



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 2014-014
)	
MAUI MASTER BUILDERS, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION
)	
vs.)	
)	
DEPARTMENT OF PUBLIC WORKS,)	
COUNTY OF MAUI,)	
)	
Respondent,)	
)	
and)	
)	
MAUI PAVING, LLC,)	
)	
Intervenor.)	
_____)	

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

I. INTRODUCTION

On October 28, 2014, Maui Master Builders, Inc. ("Petitioner") by and through its attorney Anna H. Oshiro, Esq. filed a request for an administrative hearing to contest the Department of Public Works, County of Maui's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. The pre-hearing conference was set for November 6, 2014 and the hearing was scheduled for November 18, 2014.

On November 12, 2014, Maui Paving LLC, by and through its attorney Jeffrey M. Osterkamp, Esq. filed a Motion to Intervene. At the hearing on November 18, 2014, the Motion to Intervene was withdrawn because on November 17, 2014, a Stipulation for Intervention by Maui Paving LLC was approved by the Hearings Officer.

On November 18, 2014, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Ms. Oshiro and Bethany C.K. Ace, Esq. Respondent was represented by Thomas Kolbe, Esq. Intervenor was represented by Mr. Osterkamp. At the conclusion of the hearing, the parties agreed to file written closing arguments on or before November 21, 2014 and responses on or before November 26, 2014. On November 21, 2014, the parties filed their post-hearing/closing briefs. Respondent and Intervenor also filed a Joint Motion to Dismiss (“Motion”). On November 26, 2014, the parties filed their reply briefs. On December 1, 2014, Respondent and Intervenor filed a joint reply memorandum in support of the Motion and Petitioner filed a final reply memorandum.

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. Respondent issued a Notice to Bidders seeking sealed bids for “Wailea Alanui, Okolani Drive to Wailea Ike Drive, and Wailea Ike Drive, Wailea Alanui to Piilani Highway Pavement Rehabilitation, Federal-Aid Project No. STP-0900(084), District of Wailuku, Island of Maui” (“Project”). The Notice to Bidders stated that sealed bids were to be received at the County of Maui Purchasing Division, Department of Finance, Wells Street Professional Center, 2145 Wells Street, Suite 104, Wailuku, Maui, Hawaii 96793 “until 2:00 P.M.” on Wednesday, October 8, 2014 at which time and place they will be publicly opened and read.

2. Section 102.09 of the Notice to Bidders states:

102.09 Delivery of Proposal. The Bidder shall submit the proposal in a sealed envelope, bearing on the outside the identity of the project and its name and address. The Department will reject and return a proposal unopened if received after the time set for the opening of bids.

3. The Project was posted on the State Procurement Office public notice website. The due date is “10/08/2014 – 14:00 HST”.

4. The Project was posted on the County of Maui’s website. The closing date is “10/8/2014 2:00PM”.

5. The Project was posted on a commercial website called “Public Purchase”. The end date is “Oct 8, 2014 2:00:00 PM HST.” Respondent has been using this website since June 2014. The seconds setting defaults to “:00” and was not intentionally set by Respondent.

6. On October 8, 2014, Intervenor’s representative, Ron Aroyan time-stamped the envelope containing Intervenor’s bid and immediately handed it to Julie Kawamura, who works in the Purchasing Division and was authorized to accept bids. The envelope was time-stamped 2:00 PM.

7. Intervenor’s bid was deemed timely and the two bids received were opened. Petitioner’s bid was price was \$7,055,301.00. Intervenor was the low bidder at \$6,999,225.00.

8. By a letter dated October 11, 2014, Petitioner protested the proposed award of the contract to Intervenor. Petitioner asserted that Intervenor’s bid should not be considered because pursuant to Hawaii Administrative Rules (“HAR”) § 3-11-16.08(a) (sic), it was submitted past the deadline for receiving bids (2:00:00 PM HST), and Intervenor violated the law by not following the proper procedure for submitting their bid because Intervenor time-stamped its own envelope containing the bid.

9. By a letter dated October 17, 2014 from Danilo F. Agsalog, Director of Finance, Respondent denied Petitioner’s protest. This letter states in part:

The County of Maui, based on past experience and on our intent to treat all bidders fairly under HAR section 2-122-33(c)(2) (sic) believes, by definition that the word ‘until’ is inclusive of the specific time period stated...For the purposes of administering the state procurement law, the County of Maui maintains that the seconds field is irrelevant, and that our time stamping system is adequate for the purposes of opening bids in front of the public in a timely manner. Our system of recording only the hours and minutes and not the seconds far precedes our use of a computer system to direct bidders to our bid solicitations. Further, since our time stamp is not able to discern whether

or not the Maui Paving bid was received at 2:00:00 p.m., or some other second between 2:00:01 and 2:00:59, it would be prejudicial to Maui Paving our (sic) any other bidder to assume that the bid wasn't received at exactly 2:00:00 p.m., regardless of the odds. Based on all of the above reasons, the County of Maui accepts any bid that is submitted prior to 2:01 on our time stamp.

...

Our duty to the taxpayers is to foster as much broad based competition as possible, and the County of Maui has been and always will be doing our best not to be an impediment to the contracting community. One minor way in which we can assist is to allow the contractors to time stamp their own bids at the last second if it helps them to improve their timeliness. In this case, Maui Paving came in at the last minute and Purchasing staff member Julie Kawamura, as instructed, pointed the Maui Paving representative to where the stamp machine was and told him to stamp the bid in. If Julie had gotten up from her desk and done it herself, the stamping of the bid would have been delayed by a few seconds. The County of Maui is relying on our ability, through the provisions of HAR 3-122-30(a), to use whatever method of receipt that we believe will be in the best interest of the taxpayer, including allowing contractors to time stamp their own bids.

This letter was post-marked October 21, 2014.

10. On October 28, 2014, Petitioner filed a request for administrative review of Respondent's denial of its protest with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("DCCA"). Petitioner also submitted a cash bond in the amount of \$10,000.00.

11. Edward Murphy, who works for T J Gomes Trucking Company and was at the bid opening for the Project, saw Mr. Aroyan stamp his envelope and hand the envelope to Ms. Kawamura. Mr. Murphy saw the clock on the time stamp turn to 2:01 right after Mr. Aroyan time-stamped his envelope. Mr. Murphy believes that it took a few seconds from when Mr. Aroyan time-stamped his envelope to when Ms. Kawamura received the time-stamped envelope. T J Gomes Trucking Company would work together with Petitioner on the Project.

12. The time stamp machine is an Acroprint brand machine and does not have the capability to time-stamp for seconds. The time stamp shows only hours, minutes and am/pm.

13. Respondent considers a bid time-stamped at 2:00 p.m. to be timely.

14. Sometimes people time-stamp their own bids and sometimes the person hands its bid off to one of the people in the Purchasing Division's office to time-stamp.

15. The Director of Finance or the Purchasing Division has not issued written instructions regarding methods for receipt of bids or stating that bidders are allowed to time-stamp their own bids.

16. Greg King, the central purchasing agent for the County of Maui for 19 years, has never instructed anyone in his office to allow bidders to time-stamp their own bids as it was a common practice for bidders to time-stamp their own bids at the time he started at his position and he has not changed anything. The office specifically has the time stamp on the counter so county personnel do not impede the arrival of the bid in any way.

17. Mr. King would have had a conversation with the purchasing specialists and clerical staff in his office that bids received up to 2:01 is acceptable.

18. If the method of receipt of a bid is to be changed, it has to be cleared with the Director of Finance.

19. All construction projects are being funneled through the Public Purchase website for downloading plans and specifications.

20. According to Mr. King, if a bid comes in time-stamped at 1:59 or 2:00 it is timely. If it comes in at 2:01 it is not timely. There is no way for the Purchasing Division to measure things down to the seconds.

21. Mr. King estimates it would have taken 5-10 seconds from the time Mr. Aroyan time-stamped the envelope to the time Ms. Kawamura received the envelope from Mr. Aroyan.

22. At the Purchasing Division, if a bidder time stamps its bid envelope and then several seconds later hands the bid envelope to a staff person at the Purchasing Division, it would be considered received as of the time that it is time-stamped.

23. Cory Uchima, an SSFM International construction manager, was at the Purchasing Division on October 8, 2014 for the Project's bid opening to see who the low bidder was. He saw Mr. Aroyan time-stamp the bid proposal envelope and then saw the time

stamp clock turn to 2:01 so it is his observation that the bid proposal envelope got into Ms. Kawamura's hands after 2:01 and so Respondent did not receive the bid by 2:00 p.m.

24. Dyvette Fong, Petitioner's President and RME testified that she always handed bid envelopes to the clerk for the clerk to time stamp and did not know that she could time-stamp it herself. She was never told that she could time-stamp her own bid and did not see anything in writing about this practice.

25. On October 8, 2014, Ms. Fong submitted Petitioner's bid to the Purchasing Division before 2:00 p.m. Ms. Fong later retrieved the bid, opened it up, replaced a page and sealed it up. It was time-stamped again by someone in the Purchasing Division.

26. Ms. Kawamura testified that she was sitting at her desk when Mr. Aroyan came in and when he time-stamped the bid, she got up to get it. She estimated that it took 5-10 seconds. After confirming that the time-stamp was 2:00 p.m., she gave it to Bruce Milliken who was in charge of this procurement. If it had said 2:01 p.m. she would have returned it to Mr. Aroyan.

