November 17, 2015

In re:

Massachusetts Water Resources Authority;
Alewife Brook Pump Station

Protestors:

ATTORNEY GENERAL

BID UNIT, FAIR LABOR DIVISION

BID PROTEST DECISION

INVESTIGATION SUMMARY

Pursuant to M.G.L. c. 149, § 44H, the Office of the Attorney General, through the undersigned, conducted a hearing on September 29, 2015 and October 20, 2015, to determine whether Waterline Industries Co., Inc. ("Waterline") violated the general contractor law, M.G.L. c. 149, § 44E, and the filed sub-bid law, M.G.L. c. 149, § 44F, when it bid the Massachusetts Water Resources Authority's ("MWRA") Alewife Brook Pump Station project ("project"). The Protestors include three other bidders for the project and four construction trade associations. They are: Fall River Associates Co., Inc., ("FREA") J.F. White Contracting Company, Barletta Engineering Corporation ("Barletta"), Utility Contractors Association of New England,

1 Supplemental memoranda were submitted by all parties on October 26, 2015, and the record then closed.
Associated Subcontractors of Massachusetts ("ASM"), Associated Builders & Contractors, Inc. and Construction Industries of Massachusetts, Inc. (collectively, "the Protestors").

The Protestors argue that Waterline violated M.G.L. c. 149, § 44F, by bidding five self-restricted filed sub-trades at prices that were unrealistically low, and did not contain the "complete work as specified," as required by M.G.L. c. 149, § 44F(3). They argue that Waterline’s Electrical and HVAC bids do not contain the complete work as specified in the plans and specifications. They argue that Waterline’s filed sub-bids should have contained overhead and profit allocable to the filed sub-bids. The Protestors argue that Waterline’s general bid must be rejected, since it contained costs attributable to the filed sub-bid work in violation of M.G.L. c. 149, § 44E. Waterline denies that its bids were not for the complete work of the filed sub-trades. It also argues that its general bid lawfully contains the overhead and profit attributable to the filed sub-bids. 4 The MWRA argues the Protestors have not proven that Waterline’s bid was not for the complete scope of the filed sub-bid work, and that overhead and profit do not have to be allocated to their respective filed sub-bids.

For the following reasons, I find that Waterline did not include all of its costs in its restricted filed sub-bids, but rather, carried those costs in its general bid. This was a violation of M.G.L. c. 149, §§ 44E and 44F, as well as the equal footing principle, which cannot be waived by the MWRA. The Protest is therefore Allowed.

3 "Self-restricted" sub-bids are bids that can only be used by the same bidder when it bids the general contract work.

3 "Overhead" and "general conditions" are sometimes used interchangeably. The term "overhead" will be used in this Decision.

4 However, a different argument was made in an August 31, 2015 affidavit signed by Mr. Ralph Dumke, President of Waterline, in which he attested that the overhead costs of the filed sub-bids do not exist because Waterline is "performing both the general contract and subcontract work."
STATEMENT OF THE FACTS

The filed sub-bids for the project were opened by the MWRA on June 19, 2015 and the general contractor bids on June 25, 2015. The project’s scope of work includes numerous improvements and the rehabilitation of the MWRA’s Alewife Brook Pump Station in Somerville. Waterline restricted its filed sub-bids for Miscellaneous Metals, Roofing and Flashing, Plumbing, Electrical and Heating, Ventilation, and Air Conditioning ("HVAC") to itself. Its total for these five filed sub-bids was $1,256,985; the lowest unrestricted bid for these filed sub-trades was $2,232,068. Waterline was thus $1,066,083 lower than the lowest unrestricted filed sub-bidder. The Table below illustrates the filed sub-bids at issue:

<table>
<thead>
<tr>
<th>Filed sub-bid Trade</th>
<th>Waterline’s restricted bids</th>
<th>Lowest unrestricted bids</th>
<th>Difference</th>
<th>Waterline’s % of lowest unrestricted bids</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misc. Metals</td>
<td>$77,367</td>
<td>$179,250</td>
<td>$101,883</td>
<td>43%</td>
</tr>
<tr>
<td>Roofing &amp; Flashing</td>
<td>$116,777</td>
<td>$161,000</td>
<td>$44,223</td>
<td>73%</td>
</tr>
<tr>
<td>Plumbing</td>
<td>$57,987</td>
<td>$97,000</td>
<td>$39,013</td>
<td>60%</td>
</tr>
<tr>
<td>HVAC</td>
<td>$277,677</td>
<td>$649,000</td>
<td>$371,323</td>
<td>43%</td>
</tr>
<tr>
<td>Electrical</td>
<td>$727,177</td>
<td>$1,236,818</td>
<td>$509,641</td>
<td>59%</td>
</tr>
</tbody>
</table>

The total contract bids of the three lowest general bidders were: Waterline, $11,947,677; Methuen, $11,968,090, and Barletta, $12,560,000. Although Waterline was the lowest bidder by approximately $20,000 for the total contract, its Item 1 total, i.e., its bid for the general contract work, was more than $1 million more than the lowest unrestricted bidders: Waterline, $10,404,192; Methuen, $9,358,522; and Barletta, $9,950,432. The Protestors argue that the $1 million difference represents the costs of work excluded from the filed sub-bids and overhead and profit allocable to the filed sub-bids.
The Protestors focus on two of Waterline’s filed sub-bids, Electrical and HVAC. Their arguments, however, apply to all of the filed sub-bids submitted by Waterline. They also point to the MWRA’s contract section 13.1.8, which lists other costs of the work which are not directly reimbursed except through the overhead markup:

Personnel employed by the contractor whether at the site or in the contractor’s principal or a branch office for management, administration or in support of the performance, management or administration of the work including project managers, site supervisors, purchasing and contracting agents, expeditors…timekeepers and clerks.

Wayne Sheridan, a witness for the Protestors, reviewed Waterline’s Electrical filed sub-bid and concluded that Waterline’s assertion that electrical gear will cost $267,000, as illustrated in an unexecuted purchase order from Contractor Sales, does not contain an “apples to apples” listing of the electrical gear. He stated that the estimate is not pursuant to the plans and specifications, and that there is a substitution by Waterline for all of the major electrical components which create plant and safety issues since the equipment listed by Waterline has a different functionality than that listed in the specifications. The value of the unexecuted purchase order is $35,000 to $50,000 less than the equipment specified in the project specifications, according to Mr. Sheridan. Waterline responds by arguing that the specification for the gear is not proprietary, and an “equal” manufacturer is suitable.

Waterline does not include a component of the gear required by the specifications, draw out breakers. See specification 16361. Waterline does not dispute this. In addition, the Protestors argue that the Controller Sales purchase order does not meet the requirements for Underwriter’s Laboratory (“UL”) approval. The following table illustrates this:
COMPONENT | SPECIFICATION | WATERLINE’S P.O.
--- | --- | ---
Low voltage switchboard | UL 891 | UL 805
Draw out breakers | UL 98 | UL 489
Variable frequency drives | Various | UL 805
Motor control center | UL 845 | UL 805

Waterline’s bid for the rest of the Electrical work, i.e., commodities (wire, conduit and pipe) and lighting was $187,000. The MWRA’s estimate for the cost of commodities was more than $347,000, and FREA carried $251,000 for commodities.

Michael Creamer, a representative of CAM HVAC, another bidder, submitted an affidavit stating that Waterline did not carry the cost of two Lochinvar boilers, but instead only carried the cost of one boiler. Waterline carried no line item covering mandatory fire watch of $368 per day. CAM HVAC’s cost for this item was $5,000. CAM HVAC stated that it carried $11,424 for Taco pumps, the price quoted by Taco, not $6,496 as Waterline carried. Greenheck Supply’s estimate for fans was $17,000, which CAM HVAC included in its filed sub-bid and Waterline carried $10,000. Altogether, Mr. Creamer stated that Waterline has not included over $40,000 of required costs in its HVAC filed sub-bid. Waterline offered no evidence to rebut these assertions.

It is undisputed that Waterline carried the overhead allocable to its filed sub-bids in its general contract price. This is confirmed by a letter of April 13, 2009 from Waterline to CDM Engineers regarding the use of the same approach to a different construction project:

> You will note that our sub-bids do not include any of the general conditions, such as supervision, project management, insurance bonds or insurance because that is all included in our general bid. You will also notice that there is no
overhead or profit because that too is included in our general bid. Overhead includes personnel costs and equipment costs.

Personnel costs for the filed sub-bids include: estimating, purchasing, submittals of proposed products and shop drawings, job hazard analysis, safety and health handbook, schedule of values, project construction schedule (graph and spreadsheet), quality assurance/quality control, inspections, time sheets and payroll, pay applications, certified payrolls, mobilization/demobilization, submittal schedule, MWRA contractor orientation and badge pickup, requests for information, resubmittals, coordination with vendors, transmittals, as-builts, closeout paperwork, training MWRA staff, training outlines and materials, testing, punchlist, coordination drawings and labeling.

