



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2016 AUG 24 A 11: 26

HEARINGS OFFICE

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

In the Matter of	)	PDH-2016-003
	)	
ROLLOFFS HAWAII, LLC,	)	FINDINGS OF FACT, CONCLUSIONS OF
	)	LAW, AND DECISION
Petitioner,	)	
	)	Senior Hearings Officer:
vs.	)	David H. Karlen
	)	
DEPARTMENT OF EDUCATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	
_____	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND DECISION**

**I. INTRODUCTION**

On July 29, 2016, Petitioner Rolloffs Hawaii, LLC (“Rolloffs”) filed its Request for Administrative Hearing (“RFAH”) in this matter, which Request was assigned case number PDH-2016-003. Respondent was the Department of Education, State of Hawaii (“DOE”). Rolloffs did not file a protest bond with its RFAH.

The DOE filed its Response to the RFAH on August 4, 2016.

A pre-hearing conference was held on August 5, 2016. HMP was represented by Mr. Charles E. Leonard, its President, and the DOE was represented by Deputy Attorneys General Gregg M. Ushiroda, Esq., and Paul R. Mow, Esq.

By letter filed August 8, 2016, Rolloffs filed its Exhibit List and copies of its proposed Exhibits. The DOE filed its Witness List, Exhibit List, and proposed Exhibits on August 9, 2016.

On August 10, 2016, the DOE filed Respondent's Motion to Dismiss or, in the Alternative, for Summary Judgment ("DOE Motion"). Rolloffs did not file a written opposition to this Motion.

The DOE Motion came on for hearing on August 18, 2016. Deputy Attorney General Gregg M. Ushiroda, Esq., appeared for the DOE. Mr. Charles E. Leonard, Rolloffs' President, appeared on behalf of Rolloffs.

While not filing a memorandum in opposition to the DOE Motion, Rolloffs relied at oral argument at the August 18, 2016 hearing on its documents submitted on August 8, 2016.

At the conclusion of oral argument, the Hearings Officer orally ruled in favor of the DOE with respect to most of the claims in the Motion. Part of the RFAH was dismissed with prejudice and another part of the RFAH was dismissed without prejudice. In view of this oral ruling, there was no need for an evidentiary hearing, and the hearing was adjourned.

This Decision, based on the entire record as of the close of the hearing on August 18, 2016, is the final, conclusive Decision in this 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 June 1, 2016, the DOE posted an Invitation for Bids No. D16-114 ("IFB") to provide refuse and recycling collection and disposal service for various DOE schools on Oahu in four districts: Honolulu District, Windward District; Central District; and Leeward District.

2. The original due date for the receipt of bids on the IFB was June 14, 2016.

3. This IFB, and the submission of bids in response to it, were administered electronically through the Hawaii Electronic Procurement System (“HePS”).

4. The IFB provided for four awards for refuse services for four groups, which groups were to be bid separately. The groups were identified as follows:

Group A – Honolulu/Kalua Districts;

Group B – Honolulu/Windward Districts;

Group C – Central District; and

Group D – Leeward District

5. Awards of contracts were to be to the responsive and responsible offeror who submitted the lowest bid price per group. Bidders were limited to a maximum award of two groups.

6. Bidders who submitted offers on more than two groups were required to rank each group in order of priority (to the bidder). If a bidder was low on more than two groups, the award would be made for two groups in accord with the bidder’s priority ranking.

7. If a bidder failed to indicate a priority ranking, the DOE would make an award determination based on the bid prices submitted.

8. On June 14, 2016, the DOE posted Addendum A to the IFB which revised the due date for the receipt of bids on the IFB to June 27, 2016. June 27, 2016 was a Monday.

9. On June 24, 2016, at 4:05 p.m., the DOE posted Addendum C to the IFB. June 24, 2016 was a Friday and the last business day before the date for submission of bids.

10. Bids were opened on June 27, 2016. Four companies submitted bids: West Oahu Aggregate Co., Inc. (“West Oahu”), Aloha Waste Systems, Inc. (“Aloha Waste”), Rolloffs, and Honolulu Disposal Service, Inc.

