



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of)	PDH-2017-003
)	
ALOHA WASTE SYSTEMS, INC.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW AND
)	FINAL ORDER GRANTING
vs.)	RESPONDENT'S MOTION TO
)	DISMISS, OR IN THE
DEPARTMENT OF EDUCATION, STATE OF)	ALTERNATIVE, FOR SUMMARY
HAWAII,)	JUDGMENT AS TO ALL CLAIMS
)	
Respondent.)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS, OR IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT AS TO ALL CLAIMS

I. INTRODUCTION

On March 15, 2017, Aloha Waste Systems, Inc. ("Petitioner") filed its Request for Administrative Hearing ("Request") to contest the Department of Education, State of Hawaii's ("Respondent" or "HIDOE") decision to deny Petitioner's protest. A March 21, 2017 Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On March 28, 2017, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Emily A. Gardner, Esq.; and Respondent was represented by James Raymond, Esq. At the pre-hearing conference, Respondent represented that the HIDOE would be filing a motion for summary judgment. After a discussion regarding the time

needed to file and respond to any motion filed, the hearing on any motion filed was scheduled on April 4, 2017.

Respondent filed its Motion to Dismiss, or in the Alternative, for Summary Judgment as to All Claims (“Respondent’s Motion”) on March 30, 2017. Petitioner filed its Memorandum in Opposition on April 3, 2017.

On April 4, 2017, oral arguments on Respondent’s Motion were heard by the undersigned Hearings Officer. Respondent was represented by Mr. Raymond; Petitioner was represented by Ms. Gardner. The Hearings Officer orally granted Respondent’s Motion. The scheduled April 4, and 5, 2017 hearing dates were vacated. 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 final order granting Respondent’s Motion.

II. FINDINGS OF FACT

Based upon the pleadings, exhibits, and the representations made through the pleadings, exhibits, and correspondence, the Hearings Officer finds that the following facts are not in dispute:

1. On October 17, 2016, the HIDEOE posted an Invitation for Bids No. D17-029 (“IFB”), to Provide Refuse and Recycling Collection and Disposal Services for Various Schools of the Hawaii Department of Education on Oahu, Honolulu and Windward Districts. IFB D17-029 sought to award contracts for refuse and recycling collection and disposal in different areas, and called for 2 contracts: Group A, the Honolulu/Kailua District; and Group B, the Windward/Kailua District.

2. One of the terms of IFB D17-029, Special Condition 30, stated that if an Offeror was awarded the first group, that Offeror would not be considered for an award of any subsequent group. In relevant part, Special Condition 30 provides:

Method of Award

Award, if made shall be to the responsive and responsible Offeror submitting the lowest Evaluated Total Bid Price (items 1 and 2) per Group. Offeror shall be limited to a maximum award of one (1) group...

Time is of the essence in the completion of work under this contract. For this reason, the HIDOE shall award not more than one (1) group to a single Offeror. In the event that an Offeror is successful on one (1) group, the Offeror shall not be considered for an award on any subsequent group.

3. On November 4, 2016 both West Oahu Aggregate, Inc. ("West Oahu Aggregate") and Rolloffs Hawaii, LLC. ("Rolloffs Hawaii") submitted bids in response to IFB D17-029. At this time, West Oahu Aggregate and Rolloffs Hawaii were 2 separate legal entities.

4. Aloha Waste Systems, Inc. was also a bidder for IFB D17-029, submitting bids for both Group A and Group B.

5. On January 4, 2017, at approximately 12:03 p.m., the HIDOE awarded Group A, the Honolulu/Kailua District, to West Oahu Aggregate. The HIDOE awarded Group B, the Windward/Kailua District, to Rolloffs Hawaii.

6. According to Petitioner, the HIDOE made these awards even though Petitioner had put the HIDOE on notice that Rolloffs Hawaii had filed for bankruptcy on December 9, 2016. Petitioner further notes that there was media coverage that Rolloffs Hawaii would be sold at public auction.

7. On January 4, 2017, West Oahu Aggregate acquired Rolloffs Hawaii at a public auction. West Oahu Aggregate was the sole bidder.

8. On February 1, 2017, the court approved the final sale of Rolloffs Hawaii to West Oahu Aggregate.

9. In its February 8, 2017 letter to the HIDOE, Petitioner first protested the January 4, 2017 bid award of Group B, the Windward/Kailua District award, to Rolloffs Hawaii.

10. Petitioner contends that West Oahu Aggregate and Rolloffs Hawaii were the same legal entity as of February 1, 2017. In its February 8, 2017 letter to the HIDOE, Petitioner writes, "Thus, as of February 1, 2017, West Oahu Aggregate has both the Honolulu/Kailua and Honolulu/Windward Districts, in violation of Special Condition 30."

11. Petitioner further contends that because West Oahu Aggregate had, in June 2016, been awarded refuse contracts for 2 other Oahu districts, this further flouts the time is of the essence clause in IFB D17-029.

12. Through a March 8, 2017 letter, the HIDOE denied the protest.

13. On March 15, 2017, Petitioner filed a request for hearing with the Office of Administrative Hearings, DCCA, to appeal Respondent's denial of its protest. Petitioner filed a \$2,000.00 Procurement Protest Bond with its request for hearing.

14. In its Request for Hearing, Petitioner states, among other things, that, "The basis for (Aloha Waste System's) February 8th protest is the final disposition of HIDOE's contract for Group B, the Honolulu/Windward District under IFB D17-029, to Offeror West Oahu Aggregate in lieu of Special Condition 30..."

15. In its Request for Hearing, Petitioner further states that was not until February 1,

2017 that West Oahu Aggregate and Rolloffs Hawaii were the same legal entity. Petitioner writes, "Because Rolloffs Hawaii and West Oahu Aggregate were separate legal entities until the closing of the sale of Rolloffs Hawaii to West Oahu Aggregate on February 1, 2017, (Aloha Waste System's) claim did not become ripe until that time." Petitioner's Request for Administrative Hearing at page 4.

16. In its Response, the HODOE states that Petitioner's Protest/Request for Hearing was not timely and should be dismissed. Respondent cites HRS Section 103D-701(a), which states, in 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..." .

17. The Protest provision, Special Condition 31 of IFB D17-029, states, in relevant part, "A protest shall be submitted in writing within five (5) working days after the aggrieved person knows or should have known of the facts giving rise thereto... Further provided that a protest of an award or proposed award shall be submitted within five (5) working days after the posting of award of the contract."

18. The posting of the awards for the Group A and Group B contracts under IFB D17-029 was made on January 4, 2017. See, Respondent's Exhibits B and C attached to its motion.

19. As noted above, Petitioner did not submit its protest until February 8, 2017. In its Request for Hearing, Petitioner asserts, in part, "Because Offerors Rolloffs Hawaii and West Oahu Aggregate were separate legal entities until the closing of the sale of Rolloffs Hawaii to West Oahu Aggregate on February 1, 2017, Petitioner's claim did not become ripe until that

time. (February 1, 2017, the date the court approved the sale of Rolloffs Hawaii to West Oahu Aggregate).”

20. In its Response, the HIDOE argues that Petitioner’s assertion that the HIDOE was actually awarding the Group B contract to West Oahu Aggregate (when it was, in fact, awarded to Rolloffs Hawaii) asserts hindsight. Respondent argues that by Petitioner’s own admission, West Oahu Aggregate and Rolloffs Hawaii were not the same legal entity until February 1, 2017. However, the bid awards of January 4, 2017 preceded February 1, 2017 by almost a month. The HIDOE argues that it cannot be expected to know at the time the bids were submitted, and then subsequently awarded, that West Oahu Aggregate would acquire Rolloffs Hawaii. The HIDOE notes that it could not have known that West Oahu Aggregate would be the winning bidder at the auction, and that the court would approve the sale.

21. Through a March 8, 2017 letter, Respondent denied Petitioner’s protest. This letter states in part:

“Rolloffs Hawaii, LLC was an Offeror for IFB D17-029 and WOA was an Offeror for IFB D17-029. On January 4, 2017, an award to Offeror, Rolloffs Hawaii, LLC was made for Group B and an award to Offeror WOA was made for Group A... Aloha Waste Systems states that February 1, 2017 was the date of the closing of the sale of Rolloffs Hawaii, LLC to WOA. HIDOE did not know that there would be just one bidder for Rolloffs Hawaii, LLC at the courthouse auction nor did HIDOE know that the U.S. Bankruptcy Court judge would approve the sale of Rolloffs Hawaii, LLC to WOA. Therefore, for purposes of this solicitation, the firms were still separate entities.”

Respondent’s March 8, 2017 letter to Petitioner at page 5.

“Because the award was announced on January 4, 2017, Section 103D-701 HRS requires that any protest of the award be submitted within five working days of the posting of the award. Aloha Waste Systems did not submit its protest until February 8, 2017 which renders the protest untimely.” *Respondent’s March 8, 2017 letter to Petitioner at page 5.*

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).*

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Rule 56, Federal Rules of Civil Procedure.*

Respondent’s filed its Motion to Dismiss, or in the Alternative, for Summary Judgment as to All Claims (“Respondent’s Motion”) on March 30, 2017. On April 3, 2017, Petitioner filed its Memorandum in Opposition. Respondent’s motion asserts that the protest should be dismissed as Petitioners did not timely file its protest. Alternatively, Respondent argues that summary judgment should be granted in favor of Respondent as the HIDOE’s award of both Group A and Group B contracts did not violate the terms of IFB D17-029.

Respondent’s motion presents 2 bases to grant its motion:

A. Petitioner did not timely file its protest; and

B. Based upon the untimely filing of the protest, the Hearings Officer lacks the authority to resolve the protested award.

A. Whether Petitioner Timely Filed Its Protest

The facts established that on October 17, 2016, the DOE posted IFB D17-029, to Provide Refuse and Recycling Collection and Disposal Services for Various Schools of the Hawaii Department of Education on Oahu, Honolulu and Windward Districts. IFB D17-029 was to award refuse and recycling collection and disposal in different areas, and called for 2 contracts: Group A, the Honolulu/Kailua District; and Group B, the Windward/Kailua District.

One of the terms of IFB D17-029, Special Condition 30, stated that if an Offeror was awarded the first group, that Offeror would not be considered for an award of any subsequent group. Specifically, in relevant part, Special Condition 30 provides that the Method of Award shall be to the responsive and responsible Offeror submitting the lowest Evaluated Total Bid Price (items 1 and 2) per Group. Offeror shall be limited to a maximum award of one (1) group...

Further, Special Condition 30 stated that, "Time is of the essence in the completion of work under this contract. For this reason, the HIDOE shall award not more than one (1) group to a single Offeror. In the event that an Offeror is successful on one (1) group, the Offeror shall not be considered for an award of any subsequent group."

On November 4, 2016, both West Oahu Aggregate and Rolloffs Hawaii submitted bids in response to IFB D17-029. At this time, West Oahu Aggregate and Rolloffs Hawaii were 2 separate legal entities. Aloha Waste Systems, Inc. was also a bidder for the IFB D17-029 contracts

On January 4, 2017, at approximately 12:03 p.m., the HIDEO awarded Group A, the Honolulu/Kailua District, to West Oahu Aggregate. The HIDEO awarded Group B, the Windward/Kailua District, to Rolloffs Hawaii. On the same day the bids were awarded, January 4, 2017, West Oahu Aggregate acquired Rolloffs Hawaii at a public auction. West Oahu Aggregate was the sole bidder. On February 1, 2017, the court approved the final sale of Rolloffs Hawaii to West Oahu Aggregate.

In a February 8, 2017 letter to the HIDEO, Petitioner first protested the January 4, 2017 bid award of Group B, the Windward/Kailua District award to Rolloffs Hawaii. Petitioner contends that West Oahu Aggregate and Rolloffs Hawaii were the same legal entity as of February 1, 2017. In its February 8, 2017 letter to the HIDEO, Petitioner writes, "Thus, as of February 1, 2017, West Oahu Aggregate has both the Honolulu/Kailua and Honolulu/Windward Districts, in violation of Special Condition 30."

According to Petitioner, the HIDEO made these awards even though Petitioner had put the HIDEO on notice that Rolloffs Hawaii had filed for bankruptcy on December 9, 2016. Petitioner further claims that there was extensive media coverage that Rolloffs Hawaii would be sold at public auction. Additionally, Petitioner contends that because West Oahu Aggregate had, in June 2016, been awarded refuse contracts for 2 other Oahu districts, this further flouts the time is of the essence clause in IFB D17-029.

