



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-2014-009
)	
HAWAII SUPPLY, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND ORDER GRANTING
vs.	)	RESPONDENT DEPARTMENT
	)	OF EDUCATION'S MOTION
DEPARTMENT OF EDUCATION,	)	TO DISMISS PETITIONER'S
STATE OF HAWAII,	)	REQUEST FOR ADMINISTRATIVE
	)	HEARING
Respondent.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER GRANTING RESPONDENT DEPARTMENT OF EDUCATION'S
MOTION TO DISMISS PETITIONER'S REQUEST FOR ADMINISTRATIVE HEARING

I. INTRODUCTION

On July 10, 2014, Hawaii Supply, LLC ("Petitioner"), filed a request for administrative hearing to contest the decision of the Department of Education ("Respondent") to deny Petitioner's protest in connection with Solicitation B2014014124 concerning Pearl Ridge Elementary School – Campus, Covered Walkways ("Solicitation"). Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 18, 2014, Respondent filed the instant motion to dismiss Petitioner's request for administrative hearing, and on July 23, 2014, Petitioner filed its memorandum in opposition to the motion.

The motion came on for hearing before the undersigned Hearings Officer on July 25, 2014. Petitioner was represented by Ann C. Kemp, Esq.; Respondent was represented by James E. Raymond, Esq.

Having reviewed and considered the motion, memoranda, declaration and exhibits attached thereto along with the argument of counsel, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and order granting Respondent's motion to dismiss.

II. FINDINGS OF FACT

1. On or about May 29, 2014, Respondent issued the Solicitation.
2. The work required by the Solicitation generally involved the construction of reinforced concrete covered walkways, including selective demolition, metal work, carpentry, thermal and moisture protection relating to roofs, skylights, painting, electrical and other related work.
3. The Solicitation set the closing date for June 30, 2014 when all bids were due.
4. By letter dated June 27, 2014 and hand-delivered to Respondent on June 30, 2014, Petitioner protested "the solicitation content contained within section 07542 . . ."
The protest stated in its entirety:

This letter serves as formal protest of the solicitation content contained within section 07542 – Adhered PVC Thermoplastic Membrane Roofing the bid documents for the project referenced above by Hawaii Supply LLC, 91-550 Awakumoku St., Kapolei, HI 96707 for reasons specified below.

1. Paragraph 1.02 E. Membrane to have the same basic formulation for the last ten (10) years as certified by the manufacturer...stipulation is arbitrary and used as a means

to “approve” their product to give bidders the sense the specification is open to competition. This is just a smoke screen.

2. Paragraph 2.01 A. Membrane shall be certified by the manufacturer to be within three (3) mils of the specified membrane thickness as stated in this section. ASTM minimum standards of $\pm 10\%$ will not be accepted. Only Sarnafil manufacturers within these parameters.

3. Paragraph 2.02 C. Color of Membrane: EnergySmart (patina green), initial reflectivity of 0.51, initial emissivity 0.84, solar reflective index (SRI) of 58 is not available in the quantity of 2500sqft required for this project from any of the manufacturers other than Sarnafil.

Based on the reasons listed above, this bid should be delayed or cancelled until the specification provides for fair and open competition.

5. Petitioner’s protest was subsequently denied by Respondent. According to Respondent, “Hawaii Supply LLC does NOT meet the definition of a “Protestor” which is defined as a “prospective bidder, offeror, or contractor, who is aggrieved in connection with the solicitation or award”.

6. On July 10, 2014, Petitioner filed the instant request for administrative hearing. In its request, Petitioner made the following representations:

a. Petitioner was prepared to offer roofing materials to be used by contractors to bid the project at an estimated cost of \$13,000;

b. Petitioner is a distributor of roofing, insulation and waterproofing products registered to do business in the State of Hawaii;

c. Among the products that it distributes are PVC roofing products manufactured by Carlisle Syntec; and

d. Petitioner stood ready to offer Carlisle Syntec PVC roofing products to prospective bidders to incorporate into their bids. However, Petitioner was unable to do so because the Carlisle Syntec products were deemed non-conforming.

III. CONCLUSIONS OF LAW

In bringing this motion, Respondent argues that the Hearings Officer lacks jurisdiction to hear this matter because Petitioner lacks standing to protest and that its protest was untimely.

The salient facts are not in dispute. Petitioner is a distributor/supplier of the Carlisle Syntec roofing product that it had hoped to supply to the winning bidder. Petitioner is not a roofing contractor and, as such, did not submit a bid or offer to Respondent in response to the Solicitation prior to the June 30, 2014 deadline.

Respondent's denial of the protest was based on the allegation that Petitioner lacked standing to protest because it was not an "actual or prospective bidder, offeror, or contractor who was aggrieved in connection with the solicitation or award" of the contract as required by HRS §103D-701(a). In this appeal, Petitioner does not allege that it is an actual or prospective bidder but, instead, qualifies as a "prospective offeror" because it is prepared to offer the Carlisle Syntec roofing product to bidders to incorporate into their bid.

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

§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.*

* * * *

(Emphasis added).

An "Offeror" is defined as any individual, partnership, firm, corporation, joint venture, or other legal entity submitting, *directly* or through a duly authorized representative or agent¹, an offer for the good, service, or construction contemplated *(emphasis added)*.

Hawaii Administrative Rules ("HAR") §3-120-2. "Responsive bidder or offeror" means a *person who has submitted a bid or offer* which conforms in all material respects to the

¹ It is unclear whether Petitioner is relying on the argument that its "offer" would be submitted by the winning contractor as Petitioner's duly authorized representative or agent. In any event, no evidence was presented to support such an argument. Indeed, Petitioner's counsel acknowledged during oral argument that Petitioners were *not* seeking a contract directly with Respondent but rather, with the winning bidder.

invitation for bids or request for proposals. HAR §3-120-2. (*emphasis added*). In *Dist. Council 50 of Int'l Union of Painters & Allied Trades v. Saito*, 216 P.3d 108 (Ct. App. 2009), the Court made clear the Legislature's intent to limit the ability to protest to those directly involved in the process:

* * * *

More importantly, Plaintiffs fail to explain why the Procurement Code's specific standing and exclusive remedies provisions, limiting challenges to bidders, offerors and contractors, does not foreclose this action. HRS §§ 103D-701(a) and 103D-704. *These express and specific provisions manifest a clear intent on the part of the legislature to limit actions seeking redress for injury caused by the procurement process to those directly involved in the process.*

(*Emphasis added*).

Because the Procurement Code limits standing to protest to those directly involved in the procurement process, this Office has repeatedly and consistently held that a person or entity that has not submitted a bid or offer in response to an invitation for bids or request for proposals prior to the deadline for such submissions is neither an actual or prospective bidder or offeror and thus has no standing to bring a protest under HRS Chapter 103D. *Browing Ferris Industries et. al. vs. County of Kauai*, PCH-96-11 (January 29, 1997); *Hawaii School Bus Assn v. DOE*; PCH-2003-3 (May 16, 2003)(*the rights and remedies created under HRS Chapter 103D were intended for and are available only to those who participated in or still have a realistic expectation of submitting a bid in response to the IFB*). In *Hawaiian Natural Water Co. v. City & County of Honolulu*, PCH 99-14 (April 25, 2000), the Hearings Officer said:

The language of HRS §103D-701(a), however, clearly establishes, by the use of the word "prospective", that, in order to be eligible to protest, one who has not actually submitted an offer must be expecting to submit an offer prior to the closing date of the solicitation. This Office has

previously held that a person or entity that has not submitted a bid or offer in response to an invitation for bids or request for proposals prior to the deadline for such submissions is neither an actual nor a prospective bidder or offeror, and thus has no standing to bring a protest under HRS Chapter 103D. *Browing Ferris Industries et. al. v. County of Kauai, PCH 96-11 (January 29, 1997).*

Based on these considerations, the Hearings Officer concludes that only actual or prospective bidders, offerors or contractors to the State have standing to protest under HRS §103D-701(a) because they are the only parties with actual or potential privity of contract with the State when a contract is awarded and, as such, the only parties directly involved in the procurement process. While other relationships may be created by a contractor as a result of an award such as the hiring of subcontractors and suppliers, those arrangements are between the contractor and subcontractor/supplier - not between the subcontractor/supplier and the State.

In this case, no bid or offer was submitted by Petitioner to Respondent in response to the Solicitation prior to the deadline. Rather, Petitioner is, at most, a prospective supplier of roofing material to the winning bidder. Petitioner is therefore not an entity directly involved in the procurement process as a prospective or actual bidder or offeror, and accordingly, lacks the requisite standing to maintain this action.

Respondent also argues that the Hearings Officer lacks jurisdiction for the additional reason that the protest was untimely. 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 thereto; 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 the award of the contract either under section 103D-302 or 103D-303, as applicable; *provided further*

that no protest based on 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 added).

In construing the foregoing provision, this Office has previously 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, PCH-2000-8 (October 17, 2000)* (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).

There is no dispute here that Petitioner's protest was over the content of the Solicitation. Petitioner acknowledged as much in its protest: "This letter serves as formal protest of the solicitation content contained in section 07542 – Adhered PVC Thermoplastic Membrane Roofing the bid documents for the project referenced above by Hawaii Supply LLC . . ." Petitioner, however, apparently takes the position that because the bid submission deadline in the Solicitation included a time, 4:30 p.m., together with a date, June 30, 2014, Petitioner's protest was timely because it was filed prior to 4:30 p.m. on June 30, 2014 (at 12:24 p.m.). Petitioner misconstrues HRS §103D-701(a). That section expressly requires that protests concerning the content of the solicitation be filed prior to the *date*,² rather than the time, set for the receipt of offers. Presumably, the Legislature, desired to have such protests raised and resolved early on and prior to the submission of bids in order to avoid unnecessary delays in the procurement process including the possibility of bidders having to redo their already submitted bids in the event the protest is sustained and the solicitation is amended.

Accordingly, Petitioner was required to protest *prior to the date set for the receipt of bids, to wit, prior to June 30, 2014*. Petitioner, however, did not deliver the protest

² The plain meaning of "date" as set forth in *Webster's II New College Dictionary (1995)* is, "[t]ime stated in terms of the day, month, and year."

