



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	PDH-2013-010
)	
JBH, LTD., a Hawaii corporation,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
WILLIAM AILA, JR., in his capacity)	
as chairman and contracting officer of the)	
DIVISION OF FORESTRY AND)	
WILDLIFE, DEPARTMENT OF LAND)	
AND NATURAL RESOURCES,)	
STATE OF HAWAII,)	
)	
Respondent,)	
)	

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

I. INTRODUCTION

On October 10, 2013, JBH, LTD. ("Petitioner"), filed a request for administrative review of the State of Hawaii, Department of Land and Natural Resources, Division of Forestry and Wildlife's ("Respondent") decision to deny Petitioner's protest in connection with a project designated as KAMA-1, Installing Ungulate-Proof Fence in the Kamakou Preserve ("KAMA-1"). Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for

hearing on October 22, 2013, and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On October 22, 2013, this matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. John G. Horak, Esq. appeared for Petitioner and Daniel A. Morris, Esq. and Cindy Y. Young, Esq. appeared for Respondent.

At the conclusion of the hearing, the Hearings Officer directed the parties to file proposed findings of fact and conclusions of law. Accordingly, on October 30, 2013, the parties filed their proposed findings and conclusions.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

II. FINDINGS OF FACT

1. On October 15, 2012, Respondent issued a request for proposals seeking sealed proposals for a project designated as SPF2, "Forest Restoration at Kamakou Preserve, Molokai" ("SPF2").

2. On or about December 10, 2012, the contract for SPF2 was awarded to Pono Pacific Land Management LLC ("Pono Pacific"). The Final Contract Amount was listed as \$136,900.00.

3. In or about April 2013, Respondent and Pono Pacific agreed to cancel the contract for SPF2.

4. On or about July 10, 2013, Respondent issued a Notice to Bidders for the purpose of seeking bids for KAMA-1 ("IFB").

5. KAMA-1 involved the construction of approximately 9,000 feet or 1.7 miles of ungulate-proof fencing that would enclose lands of the East Molokai Watershed Partnership on Molokai's South Slope and was the same work that had been called for in SPF2.

6. The IFB specified that the "estimated cost of construction is \$100,000-\$300,000." The IFB also provided in part:

Bidders are strongly advised to inspect the general fencing area prior to submitting a bid. Topographic and logistic conditions present difficulties that are not typical for fence installation projects. Failure to visit the work area/installation site will in no way relieve the successful bidder from completion of the work.

7. According to the terms of the IFB, the award of the contract for KAMA-1 would be made to the bidder submitting the lowest responsible total base bid selected by Respondent.

8. The IFB also included the following provision regarding the listing of joint and subcontractors:

The Bidder agrees that the following is a complete listing of all joint contractors or subcontractors covered under Chapter 444, Hawaii Revised Statutes (HRS), who will be engaged by the Bidder on this project to perform the required work indicated pursuant to *Section 103D-302, HRS*. It is the sole responsibility of the contractor to review the requirements of this Project and determine the appropriate licenses that are required to complete the Project. The Bidder certifies that the completed listing of joint contractors or subcontractors fulfills the requirements for the project and the Bidder, together with the listed subcontractors or joint contractors have all the specialty contractor's licenses to complete the work, except as provided for in *HRS §103D-302(b)*. Failure of the Bidder to comply with this requirement may be just cause for rejection of the bid.

* * * *

(Emphasis added).

9. According to the IFB, written inquiries regarding the solicitation were due 14 days prior to bid opening. The IFB also provided that written inquiries received after that date may be responded to at the discretion of the State.

10. According to the IFB, bids were due by August 12, 2013.

11. As a result of a protest filed by Petitioner on or about July 15, 2013, the solicitation was stayed pending the resolution of the protest.

12. On or about September 4, 2013, Respondent denied Petitioner's July 15, 2013 protest.

13. On or about September 19, 2013, Respondent issued Addendum A to the IFB. Addendum A notified potential bidders that the stay had ended and that the opening date for bids would be changed to September 30, 2013.

14. Aside from Addendum A, no substantive changes were made to the IFB since its issuance in July 2013.

15. On September 19, 2013, Respondent notified potential bidders of the posting of Addendum A on its website. On the same date, Petitioner sent an email to Respondent inquiring "[w]hen is the site visit planned for this project?" Less than 2 hours later, Respondent informed Petitioner by email that "[a]t this point, no guided site visit is being offered for this project. Please refer to the Detailed Specifications, "Access to the Installation Site" Section for details on how to conduct a self-guided inspection of this area."

16. No other written inquiries or requests regarding the IFB were received by Respondent from any bidder or potential bidder.

17. By letter dated September 24, 2013 to Respondent, Petitioner protested the content of the specifications in the IFB. More specifically, Petitioner alleged that "there is no pre-bid conference, site visit or request for information period" provided in the IFB. According to the protest:

* * * *

JBH, Ltd. is surprised to learn that there is no pre-bid conference, site visit or request for information period for the above-noted IFB.

Thus, JBH, Ltd. protests the above-noted solicitation because there is no pre-bid conference to be held which violates SP-2 of the solicitation as well as HRS 103D-302 because the public notice of the invitation does not give a reasonable time before the date set forth for the opening of bids.

* * * *

18. By letter dated October 4, 2013 to Petitioner, Respondent denied Petitioner's protest.

19. On October 10, 2013, Petitioner filed the instant appeal.

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.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997). And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(h).

The gravamen of Petitioner's complaint is that the IFB is deficient because it failed to provide for a pre-bid conference, and a guided or coordinated site visit prior to the submission of bids in violation of SPF2, and HRS §§103D-302 or 303. HRS §§103D-302 and 303 relate to the procuring of competitive sealed bids and proposals respectively. Petitioner does not point to, and the Hearings Officer cannot find, any requirement in those provisions for a pre-bid conference or a coordinated site visit. Moreover, there is no dispute that SPF2 was cancelled by mutual agreement and is therefore irrelevant here.

Rather, although not altogether clear from its protest and subsequent request for hearing, Petitioner appears to be contending that a pre-bid conference was required under HRS §103D-303.5. That section provides in relevant part:

At least fifteen days prior to the submission of bids pursuant to section 103D-302 for a construction or design-build project with a total estimated contract value of \$500,000 or more, and at least fifteen days prior to submission of proposals pursuant to section 103D-303 for a construction or design-build project with a total estimated contract value of \$100,000 or more, the head of the purchasing agency shall hold a pre-bid conference and shall invite all potential interested bidders, offerors, subcontractors, and union representatives to attend.

* * * *

Petitioner argues that the solicitation was a request for proposals made pursuant to HRS §103D-303 for a design-build project with an estimated contract value in excess of \$100,000. Therefore, according to Petitioner, Respondent was obligated to hold a pre-bid conference at least 15 days prior to the submission of the proposals. In support of its position that the solicitation was a request for proposals rather than an invitation for bids, Petitioner relies on the fact that the IFB contains several references to “proposals”. For instance, Petitioner points out that the IFB refers to “Sealed Proposals” and “Proposal Form” in the Information and Instructions to Bidders section. A complete reading of those sections, however, makes clear that “Sealed Proposals” and “Proposal Form” referred instead to competitive bids:

* * * *

B. SEALED PROPOSALS: *Bidders* shall submit their “*Sealed Bid*”, including the completed *bid* form, *Bid* bond, and any other documents required by the solicitation as part of their *Bid* in a sealed envelope, labeled with the name and address of the *bidder*, and marked “*Bid* for” followed by the DLNR Job No. and Project Title, as their *Bid* offer.

* * * *

D. PROPOSAL FORM: The *Bidder* shall print a hard copy of the *bid* form.

* * * *

(*Emphasis added*).

Similarly, numerous other sections of the IFB make clear the fact that the solicitation was seeking sealed bids pursuant to HRS §103D-302. For example, the Notice to Bidders expressly sought sealed *bids* for KAMA-1, and included a *Bidder's* Reminder Sheet, along with Information and Instructions to *Bidders*. More importantly, according to the terms of the IFB, the contract was to be awarded by a single-step invitation for competitive sealed bids to the lowest responsible bidder, rather than to the responsible offeror submitting a proposal determined to be the most advantageous¹. Furthermore, the IFB expressly required bidders to list all joint contractors and subcontractors it intended to engage *pursuant to HRS §103D-302*. On this record, the Hearings Officer concludes that the solicitation constituted an invitation for bids made pursuant to HRS §103D-302. Indeed, Petitioner acknowledged as much in its September 24, 2013 protest when it contended that the failure to conduct a pre-bid conference violated HRS §103D-302. The Hearings Officer also finds that the total estimated value of the contract, as established by the Notice to Bidders, was less than \$500,000². Accordingly, the Hearings Officer concludes that Respondent was not required to hold a pre-bid conference under HRS §103D-303.5.

Petitioner's protest over the failure to provide for a guided site visit and a pre-bid conference in the IFB fails for the additional reason that that protest was untimely. HRS §103D-701(a) expressly requires protests to be filed within five working days after the aggrieved party knew or should have known of the facts giving rise to the protest and, in any event, prior to the date set for the receipt of offers where the protest is based on the content of the solicitation. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)*; *Ludwig Construction v. County of Hawaii, PCX-2009-6*

¹ HRS §103D-302(h) relating to competitive sealed bids mandates that the contract be awarded to the lowest responsible and responsive bidder while HRS §103D-303(g) relating to competitive sealed proposals provides that the award of the contract "shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous . . ."

² According to the Notice to Bidders, the "estimated cost of construction is \$100,000-\$300,000."

(December 21, 2009); Kuni's Enterprises, Inc. v. City and County of Honolulu, PCY-2012-021 (August 3, 2012). The requirement was designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services, PCH 2000-8 (October 17, 2000).* Moreover, in construing HRS §103D-701(a), this Office has consistently held that the accomplishment of the underlying objectives of HRS Chapter 103D requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc., v. County of Maui, PCH 98-6 (December 9, 1998).* See also, *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget and Fiscal Services, supra (strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute's underlying purpose); CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007).*

Here, the facts giving rise to Petitioner's protest over Respondent's failure to provide for a pre-bid conference and a site visit in the IFB were known or should have been known by Petitioner on July 10, 2013 when the IFB was issued. Furthermore, because Petitioner's protest was based on the fact that the IFB did not provide for a coordinated site visit or a pre-bid conference and thereby “prohibited the Petitioner from resolving patent vagueness in KAMA-1's fence specifications”, that protest was undoubtedly one based on the content of the solicitation. As such, the protest should have been filed within 5 working days of the issuance of the IFB. Instead, Petitioner did not file its protest until September 24, 2013. And although the protest was filed within 5 days after Addendum A was issued, that addendum was not the basis for the protest. This Office has previously found that the issuance of an addendum to the IFB does not constitute a separate solicitation that allows the petitioner to raise a claim within 5 working days from the issuance of the addendum, at least where the

addendum did not change or otherwise affect the provision which was the subject of the protest. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2005-7 (December 6, 2005)*; *CR Dispatch Service, Inc. dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007)*. On this record, the Hearings Officer concludes that Petitioner's protest over Respondent's failure to provide for a pre-bid conference and a coordinated site visit in the IFB was untimely³.

In its proposed findings and conclusions, Petitioner also argues that Respondent violated HRS §103D-402 because its specifications were inconsistent with HRS §103D-405 which requires that “[a]ll specifications shall . . . encourage competition . . .” HRS §103D-402 relates to the duties of the chief procurement officer to, among other things, prepare and issue specifications. This theory, however, appears to be based entirely on the argument that the specifications failed to provide for a coordinated site visit and pre-bid conference. Having already concluded that Respondent was not required to conduct a site visit or pre-bid conference under the circumstances presented here, and that those claims were untimely, the Hearings Officer further concludes that this argument is without merit⁴.

Petitioner next complains that because Addendum A was issued on September 19, 2013 and set the bid opening date only 11 days later on September 30, 2103, the IFB failed to provide “a reasonable amount of time between the publication of the invitation for bids or request for proposals and the time set for receipt of the bids or proposals by DLNR.” Petitioner points to the provision in the IFB requiring that any written inquiries regarding the IFB be submitted 14 days before the bid opening date and contends that “there is not enough time given the prospective offerors to forward questions/request for information about the proposed fence project to the contract administrator and receive the answers back in time for responsible and responsive bid preparation.” Hawaii Administrative Rules §3-122-16.02 provides in relevant part:

³ It would appear that these claims could and should have been raised in Petitioner's July 15, 2013 protest. *See Oceanic Companies, Inc. v. Dept. of Budget and Fiscal Services, City & County of Honolulu, PCH-2004-16 (Dec. 23, 2004)*. *See also Marsh USA, PCX-2010-1 (Feb. 11, 2010)(protestor is required to raise all of its claims in a timely and efficient manner)*.

⁴ The Hearings Officer also notes that nowhere in its protest did Petitioner raise or articulate its HRS §103D-405 argument with any degree of certainty. Petitioner is therefore precluded from raising this argument on appeal. *See Oceanic Companies, Inc. v. Dept. of Budget and Fiscal Services, City & County of Honolulu, supra, (protestor, having failed to protest issue, was precluded from raising issue on appeal)*. *See also GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998)(the government is not required to assume or speculate as to the basis for a protest.)*

Preparation time for offer. (a) The minimum time period between the first date of the public notice of the solicitation and the date set for receipt of offers, except as provided by subsection (b) for construction, including design-build projects, shall be as follows:

- (1) For a single-step invitation for bids pursuant to subchapter 5, ten calendar days;

* * * *

Here, the IFB was issued on July 10, 2013 and the bid opening date was initially scheduled for August 12, 2013. On or about July 19, 2013, Respondent stayed the solicitation as a result of a protest filed by Petitioner. On September 19, 2013, Respondent issued Addendum A notifying potential bidders that the stay had ended and that bids would be opened on September 30, 2013. Having already determined that the subject solicitation was a single-step invitation for bids that did not require a pre-bid conference, the Hearings Officer further concludes that the time between the issuance of the IFB on July 10, 2013 and Addendum A on September 19, 2013 on the one hand, and the opening of the bids on September 30, 2013 on the other hand, was consistent with HAR §3-122-16.02. Moreover, the Hearings Officer notes that any potential bidder, including Petitioner, could have submitted written inquiries to Respondent following the issuance of the IFB on July 10, 2013 and/or taken steps to visit the site on its own. Having failed to do so, Petitioner still had the opportunity to submit written inquiries to Respondent as the IFB provided that “[w]ritten inquiries received after [the 14 day period] may be responded to at the discretion of the State.”⁵ And, according to Respondent’s planner, if Respondent required additional time to respond to the inquiry, it could have extended the bid opening date. On this record, the Hearings Officer concludes that Petitioner has failed to prove that the time between the issuance of the IFB and the submission of bids was unreasonable or contrary to the applicable law.

⁵ As a matter of fact, Petitioner submitted a written inquiry to Respondent on September 19, 2013 asking “[w]hen is the site visit planned for this project?” Less than 2 hours later, Respondent informed Petitioner that “no guided site visit is being offered . . .”

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that Petitioner's request for administrative review be and is hereby dismissed and that each party bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: NOV 6 -- 2013



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs