



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2016 FEB -1 A 10: 29

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

In the Matter of)	PDH-2015-012
)	
HMP, INC., dba BUSINESS SERVICES, HAWAII,)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
)	
Petitioner,)	
)	Senior Hearings Officer:
vs.)	David H. Karlen
)	
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, COUNTY OF HAWAII, ,)	
)	
Respondent,)	
)	
_____)	

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

I. INTRODUCTION

On December 23, 2015, Petitioner HMP, Inc., dba Business Services, Inc. ("HMP") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PDH-2015-012. Respondent was the Department of Environmental Management, County of Hawai'i ("County"). Concurrent with the filing of its RFAH, HMP filed a \$1,000.00 cash protest bond.

The County filed its Response to the RFAH by e-mail on January 4, 2016.

A pre-hearing conference was held on January 5, 2016. HMP was represented by

Ted H.S. Hong, Esq., and the County was represented by Belinda Castillo Hall, Esq. As a result of the pre-hearing conference, motions in this case were scheduled to be heard on January 20, 2016. The evidentiary hearing in the matter, if necessary, was scheduled to be held following the motions hearing on January 20, 2016.

The County filed its Witness List, Exhibit List, and proposed Exhibits by e-mail on January 6, 2016. HMP's Witness List, Exhibit List, and proposed Exhibits were filed on January 12, 2016.

By e-mail on January 8, 2016, the County filed its Motion to Lift Stay or, in the Alternative, Motion to Dismiss. In response thereto, the Hearings Officer scheduled a telephone status conference for January 11, 2016. During that status conference, the Hearings Officer stated that there was no basis in the law for the County to request the Hearings Officer in this proceeding to lift the automatic stay. The County could lift the automatic stay itself based solely upon its own actions. The Hearings Officer further stated that he was not going to wait until the hearing on January 20, 2016, to rule on the County's motion because his office would not be a party to any delay in efforts believed necessary to combat dengue fever. Accordingly, the County's Motion to Lift Stay, received by e-mail late in the afternoon on Friday, January 8, 2016, was denied as being unnecessary and without a basis in the law. The remainder of the County's motion remained on the January 20, 2016 calendar. This ruling was confirmed by a letter sent by fax to the parties on January 11, 2016.

By e-mail on January 8, 2016, HMP filed its Motion for Summary Judgment.

By letter dated January 13, 2016, the County lifted the automatic stay with reference to Items 2a, 3a, 5a, and 6a of the Invitation for Bids which is the subject of this RFAH. There was no evidence of a protest by HMP filed with the County concerning this action.

The RFAH was not amended to contest the lifting of the automatic stay, and no subsequent RFAH on that subject has been filed.

By e-mail on January 15, 2016, the County filed its Memorandum in Opposition to Petitioner's Motion for Summary Judgment.

By e-mail received January 19, 2016, HMP filed its Memorandum in Opposition to Respondent's Motion for Summary Judgment dated January 15, 2016. Respondent, however, did not file a Motion for Summary Judgment dated January 15, 2016. Instead, on that day, it had filed by e-mail a Memorandum in Opposition to HMP's Motion for Summary Judgment.

On January 19, 2016, HMP filed its Memorandum in Opposition to the County's Motion to Lift Stay or, in the Alternative, to Dismiss Dated January 8, 2016.

The motions came on for hearing on January 20, 2016. HMP was represented by Ted H.S. Hong, Esq., and the County was represented by Belinda Castillo Hall, Esq. At the conclusion of the argument on the motions, the Hearings Officer announced that the motions were taken under submission and that it was necessary to have an evidentiary hearing.

The evidentiary hearing commenced immediately thereafter on January 20, 2016. Ted H.S. Hong, Esq., represented HMP. Also present on behalf of HMP was Mr. Shon Pahio. Belinda Castillo Hall, Esq. represented the County. Also present on behalf of the County was Mr. Greg Goodale and Ms. B.J. Leithead-Todd.

HMP called Mr. Shon Pahio as a witness. Mr. Jeffrey Dansdil, Mr. Michael Kaha, and Mr. Greg Goodale testified on behalf of the County.

HMP's Exhibits 1 through 8 were admitted into evidence by stipulation. The County's Exhibits RE 1 through RE 11 were also admitted into evidence by stipulation.

At the conclusion of the evidentiary hearing, the matter was taken under submission. The parties were afforded the opportunity to file closing briefs, and all parties did file closing briefs on January 26, 2016.

