



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2014 AUG 29 P 12: 54

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

In the Matter of)	PDH-2014-010
)	
HONOLULU DISPOSAL SERVICE,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	DECISION
)	
vs.)	Senior Hearings Officer:
)	David H. Karlen
OFFICE OF PROCUREMENT AND REAL)	
PROPERTY, UNIVERSITY OF HAWAII)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

Petitioner Honolulu Disposal Service ("HDS") filed a Request for Administrative Hearing in this matter on August 4, 2014. At the same time, HDS filed a procurement protest bond in the amount of \$1,000.00.

By Notice of Hearing and Pre-Hearing Conference filed August 5, 2014, a pre-hearing conference was set for August 18, 2014, and a hearing was set for August 25, 2014.

The University filed its Response on August 14, 2014. In addition, the University filed a Motion to Dismiss on August 18, 2014.

The pre-hearing conference was in fact held on August 18, 2014. Mr. Stanley Hirata and Mr. Dwight Yoshimura appeared on behalf of HDS. Edsel M. Yamada, Esq., appeared on behalf of Respondent Office of Procurement and Real Property, University of Hawaii ("University").

Following the pre-hearing conference, HDS filed its opposition to the University's Motion to Dismiss on August 22, 2014.

The University's Motion to Dismiss was heard on August 25, 2014. Mr. Stanley Hirata and Mr. Dwight Yoshimura again appeared on behalf of HDS. Lane T. Ishida, Esq., appeared on behalf of the University. Mr. Duff Zwald, Director of the University's Office of Procurement and Real Property, also attended on behalf of the University.

At the conclusion of argument on the University's Motion, the Hearings Officer orally granted the Motion. As a result, there was no need for an evidentiary hearing, and the proceedings were adjourned.

This Decision, based on the record as of the conclusion of oral argument on August 25, 2014, more fully sets forth that ruling and stands as the formal order with respect to the aforesaid Motion.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On May 8, 2014, the University posted Invitation for Bids (IFB) No. 14-0240 To Provide Refuse Collection and Recycling Services for student housing at the Manoa campus of the University of Hawaii.

2. A copy of the IFB was e-mailed to HDS on May 8, 2014.

3. A pre-bid conference was scheduled for May 12, 2014, and a deadline for questions and requests for clarifications was set for May 14, 2014.

4. Representatives of HDS attended the pre-bid conference on May 12, 2014.

5. Prior to bidding, HDS submitted two questions for clarification regarding the terms of the contract. These questions, and questions from other potential bidders, resulted in the University issuing Amendment No. 2 to the IFB on May 15, 2014, which responded to

the potential bidders' questions. None of the questions submitted were pertinent to the subject matter of HDS' protest herein.

6. Bid opening was scheduled for the afternoon of May 23, 2014.

7. In May of 2014, HDS was the current provider of those services.

8. The following bid amounts were announced at the public bid opening on May 23, 2014, with HDS being the apparent low bidder:

a. HDS - \$236,362.31

b. Rolloffs Hawaii, LLC - \$240,883.87

c. West Oahu Aggregate Co., Inc. - \$279,717.35

d. Support Services Group - \$289,845.07

9. The IFB requested prices for three types of services:

A. Front End Services

B. Recycling Services

C. Roll Off Services

10. At the public bid opening, the bidders had the opportunity to review and examine all bid documents, including all of the bidders' bid amounts for the three types of services set out in the specifications.

11. After reviewing the bids it received, the University determined that arithmetical errors were made in the bids submitted by Rolloffs Hawaii, LLC, and Support Services Group. The errors were in determining the prices for (A) Front End Services and (B) Recycling Services. The University determined that these errors were correctable in accord with the terms of its General Provisions.

12. Correction of these arithmetical errors increased Rolloffs Hawaii's bid to \$244,288.99.

13. Correction of these arithmetical errors decreased Support Services Group's bid to \$234,645.07.

14. Accordingly, HDS was no longer the lowest bidder, being replaced in that position by Support Group Services.

15. HDS was informed of the change in the bid price for Support Services Group by means of a letter from the University dated May 28, 2014. This letter was sent by fax to HDS, and HDS received that fax slightly after 4:35 p.m. on May 28, 2014.