27. Ms. Kawamura has rejected late bids and would consider a bid time-stamped at 2:01 p.m. to be late. Ms. Kawamura also stated that it is not uncommon for people to time-stamp their own bids and in the 7 ½ years she's been at that office, it's been allowed.

28. No contract has been awarded in this solicitation.

III. CONCLUSIONS OF LAW

A. Motion to Dismiss

Respondent/Intervenor's Motion is based on the assertion that Petitioner does not have standing because its own bid was not submitted in accordance with the IFB or the procurement statute and rules and as such, has no realistic expectation of receiving a contract arising out of the IFB. The facts upon which Respondent/Intervenor's argument is based on testimony Ms. Fong gave at the hearing on November 18, 2014. Because it does not appear that this issue was raised in a timely bid protest and as such, was not the subject of a determination by the chief procurement officer, the Hearings Officer does not have jurisdiction to address this issue and accordingly, Respondent/Intervenor's Motion is denied. *See, Greenpath Technologies, Inc. v. Department of Finance, County of Maui, et al.*, PDH 2014-002 (March 20, 2014).

B. Receipt of Intervenor's bid by Purchasing Division

At the hearing, Respondent/Intervenor objected to evidence presented regarding whether Intervenor's bid was timely if it was stamped at 2:00 p.m. but given to the purchasing division's staff at 2:01 p.m. This specific argument was raised in the request for hearing filed with OAH but was not specifically raised in the protest filed by Petitioner and was not addressed by the chief procurement officer in its letter dated October 17, 2014 denying Petitioner's protest. Petitioner argued that this issue should be included because its protest stated:

Therefore a bidder who submits a bid after October 8, 2014 2:00:00 PM HST submits a late bid that should not be considered. The authority is HAR 3-11-16.08(a). (sic) Unfortunately, MP failed to submit the bid anytime before the above-mentioned deadline.

See, Respondent's Exhibit 1. After reviewing HAR § 3-122-16.08(a), the Hearings Officer finds that Petitioner's allegation that a violation of HAR § 3-122-16.08 occurred made it incumbent upon Respondent to determine when Intervenor's bid was received. Accordingly, the Hearings Officer concludes that this issue was included in Petitioner's protest and the Hearings Officer has jurisdiction to address this issue.

Hawaii Administrative Rules § 3-122-16.08(a) provides:

§ 3-122-16.08 Late offer, late withdrawal, and late modification. (a) Any notice of withdrawal, notice of modification of a bid or proposal with the actual modification, or any bid or proposal is late when received at the place designated for receipt and opening of an offer after the established due date, additionally defined in section 3-122-16.06(a), except when received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity. (Emphasis added.)

In addition, the Notice to Bidders states that bids will be rejected and returned if received after the time set for opening bids. In this context, "received" can only refer to the time when the purchasing agency has possession of the bid and therefore a bid is late if it is not in the possession of the purchasing agency by the due date. In this case, there is no dispute that Intervenor's bid was time-stamped at 2:00 PM. However, according to witnesses present, the

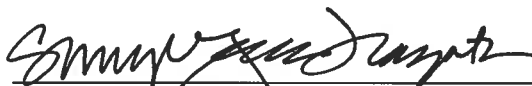
time stamp clock turned to 2:01 PM immediately after Intervenor's bid was time-stamped. While the evidence presented also showed that Mr. Aroyan immediately gave the time-stamped bid to Ms. Kawamura, Ms. Kawamura estimated that it took 5-10 seconds for her to receive the bid from Mr. Aroyan. Based on these facts, the Hearings Officer finds that Petitioner has shown by a preponderance of the evidence that Respondent received Intervenor's bid at 2:01 PM or later. Accordingly, the Hearings Officer must conclude that Intervenor's bid was late as it was received after the established due date of October 8, 2014 at 2:00 PM. While Respondent/Intervenor argued that Intervenor's bid was "received" when it was time-stamped at 2:00 PM, this argument fails as Intervenor's bid was not in the possession and control of the procuring agency by the established due date and therefore cannot be considered timely.

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 bid protest was improper and not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation. Accordingly, it is hereby ordered that: (1) Respondent's October 17, 2014 denial of Petitioner's protest is vacated, (2) Intervenor's bid is rejected as being late, (3) the matter is remanded to Respondent for award to the lowest responsive, responsible bidder and (4) the parties shall bear their own attorney's fees and costs incurred in this matter.

The parties are ordered to inform the DCCA if an appeal of this decision is filed, and if so, the outcome of the appeal so Petitioner's bond can be processed according to HRS § 103D-709(e).

DATED: Honolulu, Hawaii, DEC 9 - 2014.



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