The County's closing brief contained a jurisdictional objection to Petitioner's RFAH that the County had not raised previously. The Hearings Officer granted Petitioner until the close of business on January 28, 2016 to respond to this new jurisdiction objection.

Petitioner filed a Memorandum on the Issue of Jurisdiction on January 27, 2016.

This Decision is based upon the entire record as of the January 27, 2016 filing of Petitioner's Memorandum on the Issue of Jurisdiction, and it is the final, conclusive Decision in the matter.

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 or about November 17, 2015, the County issued Invitation for Bid No. 3339; Mixed Metals and White Goods Recycling Services, Department of Environmental Management, County of Hawaii ("IFB").

2. The IFB was for the processing and recycling of mixed metals and/or white goods with and/or without refrigerants from County facilities.

3. In Section 2.6 of the Specifications, the County provided information on quantities of material collected from County facilities in a previous fiscal year. The specification stated, however, that these quantity figures were provided "for information only," and that "**no minimum or maximum quantities will be guaranteed by the County; being a price term agreement, any quantity, including NONE, may be delivered during the contract period.**" Pet. Ex. 1 (Emphasis in original)

4. Pertinent specifications of the IFB include the following sections:

8.0 PRICING

8.1 The bid price shall be based upon a base price of the scrap value of steel, as published by the American Metal Market (AMM) ®, a copy of the AMM published price, or printout if the base is electronic, must be included with the bid. **NO EXCEPTIONS.** Bid prices will be valued in accordance with section 8.2 below at the most recent price per ton published prior to the bid opening for evaluation purposes.

8.2 This price will increase and decrease inversely proportionally to the AMM scrap price during the life of the contract. (Example: Bid price \$50.00, scrap base price \$100.00 per ton at inception of contract. Scrap price goes to \$110.00; County pays \$40.00 per ton. Scrap price goes to \$90.00; County pays \$60.00 per ton.) The price will be adjusted monthly according to the AMM price noted on the first day of the month and shall be applicable to all mixed metals, white goods with refrigerants and white goods without refrigerants where either delivered by the County or picked-up by the Contractor from the County during that month.

RE 1, Specifications page 10. (Emphasis in original)

5. Pertinent Special Provisions of the IFB include the following:

a. The term of the agreement was for one year with the possibility of two additional one year periods. RE 1, Special Provision 2 at Special Provisions page 1

b. Bidders “shall list on a separate sheet of paper any variations from, or exceptions to, the conditions and specifications of this bid. This sheet shall be labeled “Exception(s) to Bid Conditions and Specifications,” and shall be attached to the bid.” Bidders were cautioned that any exceptions to the specifications would likely result in the being rejected. The only acceptable exceptions were those “which are, solely in the opinion of the County, totally inconsequential to the performance, characteristics, quality or utility of the requested item,” correction of typographical errors, or “allowing exception when a specification clearly cannot be met by any bidder or is in conflict with another specification.”

RE 1, Special provision 10 at Special Provisions pages 1-2.

c. Any other exception to the bid documents had to be submitted in writing on or before the deadline date provided in the Notice to Bidders. RE 1, Special Provision 11 at

Special Provision page 2. Per the Notice to Bidders in RE 1, that date was November 23, 2015.

d. The award of a contract would be for each commodity of each zone, as the zones were defined in the specifications:

18. METHOD OF AWARD

Award of contract shall be made to the responsible, responsive Bidder with the highest sale offer or if no sale offer is received, the lowest bid price for each commodity in each zone. A sales offer is the price the bidder would pay to the Count if awarded the bid. A bid price is the price the County would pay the bidder if awarded the contract. A zero bid price means the bidder would provide the required services at no cost to the County if awarded the bid.

RE 1, Special Provision 18, Special Provisions page 3.

6. Bids were to be submitted by November 30, 2015. Two parties submitted bids, HMP and Big Island Scrap Metal, LLC. ("BISM").

7. Both parties bid on Items 1a, 2a, 3a, 4a, 5a, and 6a. BISM was the low bidder on all of those items except for Item 4a, Mixed Metal (Ferrous and Non-Ferrous Metals and Miscellaneous) at Zone 2, where HMP was the lowest bidder. RE 11

8. For Item 4a, HMP bid \$190.00 per ton. This figure was multiplied by the tonnage for the year that had been estimated by the County, so for Item 4a the total estimated price for HMP's bid was \$146,680.00. BISM's total estimated price for Item 4a was \$161,348.00. RE 11.

