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

In the Matter of)	PDH 2013-012
)	
SAFETY SYSTEMS AND SIGNS)	HEARINGS OFFICER'S ORDER
HAWAII, INC.,)	GRANTING INTERVENOR'S MOTION TO
)	DISMISS
Petitioner,)	
)	
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
ZIP U THERE, INC.,)	
)	
Intervenor.)	
_____)	

HEARINGS OFFICER'S FINAL ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On November 8, 2013, Safety Systems and Signs Hawaii, Inc. ("Petitioner") by and through its attorney Steven K. Hisaka, Esq. and David Y. Suh, Esq. filed a request for an administrative hearing to contest the Department of Transportation, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. The pre-

hearing conference was set for November 20, 2013 and the hearing was scheduled for November 27, 2013.

By agreement of the parties, the pre-hearing conference was rescheduled to December 2, 2013 and the hearing was rescheduled to December 5, 2013. Respondent, by and through its attorney Glenn I. Kimura, Esq. filed a response to Petitioner's request for hearing on November 27, 2013.

On November 25, 2013, Zip U There, Inc. ("Intervenor"), by and through its attorney Alan K. Lau, Esq. filed a Motion to Intervene. This motion was set for hearing on December 2, 2013. On November 29, 2013, Petitioner filed a memorandum in opposition to the Motion to Intervene. On December 2, 2013, Intervenor filed a reply memorandum in support of its motion. On December 2, 2013, the hearing was held on the Motion to Intervene. Petitioner was represented by Messrs. Hisaka and Suh and Intervenor was represented by Mr. Lau. After hearing arguments from the parties, the Motion to Intervene was granted. An Order Granting Motion to Intervene was issued on December 3, 2013.

On November 26, 2013, Intervenor filed a Motion to Dismiss Petitioner's Request for Administrative Hearing Review ("Motion to Dismiss"). This Motion was set for hearing on December 5, 2013. On December 4, 2013, Petitioner filed a memorandum in opposition to the Motion to Dismiss. On December 4, 2013, Intervenor filed a reply memorandum in support of the Motion to Dismiss.

On December 4, 2013, Intervenor filed a Motion in Limine. This motion was set for hearing on December 5, 2013. Petitioner filed a memorandum in opposition to the Motion in Limine on December 5, 2013.

On December 5, 2013, prior to the hearing on the merits, a hearing on the Motion to Dismiss was conducted by the undersigned Hearings Officer. Petitioner was represented by Messrs. Hisaka and Suh, Respondent was represented by Mr. Kimura and Intervenor was represented by Mr. Lau. Respondent orally moved to join in the Motion to Dismiss. The matter was taken under advisement and a recess was taken. When the hearing was reconvened, the Motion to Dismiss was orally granted. Intervenor withdrew its Motion in Limine.

Having reviewed and considered the evidence 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 final order granting the Motion to Dismiss.

II. FINDINGS OF FACT

1. Respondent issued a Notice to Bidders requesting sealed bids for Furnishing Operation and Maintenance Service for the H-1 Contra-Flow Zipper Lane, Island of Oahu, Project No. Hwy-C-22-13 (“Project”). Bid opening was on July 18, 2013, and Intervenor was the lowest bidder (\$1,584,558.52). G P Roadway Solutions, Inc. (“G P Roadway”) was the second lowest bidder (\$1,684,600.00) and Petitioner was the third lowest bidder (\$1,945,000.00).

2. By a letter dated August 27, 2013, Petitioner protested the proposed award of the Project contract to Intervenor.

3. By a letter dated November 4, 2013, Respondent denied Petitioner’s protest.

4. On November 8, 2013, Petitioner filed a request for administrative review of Respondent’s denial of its protest with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs (“DCCA”). Petitioner also submitted a cash bond in the amount of \$10,000.00.

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).

Intervenor’s Motion is based on the assertion that Petitioner lacks standing because as the third lowest bidder, Petitioner is not an “aggrieved party” under Hawaii Revised Statutes § 103D-701(a). Petitioner contends that it has standing to protest an award to Intervenor because if allowed to proceed to the merits, Petitioner will show that both Intervenor and G P Roadway are non-responsive or non-responsible and Petitioner will be awarded the contract.

Hawaii Revised Statutes § 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.

The issue to be resolved is whether Petitioner is “aggrieved” in connection with the award of the contract.

Petitioner argued that the *Eckard Brandes, Inc. v. Department of Finance, County of Hawaii*, PCH 2003-14, PCH 2003-20 (June 24, 2004) supports its contention that Petitioner has standing as long as it can show that it has suffered or will suffer a direct economic injury as a result of the alleged adverse agency action. Petitioner asserts that it will suffer direct economic injury if the contract is awarded to Intervenor because it is the only responsive and responsible bidder. In *Eckard Brandes*, the hearings officer determined that a party does not attain “aggrieved party status” until adverse official action is taken against it. Based on the evidence presented, the Hearings Officer finds this case inapplicable to the case at bar because it is the second lowest bidder, G P Roadways, and not Petitioner, who would be in a position to be adversely affected by Respondent’s proposed award of the Project contract to Intervenor. While Petitioner argued that G P Roadways is not a responsive and/or responsible bidder, Respondent has not made that determination so the Hearings Officer concludes that Petitioner, as the third lowest bidder, has not attained “aggrieved party status”.

This result is supported by the case of *Kiewit Pacific Co. v. Department of Land and Natural Resources, State of Hawaii and Parsons RCI, Inc.* PCH 2008-20 (February 20, 2009). In *Kiewit*, the hearings officer determined that the petitioner, the fourth lowest bidder in that case, did not attain aggrieved party status until the bids of the first and second lowest bidders were rejected. The hearings officer explained:

Petitioner was the fourth lowest bidder after Maui Master Builders, Goodfellow and Intervenor. Therefore, prior to the rejection of Maui Master Builders’ and Goodfellow’s bids on September 12, 2008, Petitioner would not have been in line for an award even if its protest was found to have merit. Thus, Petitioner did not attain ‘aggrieved party’ status and consequently, did not have standing to submit its protest prior to Respondent’s rejection of those bids.

Id., at page 9. As the third lowest bidder, Petitioner is not in line for an award even if its protest is found to have merit, and accordingly, the Hearings Officer concludes that, at this time, Petitioner has not attained aggrieved party status. Just like a rejected or unresponsive bidder, Petitioner, as the third lowest bidder has no realistic expectation of being awarded the contract and therefore is not “aggrieved in connection with the solicitation or award of the contract.” See, *Hawaii Newspaper Agency, et al. v. State Dept. of Accounting and General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting and General Services, et al.*, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999) and *Kidde Fire Trainers, Inc. v. Department of Finance, County of Hawaii*, PCH 2005-9 (January 9, 2006). Accordingly, the Hearings Officer concludes that Petitioner lacks standing to challenge Respondent’s proposed award of the Project contract to Intervenor.


IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Intervenor’s Motion to Dismiss is granted and,

IT IS HEREBY ORDERED that the above-entitled matter is dismissed. The parties will bear their own attorney’s fees and costs incurred in pursuing this matter.

Pursuant to HRS § 103D-709(e), the \$10,000.00 cash bond submitted by Petitioner shall be deposited into the general fund.

DATED: Honolulu, Hawaii, DEC 19 2013.



SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs