



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2016 FEB 26 A 9:13

HEARINGS OFFICE

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

In the Matter of)	PDH 2016-001
)	
MAUI KUPONO BUILDERS, LLC,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	FINAL ORDER GRANTING
)	RESPONDENT'S MOTION FOR
vs.)	SUMMARY JUDGMENT AND DENYING
)	PETITIONER'S MOTION FOR SUMMARY
WENDY K. IMAMURA, PURCHASING)	JUDGMENT
ADMINISTRATOR, DEPARTMENT OF)	
BUDGET AND FISCAL SERVICES, CITY)	
AND COUNTY OF HONOLULU,)	
)	
Respondent,)	
)	
and)	
)	
ROAD BUILDERS CORPORATION,)	
)	
Intervenor.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT AND DENYING
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On January 15, 2016, Maui Kupono Builders, LLC ("Petitioner") filed its request for administrative hearing to contest the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On January 26, 2016, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Anna H. Oshiro, Esq. Respondent was represented by Derek T. Mayeshiro, Esq. At the pre-hearing conference, the parties stipulated to the intervention of Road Builders Corporation (“Intervenor”), represented by Erik D. Eike, Esq. The parties agreed to file motions for summary judgment which would be heard on February 10, 2016, and that if an evidentiary hearing was necessary, the hearing would be held on February 12, 2016. Petitioner and Respondent filed their Motions for Summary Judgment on February 1, 2016. Petitioner, Respondent and Intervenor filed their respective memoranda in opposition to the motions on February 5, 2016. Reply memoranda were filed by Petitioner and Respondent on February 9, 2016.

On February 10, 2016, oral arguments were heard by the undersigned Hearings Officer. Petitioner was represented by Ms. Oshiro and Loren A. Seehase, Esq., Respondent was represented by Mr. Mayeshiro and Intervenor was represented by Mr. Eike. The matter was taken under advisement. The parties agreed that an evidentiary hearing was not necessary so the hearing set for February 12, 2016 was taken off the calendar.

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 decision.

II. FINDINGS OF FACT

1. On January 7, 2007, Duane P. Ting, Organizer and Initial Member, filed Articles of Organization for Limited Liability Company with the Department of Commerce and Consumer Affairs, State of Hawaii (“DCCA”) for the limited liability company “Maui Kuponu Builders LLC”.

2. On February 19, 2015, Respondent issued RFB-DDC-813005, Job No. 13-14, Rehabilitation of Localized Streets, Phase 13G, Kaneohe, Oahu, Hawaii (“Project”).

3. On August 26, 2015, Petitioner, through its Member Kiki Ting, filed Articles of Amendment to Change Limited Liability Company Name with the DCCA. The name of the limited liability company was changed from “Maui Kuponu Builders LLC” to “Manu Builders, LLC”.

4. On October 23, 2015, Petitioner submitted a bid for the Project. The bid was submitted in the name of “Maui Kuponu Builders, LLC” and signed by Kiki Ting, Member. The Acknowledgment of Damages Provision, Certification of Compliance with HRS 396-18, Safety and Health Programs for Contractor Bidding on City Jobs, Certification of Bidder’s Participation in Approved Apprenticeship Program Under Act 17 were executed by Kiki Ting, Member, for “Maui Kuponu Builders, LLC”.

5. The Bidder and Principal of the Surety Bid Bond was “Maui Kuponu Builders, LLC”.

6. A Certificate of Vendor Compliance dated August 10, 2015 was submitted with the bid. The Vendor Name was “Maui Kuponu Builders LLC” and the DBA/Trade Name was “Maui Kuponu Builders LLC”. The status was listed as compliant with Hawaii Department of Taxation, Internal Revenue Services, Hawaii Department of Commerce and Consumer Affairs, and Hawaii Department of Labor & Industrial Relations.

7. Bids were opened on October 30, 2015. Petitioner was the low bidder at \$8,875,162.00. Intervenor was the second lowest bidder at \$11,530,718.00.

8. On November 19, 2015, Petitioner, through its Member Kiki Ting, filed Articles of Amendment to Change Limited Liability Company Name with the DCCA to change its name from “Manu Builders, LLC” back to “Maui Kuponu Builders, LLC”.