9. For Item 1a, Mixed Metal (Ferrous and Non-Ferrous Metals and Miscellaneous) at Zone 1, HMP's total estimated price was \$119,340.00 and BISM's total estimated price was 112,320.00. RE 11.

10. HMP did not submit a copy of the AMM published price printout with its bid.

11. BISM did submit a copy of the AMM published price printout with its bid.

BISM circled or otherwise marked up this price printout to indicate which price on the printout was the basis of its price for the individual bid items comprising BISM's bid.

12. There was no mixed metal pricing in the AMM price printout corresponding to the mixed metal category in IFB 3339. HMP's bid was based on No. 2 bundles pricing. From the markings on the price printout BISM submitted, BISM used the AMM price for No. 1 heavy melt steel, a material that was not being provided by the County.

13. The IFB 3339 specifications did not require bidders to mark up the submitted AMM price printout or otherwise identify any basis for their bid price corresponding to any price on the AMM price printout.

14. At the time IFB 3339 was advertised, HMP did not a subscription to the AMM newsletter with the price sheet.

15. HMP contacted AMM and found that an annual subscription for the AMM newsletter was \$2,100.00. In the absence of actually obtaining the contract, this as an amount that HMP could not really afford.

16. However, AMM gave HMP a trial subscription for a limited of period of time. This allowed HMP to see the AMM price sheet that would have to be submitted with HMP's bid in order comply with the instructions in Specification 8.1.

17. While preparing HMP's bid, Mr. Pahio noted that on the bottom of every page of the AMM price sheet was the legend: "It is a violation of AMM copyright to photocopy/distribute this product."

18. In order to submit HMP's bid to the County following the instructions in Specification 8.1, Mr. Pahio would have had to download and print the AMM price sheet, attach it to his bid, and then upload the entire bid package on to the County's electronic purchase system. In a telephone conversation with a representative of AMM, that representative told Mr. Pahio that HMP could not upload a copy of the AMM price sheet on to the County's server as part of HMP's bid.

19. Mr. Pahio became concerned that using the AMM price sheet as part of his bid would subject HMP to charges of copyright violations. He had been threatened with copyright infringement claims in another matter during the past year. Based on that plus his own research into copyright law, he did not want to put his business into jeopardy and decided to omit the AMM price sheet from HMP's bid on IFB 3339.

20. Prior to the submission of its bid, HMP had not communicated in any manner to the County concerning the requirement for submitting an AMM published price printout with its bid. Prior to the submission of its bid, HMP had never objected to the requirement in Specification 8.1 to submit an AMM price sheet.

21. By letter dated December 1, 2015, the County notified HMP that its bid was determined to have been non-responsive "as it did not meet the minimum specifications." The only minimum specification the letter stated that had not been met was the following:

The American Metal Market documentation/published pricing as required in Section 8.1 of the Specification Section was not included in your bid submittal. It is clearly stated there is no exception to this requirement.

Re Ex. 3.

22. On December 2, 2015, the County awarded Items 1a through 6a of the Procurement to BISM. Pet. Ex. 3. This award included Item 4a where HMP had been the lowest bidder.

23. By letter from its counsel dated December 2, 2015, HMP submitted its Notice of Bid Protest challenging the legality of Invitation for Bid No. 3339. The County received this letter on December 3, 2015. Pet. Ex. 4.

24. The basis of the protest in the December 2, 2015 letter was that the AMM pricing required to be submitted with the bid by Specification 8.1 stated on each page that "It

is a violation of AMM copyright to photocopy/distribute this product.” Based on that statement by AMM, the protest letter of December 2, 2015 asserted that:

The request for a bidder to submit copyright material creates unknown legal risk. Bid No. 3339 is flawed and unlawful and warrants this Protest.

25. By letter from its counsel dated December 4, 2015, HMP submitted an Amended Notice of Bid Protest. This new letter stated that it “will renew our protest” from the December 2, 2015 letter. It also stated:

This protest shall be amended to include the challenge of:

- The County and/or governmental agencies authority to require with no exceptions the request of copyright or trademarked material for a consideration of IFB No. 3339 (Item 1);
- Evidence that the County of Hawaii received permission from AMM to photocopy/distribute its product (Item 2);
- Evidence that the Big Island Scrap Metal received permission from AMM to provide the County copyright or trademarked material for consideration of IFB No. 3339 (Item 3);
- The rational [sic], theory and/or deduction the County used to define mixed metals and white goods as a commodity (Item 4);
- The rational [sic], theory and/or deduction the County used to accept Big Island Scrap Metals definition of the commodity as No. 1 heavy melt for IFB No. 3339 but which was not defined in the solicitation (Item 5); and
- The rational [sic], theory and/or deduction the County used to accept Big Island Scrap Metals export dealer, broker or processor which was not defined (Item 6).

Pet. Ex. 5

26. By letter dated December 18, 2015, the County informed HMP that the disqualification of its bid as being non-responsive was upheld and that its bid protest was denied. Pet Ex. 6

27. The first basis for this decision was that HMP’s bid protest was untimely because it was based upon the contents of the solicitation and should therefore have been filed before bids were opened pursuant to the terms of HRS §103D-701(a). The first basis

for the County's denial of HMP's protest also stated that the requirement that the AMM documentation/published pricing be included in the bid was a material term of the solicitation and the failure to include it was a material deviation from the terms of the solicitation, making the bid nonresponsive. Pet. Ex. 6.

28. The second basis for the County's decision was its contention that the additional issues raised in the second bid protest letter of December 4, 2015, were meritless and insufficient to sustain a protest. In particular, according to the County, Items 1 through 4 in that letter related to the content of the solicitation and were therefore untimely. Further, the definitions used to define mixed metals and white goods were not arbitrary or capricious—they were based upon terms previously used in County permit applications issued by the State of Hawaii and consistent with the use of those terms in the Hawaii Administrative Rules. As for Items 5 and 6, all the solicitation required, according to the County, was the use of a price index to “assure the County of Hawaii that bid prices were reasonable and its evaluation of the bids were made on an equal basis.” Pet. Ex. 6.

29. On December 23, 2015, HMP filed its RFAH with the Office of Administrative Hearings.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

A. Petitioner's Protest Bond was Adequate

Petitioner submitted a protest bond in the amount of \$1,000.00. Pursuant to the terms of HRS §103D-709(e), a protest bond of \$1,000.00 is required when the contract at issue has an estimated value of less than \$500,000. The County asserts that the protest bond here is

insufficient because the estimated value of the contract exceeds \$500,000 but is less than \$1,000,000. If that were the case, the protest bond is required by statute to be \$2,000.

The failure to timely post an adequate protest bond would deprive the Hearings Officer of jurisdiction to consider the RFAH. HRS §103D-709(e). While the County's claim of lack of jurisdiction due to an inadequate protest bond was made very late in the proceeding, a jurisdictional objection may be raised at any time. Jurisdiction cannot be conferred by consent, stipulation, or negligence by a party failing to assert a jurisdictional objection. In this case, despite the timing of the County's objection, the Hearings Officer was able to provide Petitioner with an adequate opportunity to oppose the County's objection. Cf. See Exhibit B to Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-2 (June 6, 2011). In fact, the Petitioner filed its response on jurisdiction one day before the filing deadline and without any request for additional time to prepare a response.

As part of its response to the County's jurisdiction objection, Petitioner has asserted that the Hearings Officer does not have the ability to consider such an objection. According to the Petitioner, the Hearings Officer only has jurisdiction to review claims previously brought up in the administrative protest filed with the County. Such a theory is wholly misplaced, as questions of jurisdiction pertaining to, for example, an adequate bond under HRS §103D-709(f) or the minimum amount in controversy under HRS §103D-709(e) never come up before the administrative agency. They first become relevant jurisdictional matters only in connection with the filing of the RFAH after the procuring agency has concluded its review and denied the protest.

Furthermore, the Petitioner has failed to recognize a fundamental principal of administrative law, namely that the Hearings Officer has the authority to determine his own jurisdiction. Carl Corp. v. State, 93 Haw. 155, 170-171, 997 P.2d 567, 582-583 (2000).

Accordingly, the merits of the County's jurisdiction objection must be determined.

Throughout this entire proceeding, the parties have agreed that separate contracts could be awarded for each item of recycled material.

In the beginning, the County's ill-fated motion to lift the automatic stay would have lifted the stay only for the white goods items in IFB 3339, and the County asserted that this would not prejudice HMP because HMP was not the low bidder on those items. The County thus admitted that HMP's bid protest could proceed with respect to those items where HMP was the low bidder (i.e., Item 4a) because HMP could conceivably obtain relief on its bid protest concerning that one item. Testimony at the evidentiary hearing consistently, and without contradiction, stated that contracts could be awarded for individual bid items. This testimony is consistent with Special Provision No. 18 which requires that contracts be awarded based on the lowest bid price for each commodity in each zone.

While it is true that in this case BISM was awarded the contract for all bid items even though HMP was the lowest bidder on one bid item, that award was made only after HMP, the only other bidder, had been disqualified as a bidder with respect to all items. It is only in that limited context that the statement at page 5 of the County's Response to the RFAH, filed January 5, 2016, ("The award was based on, among other things, that BISM was the low bidder for the IFB as a whole") can be considered accurate. If HMP had not been disqualified, BISM could not have been awarded the contract for Item 4a even if the total of its bid prices for all items was lower than the total of HMP's bid prices for all items.

HMP's initial protest letter of December 2, 2015, Pet. Exhibit 4, states that it "is made to challenge the legality of Bid No. 3339," that the "letter is formal and timely notice that HMP, Inc. protests the award of Bid No. 3339," and that "Bid No. 3339 is flawed and unlawful and warrants this Protest." Contrary to the statement at page 5 of Petitioner's Memorandum on the Issue of Jurisdiction, this initial protest letter provides no explicit notice

that the protest relates to only one or two bid items. The only fair reading of this letter is that the protest related to the entire IFB and all bid items therein.

HMP's second protest letter of December 4, 2015, likewise again focusses on the entire IFB. There is nothing therein that limits the protests to Item 4a or just to mixed metal items. Actually, this letter, which expanded the stated grounds for the protest, specifically referred to all bid items in its fourth bullet point: "The rational [sic], theory and/or deduction the County used to define the mixed metals and white goods as a commodity." Since the statement was not further clarified or explained, the Hearings Officer cannot accept the assertion at page 5 of Petitioner's Memorandum on the Issue of Jurisdiction that the amended protest letter of December 4, 2015 only challenged the mixed metals portion of IFB No. 3339.

While challenging the entire award to BISM at the administrative level, Petitioner would not be precluded from reducing the scope of its challenge when it subsequently filed its RFAH. The question is whether it did in fact do so.

The introductory paragraph of the RFAH protests the "award of IFB No. 3339" on December 2, 2015. As part of the relief requested, the RFAH sought to "void the current contract," or, alternatively, that "the contract" be terminated. Nothing in these references refers to any specific bid item or limits the scope of the RFAH to the mixed metals bid items. The clear impression is that the entire contract award covering all bid items is being challenged.

There is, however, one reference in the RFAH to a scope less than the entire award. Beginning at the bottom of page 2, the RFAH refers to a copy of the Cashier's Check for \$1,000.00 that was submitted simultaneously with the RFAH "because the value of the portion of the IFB..." (Emphasis supplied) This sentence was never finished in the RFAH, presumably because of some composition, clerical, and/or or proofreading error.

Nevertheless, it is clear from this portion of the RFAH that a bond of only \$1,000,00 was being submitted because only a portion of the award was being challenged.

During the course of the proceedings on January 20, 2016, through the close of Petitioner's presentation during the evidentiary hearing, the Hearings Officer was under the clear impression that Petitioner's RFAH was concerned only with Item 4a. Accordingly, the Hearings Officer, on his own initiative, recalled Mr. Pahio to the stand to testify about the estimated value of Item 4a. The Hearings Officer stated at that time that he was concerned about whether the RFAH met the statutory requirements concerning the minimum amount in controversy. There would have been no such concern if the entire award to BISM had been at issue. After Mr. Pahio briefly testified about the estimated value of Item 4a in response to questions from the Hearings Officer, the County was given an opportunity to ask further questions but declined to do so. That would have been a natural time for the County to raise the issue that all bid items, and not just Item 4a, were at issue, but it did not do so.

In its post-hearing memorandum, the Petitioner asserted at page 9 that it was the lowest, responsible and responsive bidder on Item 4a, and, as asserted at page 13, its bid was about \$20,000 less than the "awarded bidder." Thereafter in that memorandum, Petitioner sought relief with respect to all mixed metals items, namely Items 1a, 1b, 4a, and 4b. This was somewhat surprising to the Hearings Officer because Petitioner was not the low bidder on Item 1a and did not submit any bids on Items 1b or 4b. Nevertheless, it was a confirmation that, at most, the mixed metals items were the only subject of the RFAH. It is also apparent that arguments in Petitioner's post-hearing memorandum were prepared before Petitioner received a copy of the County's post-hearing memorandum, so Petitioner's memorandum was not prepared with the County's jurisdiction argument in mind.