11. On June 30, 2016, Rolloffs sent a letter to the DOE. The letter noted that West Oahu was the lowest bidder on all four groups. In light of the limitation of West Oahu

to obtaining awards for only two groups, Rolloffs advocated that West Oahu be awarded Groups A and B and that Rolloffs be awarded Groups C and D.

12. Rolloffs' June 30, 2016, letter also expressed concern that Aloha Waste did not meet several IFB requirements under Section 6, Bidder Qualifications.

13. Rolloffs' June 30, 2016, letter also expressed concern over the last minute issuance of Addendum C. The letter noted that Addendum C came out at 4:05 p.m. on Friday, June 24, 2016, the last business day before the bids were due. In particular, Rolloffs objected that the original specification required bidders to have a Refuse Collector license from the City and County of Honolulu at the time of bid opening but that Addendum C changed the deadline for obtaining such a license to "prior to award" (which would be after bid opening).

14. In summary, the Bidder Qualifications section required as follows:

- a. At the time of bid opening, the offeror had to be registered and licensed by the City and County of Honolulu as a Refuse Collector. Addendum C changed the time of compliance with this qualification to "prior to award."
- b. Offerors were required to have a minimum of two years of relevant experience and one year of compliance with federal and state DOT requirements immediately prior to bid opening date.
- c. At the time of bid opening, an offeror must have a permanent service facility on Oahu meeting certain parameters set forth in the specifications.
- d. At the time of bid opening, the offeror was required to have the necessary vehicles and equipment to complete the work. (Although not referenced in the DOE's Motion, Addendum B to the specifications, issued June 22, 2016 (DOE's proposed Exhibit 3), changed the time of compliance with this requirement to the time "the contract is executed.")

e. At the time of submission of the offer, the offeror was required to have the requisite number of workers to do the contract work who were regular employees of the offeror. (Although not referenced in the DOE's Motion, Addendum B to the specifications, issued June 22, 2016 (the DOE's proposed Exhibit 3), changed the time of compliance with this requirement to the time "the contract is executed.")

15. On July 18, 2016, the DOE awarded Groups C and D to West Oahu. No awards on Groups A and B were made at that time.

16. West Oahu's bid price for Group C was \$575,712.00.

17. West Oahu's bid price for Group D was \$761,670.00.

18. On July 21, 2016, Rolloffs submitted its bid protest to the DOE. Its letter of that date stated that it was "formally notifying you [the DOE] that Rolloffs Hawaii, LLC, is officially protesting" the award of Groups C and D to West Oahu.

19. The July 21, 2016, protest letter also claimed that Aloha Waste should be "immediately disqualified" because it failed to comply with all the qualifications listed in the IFB under Section 6, Bidder Qualifications, at the time of bid opening as well as of the date of the protest letter.

20. Due to the "automatic stay" provision in the procurement code, this protest letter suspended the DOE's activity with respect to the issuance of awards on Groups A and B. As of the date of the hearing herein, the DOE had still not issued any awards with respect to either Group A or Group B.

21. On July 27, 2016, the DOE sent Rolloffs a letter denying Rolloffs' bid protest. This letter, in summary, defended the awards of Groups C and D to West Oahu. The DOE's letter also defended its issuance of Addendum C changing the deadline for license and permit submission from when bids were submitted to "prior to contract award."

22. The DOE's letter also stated:

If you are not satisfied with this determination, you have the right, pursuant to HRS §103D-709 and HRS §103D-712, to submit a request for an administrative review directly to the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, with notice of same to this HIDOE office, both within seven (7) calendar days of the issuance of this determination.

23. Rolloffs submitted its request for hearing ("RFAH") to the Office of Administrative Hearings by letter dated July 27, 2016, which letter was received by the Office of Administrative Hearings on July 29, 2016. The RFAH sought review of the denial of its formal protest by the DOE's letter of July 27, 2016.

24. Rolloffs did not submit a protest bond with its RFAH.

### **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.

1. General Consideration: While the DOE attached some, but not all, of its proposed exhibits to its Motion, there was no challenge to the authenticity of any of the DOE's proposed exhibits that were not attached to the Motion. In addition, there was no challenge to any of Rolloffs' proposed exhibits that were not duplicated by attachments to the DOE's Motion. The Hearings Officer's review of these documents found no reason not to rely on some of them in preparing this Decision. There was no need for these documents to be introduced by means of affidavit or declaration. Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH 2014-002 (March 29, 2014), citing Diamond v. Dobbin, 132 Haw. 9, 319 P.3d 1017 (2014).

**A. The Protest Against the DOE Awards for Groups C and D Must Be Dismissed Because of Rolloffs' Failure to Submit a Protest Bond**

2. The first ground for dismissal asserted in the DOE's Motion is that Rolloffs failed to timely submit the required protest bond in conjunction with the filing of its RFAH.

3. HRS §103D-709(e) provides as follows:

(e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

- (1) \$1,000 for a contract with an estimated value of less than \$500,000;
- (2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

4. In addition, HRS §103D-709(j) provides in this case that the estimated value of the contract is the lowest responsible and responsive bid.

5. Since this case involves a competitive sealed proposal under HRS §103D-302, HRS §103D-709(d) applies, and, in turn, the protest bond requirements of HRS §103D-709(e) apply.

6. If the awards of contracts for Groups C and D were considered separately, Rolloffs' protest of those awards should have been accompanied by two protest bonds of \$2,000.00 each. If, on the other hand, the situation is considered to involve only one award totaling \$1,337,382.00, the protest should have been accompanied by one protest bond in the amount of \$6,687. Since no protest bond in any amount was submitted, the Hearings Officer does not have to decide the amount of the bond, or bonds, that should have been submitted.

7. During the course of these proceedings, Mr. Leonard expressed the belief that Rolloffs was excused from the requirement of filing a protest bond because he was not told by the DOE about the bond requirement. This argument is unavailing because:

a. Rolloffs has not identified any statute or regulation requiring a State agency to inform a bid protester of the requirement that a bond be submitted in connection with an RFAH filed with the Office of Administrative Hearings:

b. The DOE's bid protest denial letter of July 27, 2016, did inform Rolloffs that any RFAH would be subject to HRS §103D-709, so Rolloffs did in fact receive actual notice that the statute, which includes the bond requirements, applied in this case.

c. Ignorance of the law is no excuse for not satisfying the jurisdictional requirement of filing a protest bond. Cf. Air Rescue Systems Corp. v. Finance Department, County of Hawaii, PDH 2012-006 (December 16, 2012).

8. The failure to submit a protest bond when such a bond is required means that there is no jurisdiction to consider Rolloffs' claim that the awards for Groups C and D were improper, and that claim must be dismissed. See, e.g., Air Rescue Systems Corp. v. Finance Department, County of Hawaii, PDH 2012-006 (December 16, 2012).

**B. A Portion of the RFAH Challenging the Terms of the Specifications Cannot be Dismissed as Untimely**

9. The DOE concedes that protests based on the contents of the IFB do not require the submission of a protest bond. DOE Memorandum in Support of Motion at page 7. See also Soderholm Sales and Leasing, Inc. v. Department of Budget and Fiscal Services, City and County of Honolulu, PDH-2012-005 (November 30, 2012) at pages 8-9.

10. Nevertheless, such protests must be filed in a timely manner. In that regard, HRS §103D-701(a) states that protests over the content of a solicitation shall be made within five working days of when the solicitation contents were known, or should have been known,



but in any event it must be “submitted in writing prior to the date set for the receipt of offers.”

11. The DOE argues, therefore, that even considering the protest of July 21, 2016, regarding the awards of Groups C and D as one challenging the terms of the IFB allowing such awards for Groups C and D, rather than a protest of the awards themselves, so that no bond would be required, the challenge to those terms is not timely because it was not made prior to the bid opening date. The Hearings Officer agrees with the DOE on this point. This provides a second and separate basis for the dismissal of Rolloffs’ challenge to the awards for Groups C and D.

12. There was also some question at the hearing of whether Rolloffs was challenging the contents of Addendum C changing the date for compliance with the licensing requirements of the City and County of Honolulu from the date of bid opening to the date of contract award. This question was raised in some detail in Rolloffs’ letter to the DOE dated June 30, 2016. While not specifically discussed in Rolloffs’ bid protest letter of July 21, 2016, that letter does reference the June 30, 2016 letter and does say Aloha Waste did fail to comply with all required qualifications at the time of bid opening. Thus, it could be considered as an issue “raised by reference,” and the DOE’s denial of the bid protest in its letter dated July 27, 2016, did, in fact consider the issue of Addendum C at some length at page 4 of that letter.

13. With respect to Addendum C, there was no realistically possible way for Rolloffs to submit a protest over its terms prior to the bid opening date. Addendum C was issued on the last business day prior to bid opening date, i.e., it was issued on the deadline date for filing a challenge to the contents of Addendum C. Further, it was issued with only 25 minutes left on that business day. Under these circumstances, when the DOE’s actions

made a technically timely protest impossible, it would be unfair and inappropriate to apply a June 24, 2016 deadline to this portion of Rolloffs' protest.<sup>1</sup>

14. Elimination of the June 24, 2016 deadline in this one instance does not necessarily mean that Rolloffs had an unlimited amount of time to protest the contents of Addendum C. The DOE, however, did not propose an alternative deadline for challenging the contents of Addendum C. In the absence of such advocacy, the Hearings Officer will not unilaterally create an alternative deadline.

15. The decision herein on this point is therefore very limited: any protest of the contents of Addendum C was not untimely merely because it was not filed on June 24, 2016.

16. At the hearing on the DOE's Motion, the Hearings Officer expressed the opinion that the issue of Aloha Waste's qualifications was a matter of responsibility that could be determined at any time up to the issuance of the contract award.

17. Upon further reflection and review, however, it must be noted that this issue was not raised in the DOE's Motion. It was therefore not appropriate to make a ruling on this issue at that time even though the issue might have come up if an evidentiary hearing had been conducted. Accordingly, the Hearings Officer's oral opinion on the issue must be considered dicta and not an operative part of this written decision.

**C. The Protest of a Potential Award to Aloha Waste is Premature**

18. At this point in time, Aloha Waste must be considered "in the running" for an award of a contract for Group A and/or Group B. Rolloffs claimed that Aloha Waste failed to meet any of the required qualifications set forth in Special Condition 6, Bidder Qualification, in the IFB.

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<sup>1</sup> Since Addendum B was not part of the DOE's Motion, the Hearings Officer expresses no opinion on the deadline for any challenge to its terms (changing the due date for meeting certain bidder qualifications) when Addendum B was issued two business days before the statutory deadline of June 24, 2016.

19. Those Bidder Qualifications are summarized in Finding of Fact No. 14. As set forth in that Finding of Fact, initially all qualifications were to be met at the time of bid opening but Addendums B and C changed the time of compliance for some, but not all, of those qualifications to the time of award.

20. It was undisputed that, at this point in time, the DOE has not finished evaluating the bids for Groups A and B. Based on its own investigation and/or information supplied by Rolloffs, the DOE may decide that Aloha Waste is not qualified to receive an award for Group A and/or Group B even though it may have submitted the lowest price for one or both of those groups.

21. Given that situation, the Hearings Officer agrees with the DOE's contention that Rolloffs' challenge to the qualifications of Aloha Waste is premature. Cf. Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii, PCH-2003-14, PCH-2003-20 (June 24, 2004). Such challenge should be dismissed without prejudice. Assuming, for the sake of discussion only, that the DOE awards contracts for Group A and/or Group B to Aloha Waste at some time in the future, Rolloffs can file a protest with the DOE over such an award, or awards, at that time.

#### **IV. DECISION**

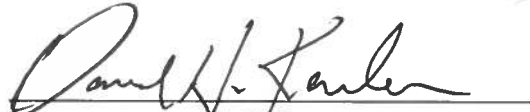
Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. The DOE's Motion is granted in part and denied in part, as stated above.
- b. Rolloffs' protest of the award of contracts to West Oahu for Groups C and D is dismissed with prejudice for lack of jurisdiction because Rolloffs failed to submit an appropriate protest bond.
- c. Rolloffs' protest of the potential award of the contracts for Groups A and/or B to Aloha Waste is dismissed without prejudice because it is premature.

d. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

**AUG 24 2016**

DATED: Honolulu, Hawaii, \_\_\_\_\_.

A handwritten signature in black ink, appearing to read "David H. Karlen", written over a horizontal line.

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