16. Prior to HDS' receipt of the May 28, 2014, letter, HDS did not perceive any need to examine the other bids because HDS was the apparent low bidder. Receipt of this letter prompted HDS to review the other bids.

17. By letter dated June 6, 2014, HDS submitted a protest to the University with respect to the IFB in question. This letter was not received by the University until June 10, 2014.

18. The HDS letter did not dispute the recalculation of the bid of Support Group Services.

19. Instead, the HDS letter disputed "the method that was used to calculate the total bid price for each location," but only for (C) Roll Off Services.

20. The recalculation of the bid of Support Group Services did not involve any recalculation of the bid for (C) Roll Off Services.

21. The price requested for Roll Off Services in the IFB was a combination of two prices. A fixed rate was requested for "Cost for Delivery/Pick-up," and a variable rate was requested for "Disposal Fee per ton". (Emphasis supplied) Adding these two together resulted in a "Total Bid Price" for each location.

22. In providing Roll Off services, the contractor delivers an empty open top container to a designated location. These are large containers of some 30 to 40 cubic yards

capacity. The students then fill the container with discarded items. Once full, the contractor picks up the container and takes it to the disposal site to dispose of the container's contents.

23. The HDS letter of June 6, 2011 disputed the use of the variable rate for the disposal fee since the only locations for the disposal of trash are operated by the City and County of Honolulu, the fees charged there are public information, and the fees are the same to all bidders. According to HDS, therefore, the only true variable item is the expected disposal weight loaded in the roll-off containers because the City and County's disposal fee would always be the same per ton.

24. Based upon that analysis, HDS had bid a disposal fee of \$286 per haul instead of the \$95.50 fee per ton charged by the City and County. (This works out to approximately 3 tons per haul of one roll-off container.)

25. The other bidders listed disposal fees for Roll Off Services as basically the City and County's rate per ton (although one listed the rate without excise tax added on).

26. HDS' letter stated: "If it were truly a variable rate that was being requested, then we should be allowed to change our Disposal Fee to \$95.50 as reflected on page BID-9 of our response."

27. Such a change would have restored HDS to the position of apparent low bidder.

28. At the hearing, HDS explained that the specifications' method for pricing Roll Off Services was something HDS had never seen before. Other contracts, including the last time this contract was awarded about eleven years ago, did not combine a fixed rate item with a variable rate item. In the past, the disposal fee had always been a fixed cost. According to HDS at the hearing, that was the "whole point" of its protest.

29. By letter dated July 31, 2014, the University denied HDS' protest on the following bases:

a. HDS' challenge to the terms of the bid specification was untimely because it should have been submitted five working days after the IFB was originally posted (May 15, 2014), or, at the latest, prior to May 23, 2014, the date of the bid opening.

b. Assuming for the sake of argument only that the HDS protest was timely filed, as an alternate basis for dismissal of HDS' protest, the University asserted that the bid specifications were clear and that it would be inappropriate to allow HDS to modify its bid, in the manner requested, after all of the bids had been opened and had been made public.

30. HDS then filed its Request for Administrative Hearing on August 5, 2014, appealing the decision made in the University's letter of July 31, 2014.

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.

The first aspect of HDS' complaint is that the pricing provision for roll off services was not appropriate. According to HDS in its bid protest letter of June 6, 2014, "we are disputing the method that was used to calculate the total bid price for each location." The problem, according to HDS, was the combination of a fixed rate for cost of pickup and delivery to the disposal site with a variable per ton rate for the disposal fee to be paid at the disposal site. The protest letter asserted that it was wrong to have the disposal fee represented as a variable.

The University correctly asserts that this is a challenge to the terms of the specifications. It is a complaint about the basic structure of the price requested, and it is a complaint based upon the face of the specifications. It does not depend upon the particular

prices per ton that were filled in by other bidders and that were not available to HDS until after bid opening.

HRS §103D-701(a) provides in relevant part:

A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise there; 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. (Emphasis supplied)

Strict compliance with the time limits for filing a protest is required. See, e.g., Okada Trucking Co., Ltd. v. Department of Education, PCH 2009-18 at page 15 (November 15, 2011).

HDS knew or should have known of the alleged problem of the specifications combining a fixed rate and a variable rate when it received the specifications prior to submitting a bid. HDS does not dispute that it received the IFB bid the day it was posted. Although there is no evidence of when HDS actually read the IFB, the critical date is that of receipt of the IFB. That has been established as the date a bidder constructively knew or should have known of the contents of the IFB. CR Dispatch, Inc. v. Department of Education, PCH 2007-7 (December 12, 2007).