Petitioner has relied on an analogy to the notice pleading approach of the Hawaii Rules of Civil Procedure, citing to two Hawaii appellate cases on page 5 of its Memorandum

in Opposition to the County's Motion to Lift Stay or, in the Alternative, Motion for Summary Judgment and on page 7 of its Closing Brief. Procurement protests before the OAH, with their special rules, expedited time limits, and lack of discovery that is available in Circuit Court proceedings, are not strictly governed by all of the principles of notice pleading. Cf. Alii Security Systems, Inc. v. Department of Transportation, State of Hawaii, PCY-2012-2 (February 24, 2012), at page 9.

Instead, the sufficiency of the RFAH must be analyzed in terms of HRS §3-126-59, which explicitly deals with the "contents of a request for hearing." That regulation provides:

Any person entitled to request an administrative hearing under this subchapter shall file a written request for hearing which shall state plainly and precisely the facts and circumstances of the person's grievance, the laws and rules involved, and the relief sought by the person requesting an administrative hearing.

See Maui County Community Television, Inc., dba Akaku Maui County Community Television v. Department of Accounting and General Services, State of Hawaii, PCX2010-3 (July 9, 2010) at page 13.

In this case, the Hearings Officer concludes that it is fair and appropriate to evaluate the RFAH by that standard as supplemented or clarified by the proceedings on January 20, 2016, Petitioner's post-hearing brief, and the apparent acquiescence of the County with the idea that Item 4a was the sole focus of the protest. Even if Item 1a is also added in as was done by Petitioner's Closing Brief, the Hearings Officer concludes that there was sufficient notice to the County and the Hearings Officer that the amount in controversy was less than \$500,000.

While the issue may be close, and while Petitioner could have done a better job (e.g., by finishing the sentence about the bond in its RFAH), nevertheless the Hearings Officer concludes that the County's jurisdictional objection based on the amount of the protest bond being allegedly insufficient must be denied.

B. Petitioner Has No Standing to Challenge the Award of Items 1a, 1b, and 4b

Exhibit RE 11 indisputably establishes that Petitioner would not be entitled to an award of contract for Item 1a even if Petitioner would otherwise be completely successful in its bid protest. Even if Petitioner's bid had not been dismissed as being non-responsive, there is no challenge to BISM's bid on Item 1a. That means that BISM would still be entitled to the award of a contract on Item 1a because it was the low bidder on that bid item. Because HMP has no realistic expectation of being selected for an award of a contract on Item 41, it has not standing to protest the award of a contract on Item 1a to BISM. Ohana Flooring v. Department of Transportation, State of Hawaii, PCH 2011-12 (November 18, 2011).

With respect to Items 1b and 4b, on the other hand, neither party submitted a bid. An award of a contract for these two items cannot be made. Since HMP has no realistic expectation of receiving an award of a contract for Items 1b, and 4b, it has no standing to challenge any award for those items to BISM. Ohana Flooring v. Department of Transportation, State of Hawaii, *supra*.

C. The County and HMP Motions for Summary Judgment are Denied

Summary judgment is appropriate when the record shows that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, are viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc. v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

As the parties hereto are well aware, several procurement protests in recent years have been decided on the basis of summary judgment motions. In this case, however, the Hearings Officer concluded that, as stated in the hearing on January 20, 2016, it was

important to have an evidentiary hearing. In the Hearings Officer's opinion, the motions for summary judgment involved important questions regarding the context of HMP's bid as well as the intent behind the requirement for submission of the AMM price list as well as how that price list would be used by the County. A more complete record was necessary in order to properly analyze and decide the case.

Accordingly, the summary judgment motions of the County and HMP taken under advisement at the hearing on January 20, 2016, are hereby denied. Even in the absence of issues of disputed fact, the Hearings Officer has the power to deny summary judgment when, as here, there is reason to believe that the better course of action would be to conduct a full hearing with a full development of the record. See, e.g., Lind v. United Parcel Service, Inc., 254 F.3d 1281, 1285 (11th Cir. 2001); Virgil v. Time, Inc., 527 F.2d 1122, 1131 n.15 (9th Cir. 1975); Big Island Scrap Metal, LLC v. Department of Environmental Management, County of Hawaii, PDH-2014-003 (April 10, 2014), at pages 18-19.

