

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF ADMINISTRATION**

OTIS ELEVATOR COMPANY)
)
 v.)
)
 DEPARTMENT OF TRANSPORTATION)
 AND PUBLIC FACILITIES) OAH No. 12-0113-PRO
) ITB No. 2512N025

DECISION

I. Introduction

The Department of Transportation and Public Facilities issued a solicitation for bids on a contract to provide elevator maintenance services. The solicitation included three lots. Two bids were submitted. ThyssenKrupp Elevator Company (Thyssen) was deemed the lowest responsive and responsible bidder and the Department issued notice of intent to award it the contract. Otis Elevator Company (Otis) filed a protest, asserting that Thyssen did not meet a requirement of the solicitation that the contractor provide two qualified journeymen elevator mechanics in Fairbanks. Following the protest, the Department obtained further information from Thyssen, and it denied the protest.

The parties submitted the matter for decision on the written record. The Department had discretion to consider the additional information submitted by Thyssen, and in light of that information its decision that Thyssen met the solicitation's requirements was not an abuse of discretion. The appeal is therefore denied.

II. Facts

The Department of Transportation and Public Facilities issued Invitation to Bid No. 2512N025 (ITB), soliciting bids to provide elevator maintenance and repair services.¹ The ITB included three lots, and contracts were to be awarded to the lowest responsive and responsible bidder on each lot.² Bids were due on March 7.³

¹ R. 98-107.

² R. 100.

³ See R. 43.

Two bidders responded: ThyssenKrupp Elevator Company and Otis Elevator Company.⁴ Thyssen was the low bidder on Lot 1 (Central Region) and Lot 2 (Northern Region), and Otis was the low bidder on Lot 3 (Southeast Region).⁵ On March 8, the Department issued notice of intent to award the contract on Lot 2 to Thyssen.⁶

Sandra Harrel was the procurement officer for this solicitation.⁷ On March 9, she emailed Thyssen, asking it to provide a statement of qualifications for the technicians that would be providing the requested services.⁸ Thyssen responded on March 12.⁹ On March 13, Thyssen identified its two Fairbanks technicians as James Perkins and Kent Kvasager.¹⁰ The next day, Ms. Harrel notified Thyssen that Mr. Perkins' resume did not show that he was a journeyman and she asked Thyssen to provide his apprenticeship records.¹¹ Thyssen responded by providing the apprenticeship record for Mr. Perkins; that document identified Mr. Perkins as a fourth year apprentice sited in Anchorage.¹²

Otis filed a protest on March 13, asserting that Thyssen had only one journeyman elevator mechanic working in Fairbanks.¹³ Otis asserted that Thyssen did not meet the ITB's specifications, which called for a minimum of two qualified journeymen elevator mechanics located in Fairbanks.¹⁴ Ms. Harrel provided Thyssen notice of the protest on March 14.¹⁵ She asked that Thyssen provide résumés for its Fairbanks based journeymen technicians by March 23.¹⁶ She again asked for information regarding the Fairbanks technicians on March 19.¹⁷

On March 20, Ms. Harrel notified Thyssen that based on the apprenticeship record and his résumé, Mr. Perkins did not meet the ITB's requirement for a Fairbanks based journeyman.¹⁸ Later that day, Thyssen responded, "There are two journeymen level elevator mechanics in Fairbanks right now – Lance Johnson and Kent Kvasager. James Perkins is a temporary

⁴ See R. 41.

⁵ See R. 41.

⁶ R. 40.

⁷ See R. 98.

⁸ R. 36.

⁹ R. 30 (email, Thyssen to Harrel @ 11:38 a.m. [Statement of Qualifications, references and résumés]; 35 (email, Thyssen to Harrel @ 12:55 p.m. [background checks]).

¹⁰ R. 31 (email, Thyssen to Harrel @ 10:02 a.m.).

¹¹ R. 8 (email, Harrel to Thyssen @ 11:06 a.m.).

¹² R. 30.

¹³ R. 38.

¹⁴ R. 38. See ITB Technical Specifications ¶2.3(A), ¶8.1.

¹⁵ R. 37.

¹⁶ R. 7 (email, Harrel to Thyssen@ 1:28 p.m.).

¹⁷ See R. 1 (email, Harrel to Thyssen @ 12:30 p.m.).

¹⁸ R. 25 (email, Harrel to Thyssen @ 8:26 a.m.).

mechanic per the IUEC agreement.”¹⁹ On March 21, apparently in response to an email sent to it late in the afternoon of March 20,²⁰ Thyssen sent a letter to Ms. Harrel stating, “ThyssenKruypp Elevator currently has two qualified journeyman elevator mechanics based in Fairbanks.”²¹ The letter did not identify those individuals. In response, Ms. Harrel reiterated that Mr. Perkins did not qualify as a journeyman, and again informed Thyssen that it needed to provide documentation to support the presence of two journeymen in Fairbanks, no later than March 23.²²

Eric Johnson is the Department’s procurement officer for the Northern Region. On April 3, Mr. Johnson notified Thyssen that the contract could not be awarded absent a showing of two qualified journeymen in Fairbanks, and stating that Mr. Kvasager met the requirement but Mr. Perkins did not.²³ Mr. Johnson requested that no later than April 6 Thyssen submit evidence that it had two journeymen stationed in Fairbanks, and also that it submit a satisfactory insurance certificate and performance bond by that date.²⁴ Thyssen responded April 4, identifying its second journeyman “located in Fairbanks” as Lance Johnson.²⁵ (Thyssen had previously identified Mr. Johnson’s home as Anchorage.²⁶) On April 6, Thyssen submitted a revised insurance certificate and a performance bond.²⁷

Eric Johnson spoke with Thyssen about its plan. Thyssen informed Mr. Johnson that although Mr. Perkins was an apprentice, it anticipated that he would achieve journeyman status in October, and that in the meantime it would temporarily relocate Lance Johnson to Fairbanks.²⁸ On April 18, Otis contacted Eric Johnson regarding the status of its protest, and Mr. Johnson informed Otis of his conversation with Thyssen. Otis checked into the matter and on April 19

¹⁹ R. 24 (email, Thyssen to Harrel @ 10:53 a.m.).

²⁰ See R. 23. The letter appears to have been an attachment to an email sent to Ms. Harrel at 7:47 a.m. on March 20, in response to an email Ms. Harrel had sent to Thyssen on March 20 at 2:59 p.m. The header to the latter email is in the record, but not its text.

²¹ R. 22 (M. Evans to Harrel).

²² R. 23 (email, Harrel to Thyssen @ 9:08 a.m.).

²³ R. 21 (Johnson to Evans).

²⁴ R. 21 (E. Johnson to M. Evans).

²⁵ R. 20 (J. Evans to Johnson).

²⁶ R. 75. This document was identified in the Index to [Agency] Record as a part of Thyssen’s bid (Item 3). However, it appears not have been a part of the bid, but rather an attachment to an email sent to Ms. Harrel on March 13. See R. 76.

²⁷ R. 12-19.

²⁸ See Otis Appeal.

informed Eric Johnson that Mr. Perkins had been expelled from the union and “could not sit for the [October] test.”²⁹

On April 24 the protest was denied.³⁰ The contract was awarded to Thyssen, with performance to begin May 1.³¹

III. Analysis

A. Issues Raised

Otis’s appeal suggests that Thyssen’s plan to temporarily base Lance Johnson in Fairbanks pending Mr. Perkins’ completion of his apprenticeship was not feasible in light of Mr. Perkins status with the union, but Otis does not directly assert that Thyssen lacked the ability to locate a second journeyman mechanic in Fairbanks for the duration of the contact, if necessary. Thus, it appears, Otis is not asserting on appeal that Thyssen cannot comply with the solicitation’s requirement for two Fairbanks based journeymen mechanics, even though its original plan may not have been feasible. Rather, Otis’s appeal “is based primarily on the fact that there should not have been a second and third opportunity to correct the submittal.” Secondly, Otis objects that the Thyssen personnel do not have the “specialized knowledge as required by the specifications.”

B. Supplemental Information

Otis contends that Thyssen should not have been provided multiple opportunities to provide information that was not contained in its bid (“the submittal”), or to correct information that was in the bid. In particular, Otis objects to the additional information submitted regarding the identity and qualifications of its Fairbanks journeymen, and submission of a corrected insurance form.

In responding to an invitation for bids, a vendor must provide the information that is required by the solicitation. In this case, the invitation to bid states:

Bidders must provide evidence that the person(s) performing the service work is a [*sic*] competent and has sufficient training or experience to effectively service the equipment identified in this ITB.

The bidder’s failure to provide the evidence mentioned above, within the time required by the state, may cause the state to consider the bid non-responsive and reject the bid.^[32]

²⁹ See Otis Appeal.

³⁰ R. 8-8.

³¹ R. 4. The date the contract was awarded is not evident from the record.

³² R. 110 (ITB p. 13).

In addition, the technical specifications included a provision, under the heading “Required for Award”, calling for submission of a statement of qualifications and references for all technicians and stating, “The Contractor shall have at least 2 fully qualified journeyman elevator mechanics located... in Fairbanks.”³³

With respect to insurance, the invitation to bid stated that proof of insurance was required and that “[f]ailure to provide satisfactory proof of insurance within the time required will cause the state to declare the bid non-responsible and to reject the bid.”³⁴

Nothing in these provisions required submission of information regarding personnel or insurance with the bid. Rather, the provisions state that the information must be provided within the time allowed. It was within the discretion of the purchasing agency to extend the time for providing the requested information, including an extension beyond the originally set date. After setting an initial deadline of March 23 with respect to personnel, the purchasing agency extended the deadline to April 6. Otis has not shown that the agency abused its discretion in setting the original deadline and extending it. Accordingly, the appeal on this issue is denied.

C. Specialized Knowledge

Otis’s protest did not specify any shortcoming in Thyssen’s experience, qualifications and knowledge, other than to assert that two mechanics were required to do the work properly and that this was “especially important when it comes to working on escalators.”³⁵ On appeal, Otis again did not specify any particular absence of technical skill, experience or qualifications, but rather asserted that Thyssen’s offer to provide some staffing from their Anchorage office was an implicit acknowledgement that its Fairbanks personnel lacked the “specialized knowledge as required by the specifications.”³⁶

The invitation to bid states that the persons performing the work must be competent and have sufficient training or experience to service the equipment covered by the contract.³⁷ It requires the contractor to have “an established record of satisfactorily maintaining and testing equipment of the types identified in the Bid Schedule.”³⁸

³³ R. 113 (ITB p. 16, ¶2.3A).

³⁴ R. 107 (ITB p. 10).

³⁵ R. 39.

³⁶ R. 3.

³⁷ R. 13 (ITB p. 13).

³⁸ R. 15 (ITB p. 15, ¶2.1).

Otis does not dispute that Thyssen is an experienced firm with respect to the services covered by the contract. A journeyman elevator technician by definition has the training or experience to work on elevators. Prior to awarding the contract, the purchasing agency confirmed that Thyssen's Fairbanks personnel have experience working with escalators.³⁹ Nothing in the invitation to bid precludes a contractor from providing extra technicians from another location to assist in carrying out the work on occasion. Thyssen's commitment to provide additional support for large repairs or scheduled testing involving specialized training is entirely consistent with the solicitation. It does not mean that the Fairbanks personnel identified by Thyssen lack the training or experience to service the equipment covered by the contract. Otis has not shown an abuse of discretion.

D. Provision of False Information

In addition to asserting that Thyssen should not have been provided additional time to provide information required for a determination of responsiveness or responsibility, on appeal Otis makes a further charge: that Thyssen misrepresented Mr. Perkins' status.⁴⁰ Specifically, Otis alleges that at some point prior to April 18, Thyssen had told Eric Johnson that it anticipated that its apprentice, James Perkins, would obtain certification in October. According to Otis, that was a false representation, and Mr. Perkins was at that time ineligible to obtain certification in October. However, Otis also asserts that it provided Mr. Johnson with the correct information regarding Mr. Perkins' status before Mr. Johnson denied the protest, and, as previously observed, it has not argued on appeal that Thyssen is incapable of providing two journeymen in Fairbanks even if Mr. Perkins will not be one of them. Thus, for purposes of the protest appeal, Otis has not shown that the purchasing agency abused its discretion in awarding the contract to Thyssen.

Nonetheless, the allegation that Thyssen misrepresented Mr. Perkins' status should not be disregarded. Misrepresentation of material facts in connection with a procurement, if the procurement officer makes a specific finding it has occurred, may, after consultation with the attorney general, be grounds for voiding a contract.⁴¹ However, the decision to proceed with any

³⁹ R. 18. *See also* R. 10.

⁴⁰ R. 3.

⁴¹ *See* AS 36.30.687; 2 AAC 12.690.

such action after a contract has been awarded is a matter of contract administration, within the discretion of the purchasing agency and not subject to review in a protest.⁴²

IV. Conclusion

Otis has not shown that the Department abused its discretion in awarding the contract to Thyssen. Whether Thyssen's alleged misrepresentation warrants further action is committed to the discretion of the Department. Otis's appeal is denied.

DATED May 16, 2013.

By: Signed
Andrew M. Hemenway
Administrative Law Judge

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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 1st day of July, 2013.

By: Signed
Signature
Becky Hultberg
Name
Commissioner
Title

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

⁴² See generally, In Re Bachner Company, Inc., No. 03.10 (Department of Administration 2004) (available on the webpage of the Office of Administrative Hearings).