In this case, moreover, there is also no need to determine when HDS knew or should have known of the alleged problem. HRS §103D-701(a) establishes an outside time limit on protests concerning the contents of a solicitation—in all cases, the protest must be submitted prior to the date for submission of bids. In this case, the last possible deadline date was therefore May 22, 2014. HDS clearly missed that deadline.

To avoid this conclusion, HDS argued that it relied upon the terms of the University of Hawaii General Provisions for Goods and Services (Exhibit 4) when determining the appropriate time for submitting its protest. It asserted that General Provision 2.23 (b) set five

days after posting of the award as the time limit on protests. This is a misreading of that provision, for that deadline is clearly the outside deadline—the deadline is five days after the protestor knew or should have known of the facts giving rise to the protest, with five days after the posting of the award being the outside date. Furthermore, HDS pointedly ignored that portion of General Provision 2.23 (b) which states: provided further that no protest based upon the content of the solicitation shall be considered if submitted after the date set for the receipt of offers.

In all respects relevant to the matter at issue herein, General Provision 2.23(b) is identical to HRS §103D-701(a). Any reliance on that General Provision to avoid the statutory deadline is therefore misplaced.

Further, even if General Provision 2.23(b) could be read as asserted by HDS, it should be noted that a general contractual provision cannot contradict or overrule a statutory imperative. This is acknowledged on the cover page of the General Provisions, where it states:

In the event of any conflict between these General Provisions and the Hawaii Revised Statutes and Hawaii Administrative Rules, the Statutes and Rules in effect at the time of the issuance of the solicitation shall control, and are hereby incorporated by reference.

HDS has also asserted that it had no reason to review the other bids until after it received the University's letter of May 28, 2014 informing HDS of the corrections which made Support Services Group the apparent low bidder. However, since this is really a challenge to the terms of the specifications, the latest possible deadline for submission of the protest was, as discussed above, May 22, 2014.

Moreover, even assuming that the May 28, 2014 letter was the first time HDS knew or should have known of the potential grounds for a protest, and even giving HDS the benefit of the doubt that effective receipt of that letter was on May 29, 2014, because the fax arrived after business hours, submitting the protest on June 10, 2014, still was not timely.

The timely filing of a protest is a jurisdictional requirement, and that requirement cannot be waived. CR Dispatch Service, Inc. v. Department of Education, *supra*. There being no jurisdiction in this matter, there is no basis for ruling on the merits of any remaining substantive claims of HDS.

At oral argument, the Hearings Officer expressed the opinion that, if the merits of HDS' complaint were reached, he would find that there was no problem with the specification as written. A per ton disposal price could be bid, as was done by three other bidders. The specification could not be reasonably read to limit payment to one ton if a load exceeded one ton. The reasonable reading of the specification was that the payment, for example, on a three ton load would be payment of the pickup and delivery cost as bid plus three times the per ton price bid. Pricing in this manner does not automatically lead to a loss on the job because all loads are around three tons, and there is nothing unfair or improper about the specification.

Further, this is not a situation where HDS' bid can be corrected. The situation does not fit into any of the provisions for changing bids set forth in General Provision 2.16—there was no arithmetical error, there was no minor informality that does not affect price, and there was an error in judgment (an antipathy towards, and/or a misreading of, the new type of pricing provision not shared by other bidders) and it would be unfair to other bidders to allow a change by HDS now that it has seen the prices from all of the other bidders.

The Hearings Officer concludes that these observations must be considered as being made as a courtesy to HDS because of the highly appropriate manner in which it participated in the present proceeding. However, they are not an official part of the decision herein because there is no jurisdiction to reach the merits of the protest.


IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. The University's Motion to Dismiss is granted.
- b. Honolulu Disposal Service's Request for Administrative Hearing herein is dismissed with prejudice.
- c. Pursuant to HRS §103D-709(e), Honolulu Disposal Service's \$1,000.00 bond is forfeited to the general fund.
- d. The parties shall bear their own attorney's fees and costs incurred in this matter.

AUG 29 2014

DATED: Honolulu, Hawaii, _____ .



DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs