

¹⁰ Swanson Motion, Ex. 2. ES 08 is worded identically to SS 88, which is the provision actually submitted to and approved by the federal government. See Swanson Motion, Ex. 14, p. 7.

Before finalizing the bid documents for the Eklutna project, DOTPF staff questioned whether the contractor would need to employ an electrical administrator at the time of bid opening.¹¹ DOTPF confirmed that the federal waiver approving the use of ES 08 applied to any project on which the electrical component of the work constituted more than 50% of the cost.¹²

Based on the confirmation that the federal waiver applied,¹³ the bid documents included Special Provision (SP) 102-1.01, which stated:

An Electrical Administrator or a person whose Electrical Administrator's license is assigned to the Contractor must be employed by the Contractor under AS 08.40 at the time designated for bid opening.¹⁴

DOTPF's intent, when it included this language in the bid document, was to create a requirement identical to that contained in the statewide special provision, ES 08, that had been adopted in March, 2010.

Elcon decided to bid on the project. Under Alaska law, Elcon could not submit a bid unless it was registered as a contractor with the Division.¹⁵ Accordingly, Elcon submitted an application for registration as a contractor. The Division has issued a certificate effective September 10, 2010, showing that Elcon is a registered general contractor-limited residential in Alaska.¹⁶ The certificate identifies Mr. Wilkins as Elcon's electrical administrator.¹⁷

Bids were opened at 2:00 p.m. on September 10. DOTPF staff identified Elcon as the lowest bidder. On September 13, DOTPF staff notified Elcon that "[a] review of your Contractor's Registration following bid opening did not provide sufficient written documentation of who the Electrical Administrator assigned to [Elcon] is."¹⁸ That same day, Mr. Wilkins signed a form notice of change of affiliation of his electrical

¹¹ Protest, Ex. 9, pp. 1-2 (Email, S. Smith to M. O'Brien, 8/11/2010 @ 10:30 a.m.).

¹² Protest, Ex. 14, p. 2 (Email, M. Niehold to S. Smith, 8/26/2010 @ 1:24 p.m.).

¹³ See Ex. 14, p. 1 (Email, S. Smith to J. Linnel, 8/26/2010 @ 2:45 p.m.).

¹⁴ Memorandum in Support of Motion for Summary Judgment (hereinafter, Swanson Motion), Ex. 1.

¹⁵ AS 36.30.110(b); AS 18.18.011(a).

¹⁶ Protest Decision, Attachment D, Ex. A. AS 18.08.026(a) provides that the department may not issue a certificate of registration as an electrical contractor unless the applicant is, or employs, a licensed electrical administrator. However, the department may issue a certificate of registration as a general contractor when the applicant has not identified an electrical administrator. It cannot be determined from the documents in the record whether the copy of Elcon's certificate of registration as a general contractor that is in the record was issued on, before, or after September 10.

¹⁷ Protest Decision, Attachment D, Ex. A.

¹⁸ Protest, Ex. 5, p. 1.

administrator's license from unassigned to assignment to Elcon,¹⁹ which Elcon sent to the Division the same day.²⁰ The Division received the notice on September 15,²¹ and it issued a new electrical administrator's license, showing an effective date for the license of June 3, 2010, and that the license was assigned to Elcon.²²

III. Discussion

The fundamental issue in this case is whether Elcon's bid was responsive in light of SP 102-1.01.

Swanson argues the DOTPF erred in finding Elcon's proposal responsive, because SP 102-1.01 should have been interpreted to require that an electrical administrator's license must be assigned to the contractor on the bid date (September 10), consistently with ES 08, and Mr. Wilkins did not notify the Division that he had assigned his license to Elcon until September 13, and he then gave an effective date for the assignment of September 13.

In response, DOTPF raises two threshold issues: that Swanson's protest should be dismissed as untimely, and that an affirmation of compliance with SP 102-1.01 (rather than actual compliance) is sufficient to make a bid responsive. On the merits, DOTPF argues that SP 102-1.01 may reasonably be interpreted to require only that an electrical administrator must be employed by the contractor on the bid date, and that DOTPF did not err in making a determination of responsiveness based on that reading. In any event, DOTPF says, Mr. Wilkins gave an effective date for the assignment of September 3, not September 13, and so even under Swanson's interpretation, Elcon was responsive.

A. The Protest Is Timely

A protest "based on alleged improprieties or ambiguities in a solicitation" must be filed before bids are due.²³ DOTPF contends that Swanson's protest is untimely, because it is based on an alleged impropriety or ambiguity in the terms of the solicitation.²⁴

¹⁹ Swanson General Contractors, Inc.'s Reply and Response to DOT/PF's Memorandum in Opposition to and Cross-Motion for Summary Judgment (hereinafter, Swanson Reply), Ex. 10. The stated effective date of the assignment as stated the notice was originally September 10. The "0" is was crossed out by a line that touches the "1", and the numeral "3" was written above. The document on its face is equally susceptible to being read as having an effective date of either September 3 or September 13.

²⁰ Protest Decision, Attachment E.

²¹ Protest, Ex. 5, p. 3.

²² Protest Decision, Attachment D, Exhibit B.

²³ AS 36.30.565(a).

Swanson's position is that DOTPF failed to interpret the solicitation as it should have, and as a result DOTPF issued a notice of intent to award the contract to a bidder whose bid should have been deemed non-responsive.²⁵ Under AS 36.30.565(a) a protest "based upon alleged improprieties in an award of contract or a proposed award of contract" may be filed after the notice of intent is issued. An award based on an incorrect reading of the terms of a solicitation is improper. The basis for Swanson's protest is not an alleged ambiguity or impropriety in the terms of the solicitation, but rather DOTPF's responsiveness determination. Thus, the protest is timely.

B. Affirmation of Compliance With SP 102-1.01 Is Insufficient

DOTPF argues that the bid documents did not require compliance with SP 102-1.01 at the time of bid opening as a condition of responsiveness, but rather only required a bidder to affirm that it was in compliance with SP 102-1.01.²⁶ The procurement officer was entitled to rely on Elcon's representation for purposes of the responsiveness determination, DOTPF argues, and because by submitting a bid Elcon impliedly certified its compliance with SP 102-1.01, the bid was responsive.²⁷

Neither party submitted a copy of portions of the ITB addressing responsiveness, and thus DOTPF's assertion that the ITB required only an affirmation of compliance with SP 102-1.01, rather than actual compliance, is without evidentiary support. SP 102-1.01 bears the heading, "QUALIFICATION OF BIDDERS", and on its face requires that the bidder must be or employ an electrical administrator at the time of bid opening. This indicates that actual compliance, rather than a mere affirmation, was required as a condition of bidder qualification. A bid submitted by a bidder who does not meet the solicitation's stated qualifications for bidders is not a responsive bid. For this reason, DOTPF's assertion that affirmation of compliance with SP 102-1.01 suffices for responsiveness is rejected.

²⁴ Memorandum in Opposition to and Cross-Motion for Summary Judgment at 5-7 (hereinafter, DOTPF Opposition).

²⁵ Protest at 2-3.

²⁶ See DOTPF Opposition at 10-11.

²⁷ Protest Report at 4-6; DOTPF Opposition at 9-11, *citing* Flagship Development, LLC v. Division of General Services, OAH No. 06-0249-PRO at 7 (Commissioner of Administration 2006) and In Re World Wide Movers, Department of Administration No. 97-004 at 4 (2007).

C. DOTPF Did Not Err In Its Responsiveness Determination

Having disposed of DOTPF's threshold arguments, the stage is set for consideration of the central issue in the case: was Elcon's bid responsive in light of SP 102-1.01, which stated:

An Electrical Administrator or a person whose Electrical Administrator's license is assigned to the Contractor must be employed by the Contractor under AS 08.40 at the time designated for bid opening.^[28]

Swanson argues that SP 102-1.01 should have been interpreted to require not only employment of an electrical administrator, but also that the electrical administrator's license must be assigned to the bidder, consistent with ES 08, which states:

You must be registered as an Electrical Administrator, or must employ a person whose Electrical Administrator's license is assigned to you, under AS 08.40 at the time designated for bid opening.^[29]

Swanson's argument rests on three main points: (1) SP 102-1.01 may reasonably be read to require assignment on the bid date; (2) DOTPF's expressed intent, prior to issuing the solicitation, was that SP 102-1.01 would have an effect identical to that stated in ES 08; and (3) an interpretation other than as provided in ES 08 is contrary to federal law, because the federal waiver allowing DOTPF to require an electrical administrator's license at the time of bid was restricted to the language stated in ES 08.³⁰

1. *Reasonable Reading of SP 102-1.01*

SP 102-1.01 consists of a single sentence:

An Electrical Administrator or a person whose Electrical Administrator's license is assigned to the Contractor must be employed by the Contractor under AS 08.40 at the time designated for bid opening.^[31]

DOTPF reads the descriptive clause "whose Electrical Administrator's license is assigned to the Contractor" in that sentence as applying only to the most recent antecedent noun, that is, to "a person." In that reading, SP 102-1.01 says that at the time of bid opening, either: (1) an electrical administrator must be employed by the bidder; or (2) a person whose electrical administrator's license is assigned to the bidder must be

²⁸ Memorandum in Support of Motion for Summary Judgment (hereinafter, Swanson Motion), Ex. 1.

²⁹ Protest, Ex. 14, p. 7.

³⁰ Swanson Appeal, p. 7.

³¹ Memorandum in Support of Motion for Summary Judgment (hereinafter, Swanson Motion), Ex. 1.

employed by the bidder. Swanson does not suggest that this is an unreasonable way to read SP 102-1.01 (looking only to the language used).

However, Swanson contends that there is another grammatically correct and reasonable interpretation of SP 102-1.01, namely, that the descriptive clause “whose Electrical Administrator’s license is assigned to the Contractor” applies to both of the antecedent nouns, that is, to both “An Electrical Administrator” and “a person.” In that reading, SP 102-1.01 says that at the time of bid opening, either: (1) an electrical administrator whose license is assigned to the bidder must be employed by the bidder; or (2) a person whose electrical administrator’s license is assigned to the bidder must be employed by the bidder.

Swanson’s reading is grammatically plausible.³² However, to read the sentence as Swanson suggests would yield a sentence with two clauses that say essentially the same thing: that the contractor must employ an electrical administrator whose license is assigned to it. This is so, because there is no difference between “an electrical administrator” and “a person who holds a license as an electrical administrator”. Moreover, the reading Swanson suggests would eliminate the possibility that a bidder could be a licensed electrical administrator, which is a possibility that is expressly stated in ES 08. For these reasons, DOTPF’s reading is the more reasonable reading of the two.

2. *DOTPF’s Intent Does Not Control*

The evidence establishes that DOTPF intended SP 102-1.01 to convey the same requirement as is contained in ES 08. Swanson suggests that this means that in determining responsiveness, DOTPF was required to apply SP 102-1.01 in accordance with ES 08, and that it could not accept a bid that was at variance from what it intended to ask for but did not (due to what Swanson characterizes a drafting error).

Under Alaska law, a purchasing agency must evaluate the responsiveness of a bid on the terms stated in the bid documents.³³ For this reason, Swanson’s suggestion that DOTPF could not accept Elcon’s bid, even though it was consistent with SP 102-1.01 as written, is unpersuasive. To reject a bid that is responsive to the terms of a solicitation as written could be unfair to a bidder who is unaware of the purchasing agency’s unstated

³² The same grammatical issue was discussed in Computer Task Group, Inc. v. Division of General Services, OAH No. 07-0147-PRO at 8-10 (Commissioner of Administration 2007).

³³ AS 36.30.150(a).

intent, and would invite a protest from the bidder whose facially responsive bid was rejected.³⁴

Swanson suggests that it is not unfair to Elcon to apply SP 102-1.01 consistently with ES 08, because SP 102-1.01 was accompanied by a reference to “ES 08 06302004”.³⁵ If it were true that the solicitation expressly directed the reader to refer to ES 08, then this argument might have merit. In that situation it could be reasonable to conclude that Elcon was not entitled to rely on the language of the bid document. But in this case the invitation to bid appears to reference ES 08 as the authority for the language stated in SP 102-1.01; it does not suggest that the reader should refer to ES 08 to confirm that the language used in SP 102-1.01 is accurate. In short, the reference to ES 08 is not a sufficient basis upon which a reasonable bidder would disregard the language stated in SP 102-1.01, and Elcon could reasonably rely on the language stated in SP 102-1.01.

3. *Federal Law Does Not Require Application of ES 08*

Swanson argues that, to the extent SP 102-1.01 is read as DOTPF reads it, then it is contrary to federal law, because federal law prohibits requiring a bidder to obtain a license prior to submitting unless the solicitation conforms with ES 08.³⁶ But that SP 102-1.01 does not conform to the language approved by the federal government does not mean that the federally-approved form, ES 08, must be read into the solicitation. Rather, as DOTPF points out, if SP 102-1.01 is contrary to the federally-approved language in ES 08, then for purposes of compliance with federal law it should be disregarded altogether.³⁷ In any event, since DOTPF accepted bids from both Elcon and Swanson as responsive under state law, DOTPF’s interpretation of SP 102-1.01 did not result in a denial to either of them of their rights under federal law.

D. Cancellation Was Not Required

At oral argument, Swanson argued that rather than accepting Elcon’s bid, DOTPF should have rejected the all bids and resolicited or cancelled the solicitation, because SP

³⁴ Such a protest might be untimely. However, that is not necessarily the case, as is demonstrated by the treatment of Swanson’s protest in this case. In any event, even an untimely protest can be disruptive to the procurement process, and fundamental fairness in the procurement process is an important consideration.

³⁵ Appeal, p. 5; Swanson’s Motion at 4-5; Swanson’s Reply at 7-8. *See* Protest, Exhibit 1.

³⁶ Protest Appeal, p. 7.

³⁷ Protest Report, p. 14.

102-1.01 did not reflect DOTPF's intent.³⁸ But that rejection of all bids is a possible response to a solicitation that includes terms inconsistent with the purchasing agency's intent does not mean that rejection of all bids is required in every such case. In this particular case, even though DOTPF recognized, after the fact, that the language used in SP 102.1-1.01 did not convey what DOTPF intended (*i.e.*, what ES 08 provides), DOTPF could reasonably have decided not to cancel the solicitation if it deemed a requirement for assignment of a license at bid time unnecessary. Because Elcon is a general contractor, and not an electrical contractor, it was under no legal obligation to have an electrical administrator's license assigned to it before it submitted a bid, and Swanson has not pointed to any reason (other than a purported requirement in the solicitation) that assignment of an electrical administrator's license to a general contractor at bid time might be necessary.³⁹ Accordingly, Swanson has not shown that DOTPF abused its discretion in electing not to cancel the solicitation, but rather to accept Elcon's bid (which was responsive to SP 102-1.01 as written) and to treat assignment of its employee's electrical administrator's license (which was not required by SP 102-1.01 as written) as a matter of bidder responsibility (*i.e.*, ability to perform).⁴⁰

IV. Conclusion

DOTPF's determination of responsiveness was based on SP 102-1.01 as written and was consistent with how SP 102-1.01 would be read by a reasonable bidder. Swanson has not shown that DOTPF was required to make a determination of responsiveness based on an interpretation of SP 102-1.01 that is consistent with ES 08. The denial of Swanson's protest is therefore sustained.⁴¹

DATED March 11, 2011.

Signed

Andrew M. Hemenway
Administrative Law Judge

³⁸ See 2 AAC 12.860.

³⁹ It appears that DOTPF considered the requirement necessary only with respect to bids submitted by an electrical contractor, because that is what state law requires. See 12 AAC 21.310; Protest, Ex. 11, p. 1 (Email, M. O'Brien to S. Smith, 8/12/2010 at 10:15 a.m.).

⁴⁰ See Protest Report at 4-8; DOTPF Opposition at 9-13.

⁴¹ Because DOTPF's decision is sustained on the ground that Elcon's bid was responsive to SP 102-1.01 as written, it is not necessary to decide whether the effective date on the notice of change of affiliation was September 3 (as DOTPF contends) or September 13 (as Swanson contends). For the same reason it is not necessary to determine whether the certificate of registration that is in the record (which on its face shows that Mr. Wilkins' license is assigned to Elcon) was issued before or after bid opening.

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of April, 2011.

By: Signed
Signature
Marc A. Luiken
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]