9. On November 20, 2015, Petitioner filed a trade name registration with the DCCA for the trade name “Manu Builders”. Its stated purpose is “general contractor licensed ABC contractor in the State of Hawaii”. The registration expires on November 19, 2020.

10. The DCCA File Number for “Maui Kuponu Builders, LLC” and “Manu Builders, LLC” is the same—50005 C5.

11. At the time of bid submission and bid opening, Petitioner’s contractor’s license was held under “Maui Kuponu Builders, LLC”.

12. From August 26, 2015 to November 19, 2015, Petitioner continued to do business as “Maui Kuponu Builders, LLC” even though it changed its name to “Manu Builders, LLC”.

13. By a letter dated December 16, 2015, Petitioner was notified that Maui Kuponno LLC's bid for the Project was being rejected because "...from August 26, 2015 to November 18, 2015, Maui Kuponno Builders, LLC did not legally exist in the State of Hawaii and could not conduct business in the State."

14. On December 22, 2015, Petitioner filed a protest of Respondent's rejection of Petitioner's bid. This letter explains that:

The corporate entity never changed. Maui Kuponno elected to change its business name, and as it took time for it to complete the name change at the contractor's license board, it bid the job in the name in which its license is held.

...

Maui Kuponno continued in existence, and it was entirely proper for Maui Kuponno to be listed as the bidder, since that was the name in which the contractor license was held.

...

A simple and common sense response to the question of Maui Kuponno's name change would have been to check with the DCCA and/or to ask Maui Kuponno, either of which would have cleared up this matter immediately.

15. By a letter dated January 11, 2016, Respondent denied Petitioner's protest.

This letter states in part:

In light of the Hawaii authorities, the City finds that a legal entity named 'Maui Kuponno Builders, LLC' did not exist on October 23, 2015 when the bid was submitted. Therefore, it is not a bidder under the Procurement Code. Furthermore, as Maui Kuponno cannot be construed as a 'bidder', it does not have standing.

16. On January 15, 2016, Petitioner filed a request for hearing with the Office of Administrative Hearings, DCCA, to appeal Respondent's denial of its protest. Petitioner filed a \$10,000.00 Procurement Protest Bond with its request for hearing.

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).

A. Standing

Respondent argued that Petitioner lacks standing to protest pursuant to HRS § 103D-701 because it is not an actual or prospective bidder. “Bidder” is defined in Hawaii Administrative Rules (“HAR”) § 3-120-2 as “any individual, partnership, firm, corporation, joint venture or other legal entity submitting, directly or through a duly authorized representative or agent, a bid for the good, service, or construction contemplated.” It is not disputed that the bidder was identified as “Maui Kupono, LLC” at a time when that entity had formally changed its name to “Manu Builders, LLC”. As Petitioner legally existed as “Manu Builders, LLC” when it submitted its bid on October 23, 2015, the Hearings Officer finds that Petitioner was not an actual or prospective bidder and accordingly, concludes that Petitioner lacks standing to pursue this protest.

Responsiveness of Petitioner’s Bid

The issue to be resolved is whether Petitioner’s submission of a bid under its former name is responsive to the solicitation. Petitioner contends that “Maui Kupono Builders, LLC” never ceased to exist when it changed its name to “Manu Builders, LLC” and that “Maui Kupono Builders, LLC” became an unregistered trade name of “Manu Builders, LLC” and as such, Petitioner could submit a bid under “Maui Kupono Builders, LLC” even when it filed a formal name change to “Manu Builders, LLC”. In support of its contention, Petitioner cited the fact that the DCCA file number remained the same through the name changes; that it continued to do business under “Maui Kupono Builders, LLC”, and continued to hold its contractor’s license under “Maui Kupono Builders, LLC”. Respondent contends that “allowing contractors to submit bids under different names only to have the contractor assume the name of the successful bid will encourage and foster unfair and deceptive competitive strategies” and risks the integrity of the procurement process. *See*, Respondent’s Reply Memorandum at page 3. Intervenor argued that bidding with an unregistered trade name that is different than its

actual legal name is “*per se* unresponsive to the solicitation which requires the bidders to identify themselves and unequivocally commit to fulfilling the contract without qualification or ambiguity.” *See*, Intervenor’s Memorandum in Opposition to Petitioner’s Motion for Summary Judgment at page 2.

The Hawaii Supreme Court has held that an ambiguous bid is a nonresponsive bid. *See, Southern Food Groups, L.P. v. State Department of Education*, 89 Haw. 443, 974 P.2d 1033 (1996). In *Greenpath Technologies v. Department of Finance, County of Maui*, PDH 2014-002 (March 20, 2014), the Hearings Officer found that the “identity of the offeror is just as material as the statement of the price in the *Southern Foods* case”, *Id.* at 34, and concluded that the proposal is nonresponsive if the identity of the offeror is ambiguous. Applying *Greenpath* to the case at bar, the Hearings Officer concludes that a bid is nonresponsive if the identity of the bidder is ambiguous.

The determination of responsiveness is made solely by reference to the bid submissions and facts available to the government at the time of bid opening. *Okada Trucking Co. v. Board of Water Supply*, 101 Haw. 68, 75, 62 P.3d 631-638 (Haw. App. 2003). It is not disputed that Petitioner, who had formally changed its limited liability company name to “Manu Builders, LLC”, submitted a bid under its former limited liability company name “Maui Kupono Builders, LLC” and that it was still “Manu Builders, LLC” at the time of bid opening. While Petitioner asserted that Respondent could have checked with the DCCA and quickly determine that “Maui Kupono Builders, LLC” and “Manu Builders, LLC” were one and the same company, Petitioner did not present evidence to support this contention as the screen shots submitted by Petitioner with its Motion for Summary Judgment (Exhibits “F” and “G” as well as the screen shots attached to its Exhibit “J”) are not or cannot be determined to be evidence of what was available at the time of bid opening on October 30, 2015.

Petitioner also argued that Respondent could have asked “Maui Kupono, LLC” about the name change. However, that inquiry would have been improper, as providing a bidder with an opportunity to clarify an ambiguous bid is not permitted. *See, Kiewit Pacific Co. v. Department of Land and Natural Resources, et al.*, PCH 2008-20 (February 20, 2009). Based on the evidence presented in this case, the Hearings Officer finds that the bid submitted by Petitioner under “Maui Kupono, LLC” after it had formally changed

its name to “Manu Builders, LLC” was ambiguous, and accordingly, concludes that Petitioner’s bid was nonresponsive to the solicitation.

The Hearings Officer would note that Petitioner objected to the parties raising additional arguments and objections to Petitioner’s bid which went beyond the arguments and objections raised by Respondent in its rejection of Petitioner’s protest. In *Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transit, et al.*, PDH 2013-011, a similar argument was raised and it was determined that the Hearings Officer’s consideration of new arguments were proper as long as the parties “receive ‘fair warning’ and have an opportunity to submit arguments and have a hearing on those issues.” *Id.* at page 15. In this case, Petitioner had the opportunity to oppose any new arguments made by the Respondent in its memorandum in opposition to Respondent’s Motion for Summary Judgment and file a reply to arguments raised by the Intervenor in its memorandum in opposition to Petitioner’s Motion for Summary Judgment. Petitioner also had the opportunity to address all the arguments raised at the hearing on the motions held on February 10, 2016. Accordingly, the Hearings Officer finds that Petitioner was given adequate notice and opportunity to respond to all the arguments raised by Respondent and Intervenor. Additionally, as stated in *Aon*:

It is well established that, on appeal, where *de novo* review of legal issues is involved, the reviewing court can uphold the decision of the lower court on any basis established by the record even if the basis for upholding the decision was not cited or utilized by the lower court and/or the lower court’s decision was erroneous. (Citations omitted).

Id., at page 14.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that Respondent’s denial of Petitioner’s protest was proper and grants Respondent’s Motion for Summary Judgment. Petitioner’s Motion for Summary Judgment is denied. Accordingly, Respondent’s denial of Petitioner’s bid protest is affirmed. 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 shall be deposited into the general fund.

FEB 26 2016

DATED: Honolulu, Hawaii, _____.



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