D. HMP's Claim that it was Against the Law for the County to Require Bidders to Submit the AMM Pricing Sheet Was Untimely

At the time IFB No. 3339 was issued, HMP did not have a subscription to the AMM publication containing the price sheet required by Specification 8.1. It certainly would be debatable to require bidders to purchase access to that price sheet when a subscription to the AMM publication cost over \$2,000. However, that potential issue is not in the case because Mr. Pahio was able to obtain a brief trial subscription from AMM at no charge, and that trial subscription allowed HMP access to the price list required by the County's specifications.

The evidence was undisputed that HMP had access to the required price list at the time it submitted its bid but chose, entirely on its own, to not submit the price list with its bid. This decision was based on the statement on the price list that it was copyrighted material that could not be duplicated or distributed as well as Mr. Pahio's previous experience with claims of copyright violations that made him wary about submitting the

AMM price sheet. There was no evidence that Mr. Pahio sought legal advice about his decision.

In addition, the evidence was undisputed that HMP did not notify the County prior to submitting its bid that it considered the AMM price sheet requirement of Specification 8.1 to be in violation of copyright law or to be in any other way illegal or unethical. Further, it is undisputed that HMP did not even inform the County in advance of its bid, or in any written materials submitted with its bid, that it would not be submitting an AMM price sheet with its bid.

It is hard to discern HMP's bidding rationale here when Specification 8.1 contained the admonition, in capital letters, "NO EXCEPTIONS." As would be expected, the County noticed the omission from HMP's bid immediately and sent HMP the letter of December 1, 2015, disqualifying HMP's bid for being non-responsive.

The sole basis of the County's declaration of non-responsiveness in that December 1, 2015 letter was that the AMM price list was not included with HMP's bid. Based on the facts summarized above, HMP could not challenge this determination by claiming the AMM price list was proprietary and HMP did not have access to it (or that HMP could obtain access only at a prohibitory cost).

HMP, therefore, had two options in challenging the County's non-responsiveness determination:

Option A. HMP could claim that it was in violation of copyright law and/or otherwise illegal to require submittal of the AMM price list; and/or

Option B. HMP could claim that the failure to submit the AMM price list was not a material deviation from the specifications. Since it could claim that the absence of the price list did not affect the bid's price or relate to such things as quantity or method of performing the contract, or give HMP any unfair advantage over the other bidder, the

absence of the price list was immaterial and did not rise to the level of importance required to disqualify HMP's bid as non-responsive.

HMP's first letter clearly chose Option A, as defined immediately above, and only Option A. That challenge, however, was clearly a challenge to the terms of the IFB. When a bidder challenges the inclusion in the IFB of a requirement to be imposed on all bidders, that is definitely a complaint about the contents of the solicitation. Such challenges are required by HRS §103D-701(a) to be made "prior to the date set for the receipt of offers."

The Hearings Officer cannot accept HMP's contention that it was challenging a determination of non-responsiveness rather than the language of the solicitation. The first protest letter challenged the determination of non-responsiveness based solely upon the solicitation's requirement for submission of the AMM price list. As stated in HRS §103D-701(a), this was a "protest based upon the content of the solicitation." (Emphasis supplied) HMP has not provided any evidence justifying any possible exception to the requirement that such protests must be made prior to the day of bid opening.

The question then becomes whether HMP's amended protest letter of December 4, 2015 eliminated the problem with HMP's first protest. To the extent that the second letter incorporated and "renewed" the protest in the first letter, HMP's timeliness problem remains.

The Hearings Officer further concludes that the amendments to the protest in HMP's second letter do not eliminate HMP's timeliness problem with respect to challenging the requirement of Specification 8.1. The six new statements in this second letter are set forth in Finding of Fact No. 25. Items one through three all raise challenges to the legality of the requirement to submit the AMM price list with the bid, i.e., challenges based upon the requirement of submission of copyrighted material, lack of permission from AMM to use its

material, and lack of authority of BISM to provide the County with copyrighted AMM material. These challenges are all necessarily based upon the contention that it was unlawful to require submission of the AMM price list with the bid.

The question then becomes whether Items 4, 5, and/or 6 in the amended protest letter of December 4, 2015, can be considered a protest utilizing Option B set forth above, i.e., in the context of this particular solicitation, the failure to submit the AMM price list did not amount to a material deviation from the specifications sufficient to justify a determination of non-responsiveness.

First, Item 4 challenges the solicitation's definitions of mixed metals and white goods. The definitions in question are in Specification Section 1.1 and 1.3. While a claim of illegality is not necessarily present here, this is still a challenge based upon the contents of the Specifications. Once again, there was no evidence justifying any excuse from raising the challenge prior to the date for opening bids. Accordingly, this challenge is also untimely under the terms of HRS §103D-701(a).

Second, Item 5 challenges BISM's use of No. 1 heavy melt prices from the AMM price sheet when HMP asserts, apparently based upon a telephone conversation with AMM, that the category to utilize from the price sheet was No. 2 bundles. It should be noted that Item 5 does not really provide fair notice of the basis of this claim, as the Hearings Officer's statement above that it is "apparently based" upon a contrary interpretation of the AMM price sheet that was allegedly endorsed by AMM" is based solely upon Mr. Pahio's testimony at the evidentiary hearing and cannot be discerned from the protest letters.

In any event, while the challenge in Item 5 is not based on the alleged illegality of requiring submittal of the AMM price sheet with the bid, and it fails to constitute an Option B challenge. At best, it is a claim that the County was using the wrong category in the AMM price list, an alleged mistake that could possibly affect adjustments to the contract

price in subsequent option years pursuant to the terms of Specification 8.2. Nothing in the brief statement in Item 5 can be construed as a claim that a failure to submit the pricing list was not a material deviation from the requirements of the specification so that HMP's bid was not non-responsive.

Item 6, the last new item in the amended protest letter of December 3, 2015, concerns a challenge to acceptance of BISM's export dealer, broker or processor. Nothing herein concerns the alleged illegality of requiring submission of the AMM price list, and there is also nothing to define what Item 6 is about or how it relates to any alleged non-materiality of the omission of the AMM price list from HMP's bid. This challenge was not discernible in the RFAH or the evidence, arguments, or briefings in the OAH proceedings. It does not provide any basis for granting HMP's bid protest or affording any relief sought in HMP's RFAH.

HMP points out that the County's December 18, 2015 response to its two protest letters does discuss the County's contention that HMP's bid was nonresponsive because omission the AMM price sheet was "a material deviation from the terms of the solicitation and is, therefore, nonresponsive." This discussion, however, is in the second identified argument beginning on 3 of the letter. The County's first separately identified argument on pages 1 and 2 of the letter concerns itself solely with the alleged lack of timeliness of the protest concerning the alleged illegal use or requirement of copyrighted material. The County was entitled, however, to assert a backup argument. HMP cannot be allowed to bootstrap itself by using this argument by the County to claim that it indeed submitted an Option B argument timely challenging the determination of non-responsiveness. The simple fact of the matter is that HMP's two rather abbreviated protest letters just cannot be read as asserting an Option B protest.

At the evidentiary hearing, the Hearings Officer expressed serious concerns with the County's argument that the lack of an AMM price sheet made HMP's bid nonresponsive. Nevertheless, upon consideration of the record as a whole, the Hearings Officer declines to issue an opinion on that point. As the Hearings Officer also expressed at the evidentiary hearing, it is not up to the Hearings Officer to write up or create a protest that is not there. HMP's protest is limited to what was asserted in its two protest letters to the County, and the only protest sufficiently articulated in those two letters was untimely.

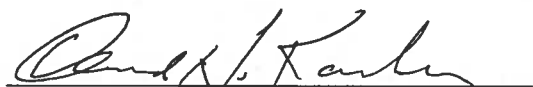
IV. DECISION

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

- a. HMP's and the County's Motions are both denied.
- b. The County's jurisdiction objection to HMP's RFAH based upon the alleged insufficiency of the HMP protest bond is denied.
- c. The protest of HMP contained in its letters to the County of December 2, 2015, and December 4, 2015, was untimely pursuant to the terms of HRS §103D-701(a).
- d. HMP has failed to sustain its burden of proof to justify that it is entitled to any relief pursuant to its RFAH, and its RFAH is therefore dismissed in its entirety.
- e. The protest bond deposited by HMP shall be forfeited to the general fund.
- f. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

FEB - 1 2016

DATED: Honolulu, Hawaii, _____.



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