In addition, there are costs for specialized equipment and small tools used in each filed sub-bid’s scope of work. For example, the electrical equipment and small tools include: pipe benders, PVC pipe benders, PVC coated pipe threading equipment, pipe threading equipment, lifts, band saws, hole punching equipment, coring rigs and bits, cordless drills, extension cords, gang boxes, reel jacks, wire pulling equipment, chain falls, hole saw kits and safety equipment. Waterline must carry liability insurance which is not included in the filed sub-bids. According to FREA, all of its personnel costs and specialized equipment costs were carried in its filed sub-bid. Its overhead amounted to 5% of the filed sub-bid. Annese Electrical carried 10% of its filed sub-bid cost as overhead.

The primary electrical materials are electrical gear, electrical materials and lighting fixtures. The MWRA’s estimate for the gear was $363,000. Eaton, a manufacturer of electrical gear, provided bidders with a quote of $335,800, which does not include the distributors’ mark-up (generally 10%-15%), electrical disconnects and a pad mount transformer that would add a cost of $15,000 to the electrical gear. The total would therefore be $350,800 plus the distributors’
Waterline, however, submitted a purchase order for a vendor, Controller Sales and Services, that was for $267,000.

Many of the same overhead items apply to the HVAC filed sub-bid as well, e.g., estimating, purchasing, submittals, scheduling, as well as delivery and storage, cutting and patching, and labeling.

Profit is determined by subtracting the costs of the work from the revenues for that work. It is undisputed that Waterline did not include allocable profit in its filed sub-bids, but rather, carried it in its general bid. The Protestors argue that a bid that assigns the profit markup at bid time to the general contractor’s work instead of the filed sub-bids creates an unlevel playing field.

ANALYSIS

The first issue in this case is whether Waterline carried all of the costs associated with its filed sub-bids in its filed sub-bids. It did not do so, which was in violation of M.G.L. c. 149, § 44F. The second issue is whether Waterline may shift its overhead and profit from its filed sub-bids to its general bid. It may not, as this cost-shifting violates M.G.L. c. 149, § 44F. Third, Waterline’s general bid violated M.G.L. c. 149, § 44E, because its general bid should have excluded costs allocable to the filed sub-bids. In addition, all of these problems with the bids violated the equal footing doctrine.

1. Carried Costs

Waterline’s Electrical and HVAC bids did not include the entire cost of the project. Waterline did not carry all of its costs in its Electrical filed sub-bid. It did not carry draw out breakers required by specification 16361. In addition, the Controller Sales purchase order does not meet the requirements for Underwriter’s Laboratory ("UL") approval. However, the
argument raised by the Protestors that the equipment listed in the purchase order does not meet the project specifications is a submittal issue, not a bid issue, over which I have no jurisdiction. A submittal in this context is the bidder’s proposed substitution for a product named in the specifications. The submittal process is not part of the bid process, but rather, substitutions are proposed after the award of the contract. See, e.g., Collins v. UMass Building Authority, Attorney General Bid Protest Decision (July 31, 2015) (submittal of substitute products is done after award of the bid).

Waterline did not carry all of its HVAC costs in its filed sub-bid. The affidavit submitted by CAM HVAC’s representative, Michael Creamer stated that Waterline did not carry the cost of two Lochinvar boilers, but instead only carried the cost of one boiler. Waterline carried no line item covering mandatory fire watch of $368 per day. CAM HVAC’s cost for this item was $5,000. Altogether, Mr. Creamer stated that Waterline has not included over $40,000 of required costs in its HVAC filed sub-bid. Importantly, Waterline did not produce any evidence or testimony to disprove Mr. Creamer’s assertions.

2. Shifting of Costs

Second, Waterline’s bids, which shifted its filed sub-bid costs to its general bid, violated both M.G.L. c. 149, § 44E and M.G.L. c. 149, § 44F. Those laws contain several provisions that mandate the rejection of Waterline’s filed sub-bids and general bid. First, a filed sub-bidder must certify in its bid that it will “furnish all labor and materials required for completing, in accordance with the hereinafter described plans, specifications and addenda.” See M.G.L. c. 149, § 44F(2) (statutory form for subbid). This requirement is echoed by the MWRA’s specification 1.126, which defines work as “all labor, materials, equipment, supervision, and services required by, or reasonably inferred from, the contract documents, which are necessary for the construction
of the project.” The MWRA argues that “labor” includes only craft labor, and not labor performed by estimators, purchasers or other overhead personnel involved in the project. This definition is too narrow.

The form for General Bid, found in M.G.L. c. 149, § 44E(2), similarly requires the bidder to certify that it “proposes to furnish all labor and materials...in accordance with the accompanying plans and specifications.” The term “labor” in this context has not been interpreted by a Massachusetts court. The term clearly must have the same meaning in M.G.L. c. 149, § 44E, as it does in M.G.L. c. 149, § 44F. If “labor” means only craft labor, then no contractor would ever be compensated for personnel costs such as estimating and submitting substitutes. This makes no sense, since these overhead items are a large part of any bid. Therefore, the statutory term “labor” must include personnel labor overhead costs.

If a general bidder submits a sub-bid for a trade he customarily performs, it must be “on a par” with other sub-bidders. M.G.L. c. 149, § 44F(5). If Waterline were allowed to exclude general conditions and profit from its filed sub-bids, it is not “on a par” with the other filed sub-bidders, who have carried these costs in their bids.

The general bidders specify separately on the general bid form their prices for Item 1 (general contractor’s work) and Item 2 (filed sub-bidders’ work). Item 1 work is the “work of the general contractor, being all work other than that covered by Item 2.” M.G.L. c. 149, § 44E(1). This statute means that Item 1 costs and Item 2 costs must be segregated. They are not segregated in the Waterline bid, since the filed sub-bids’ overhead and profit is shifted to the general bid. This is a violation of M.G.L. c. 149, § 44E(1), and mandates the rejection of Waterline’s general bid as well as its filed sub-bids.
While profit cannot be considered a “cost” of the filed sub-bid, it would be a violation of equal footing to exclude profit from the filed sub-bids. The other filed sub-bidders’ filed sub-bid prices include profit. They would not be competing in the same way as Waterline if Waterline were allowed to exclude profit from its sub-bid.

3. **Equal Footing Doctrine**

One of the main goals of the competitive bidding laws is to place all bidders on “equal footing.” See *Interstate Engineering v. Fitchburg*, 367 Mass. 751 (1975), which held that the two fundamental purposes of the bid laws are, first, to enable the public contracting authority to obtain the lowest price for its work that competition among responsible contractors can secure. Second, the statute establishes an honest and open procedure for competition for public contracts and, in so doing, places all general contractors and sub-bidders on an equal footing in the competition to gain the contract. Equal footing is maintained if the bidders have the “opportunity to bid in the same way, on the same information and to bear the same risk of rejection.”

*Department of Labor and Industries v. Boston Water and Sewer*, 18 Mass. App. Ct. 621, 626 (1984) (emphasis added). Filed sub-bidders are not bidding “in the same way” if one of them shifts its overhead and profit to its general bid.

By excluding overhead and profit from its filed sub-bids, Waterline is assured that its filed sub-bids are the lowest for the project. Every filed sub-bidder wants to submit the lowest sub-bid price. The filed sub-bidder who submits the lowest price may secure the award of the work by being substituted for a higher bidder who was carried by the low general bidder. See M.G.L. c. 149, § 44(E)(2)(D). Waterline’s bidding guarantees that it will be the lowest filed sub-bidder for the pertinent trades.
Waterline and the MWRA make three main arguments as to why the Protest should be denied. First, they point to two prior Bid Protest Decisions involving projects bid upon by Waterline that they assert support their cost-shifting practices. In *R.H. White v. Webster*, Attorney General Bid Protest Decision (July 2, 2009), the issue of cost-shifting was viewed by the Hearing Officer as an unresolved “interesting issue” that warranted further discussion but did not provide the basis for the decision. Similarly, in *R.H. White v. Newburyport*, Attorney General Bid Protest Decision (January 21, 2010), the hearing officer relied on the *Webster* Decision to deny the Protest. A review of Waterline’s position statement, however, reveals that it argued that it was not shifting any costs such as overhead, but rather, eliminating such costs. To the extent that Decision is pertinent, it cannot be relied on in the instant case since Waterline’s position now is that cost-shifting is permissible, not that it had eliminated overhead costs.

Second, Waterline and the MWRA assert that any flaws in Waterline’s bid can be waived by the awarding authority. That is incorrect. Both Waterline’s general bid and its filed sub-bids must be rejected because they violate M.G.L. c. 149, §§ 44E and 44F. Since these are statutory violations, they cannot be waived by the MWRA. See *Gil-Bern Construction v. Brockton*, 353 Mass.233 (1968) (“in matters of substance, there must be strict compliance with the requirements of c. 149”).

Third, the MWRA and Waterline argue that any decision unfavorable to their position should be prospective in nature, rather than retrospective. That request is denied. The interpretation of an existing statute generally applies retroactively. In *Shawmut Worcester County Bank v. Miller*, 398 Mass. 273, 281 (1986), the Supreme Judicial Court stated that “[a]lthough this court has not previously dealt with the issues raised here, we are not announcing common law rules but rather are construing certain statutory provisions. Those provisions have
had the same meaning since the effective date of the statute.” Thus, the prohibitions against cost shifting contained in M.G.L. c. 149 §§ 44E and F have existed since their passage. This Decision will be applied retrospectively to the instant case.

For the foregoing reasons, the Protest is Allowed.

Respectfully submitted,

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Assistant Attorney General

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