Through a March 8, 2017 letter, the HIDEO denied Petitioner's protest. The letter states, in part, when the January 4, 2017 bid award for Group A was awarded to West Oahu Aggregate, and Group B was awarded to Rolloffs Hawaii, "HIDEO did not know that there would be just one bidder for Rolloffs Hawaii, LLC at the courthouse auction nor did HIDEO know that the

U.S. Bankruptcy Court judge would approve the sale of Rolloffs Hawaii, LLC to WOA. Therefore, for purposes of this solicitation, the firms were still separate entities.”

In its March 8, 2017 letter, HIDOE further states, “Because the award was announced on January 4, 2017, Section 103D-701 HRS requires that any protest of the award be submitted within five working days of the posting of the award. Aloha Waste Systems did not submit its protest until February 8, 2017 which renders the protest untimely.”

Petitioner argues that its protest was timely, as its claim had not become ripe until February 1, 2017, the date the court approved the sale of Rolloffs Hawaii to West Oahu Aggregate. However, the critical date to consider is the date of the posting of the bid award – January 4, 2017; not the February 1, 2017 date on which the sale of Rolloffs Hawaii to West Oahu Aggregate was approved. Petitioner’s February 8, 2017 protest is well beyond the 5 working days after the posting of the award of the contract. HRS Section 103D-701(a).

Under HRS Section 103D-701(a) “a protest shall be submitted in writing within five working days after the aggrieved person knows or should have 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...” See also, Hawaii Administrative Rules (“HAR”) Section 3-126-4.

Further, the IFB itself, Special Condition 31 of IFB D17-029, states in relevant part, “A protest shall be submitted in writing within five (5) working days after the aggrieved person knows or should have known of the facts giving rise thereto... Further provided that a protest of an award or proposed award shall be submitted within five (5) working days after the posting of award of the contract.”

The bids under IFB D17-029 were awarded on January 4, 2017. The posting of the award for IFB D17-029 was on January 4, 2017. Petitioner did not submit its protest until February 8, 2017. Although Petitioners argue that its claim was not ripe until February 1, 2017 (the date the court approved the sale of Rolloffs to West Oahu Aggregate), as Respondent argues, the posting of the award of the contract is the applicable date in determining whether Petitioner's protest was timely filed. Because the February 8, 2017 date is well beyond the 5 working days under HRS Section 103D-701(a), the Hearings Officer concludes that Petitioner's protest was not timely filed, and should be dismissed.

B. Whether the Hearings Officer Has the Authority to Resolve the Protested Award

Petitioner argues that Rolloffs Hawaii should not have been considered for an award of the Group B contract. Petitioner argues that on February 1, 2017, West Oahu Aggregate and Rolloffs Hawaii were the same legal entity.

Petitioner points to Special Condition 30 of IFB D17-029, which states that if an Offeror was awarded the first group, that Offeror would not be considered for an award of any subsequent group. Special Condition 30 also states that, "Time is of the essence in the completion of work under this contract. For this reason, the HIDOE shall award not more than one (1) group to a single Offeror. In the event that an Offeror is successful on one (1) group, the Offeror shall not be considered for an award of any subsequent group."

The facts established that the bids for IFB D17-029 were submitted on November 4, 2016. At this time, West Oahu Aggregate and Rolloffs Hawaii were 2 separate legal entities. When the HIDOE awarded the Group A contract to West Oahu Aggregate, and the Group B contract to Rolloffs Hawaii on January 4, 2017; again, West Oahu Aggregate and Rolloffs

Hawaii were still 2 separate legal entities as the bankruptcy court had not yet approved the acquisition bid.

Petitioner further argues that the HIDOE made these awards even though Petitioner had put the HIDOE on notice that Rolloffs Hawaii had filed for bankruptcy on December 9, 2016; and there was extensive media coverage that Rolloffs Hawaii would be sold at public auction. Petitioner further points out that on January 4, 2017, the same day the bid awards were made, West Oahu Aggregate acquired Rolloffs Hawaii at a public auction. West Oahu Aggregate was the sole bidder. On February 1, 2017, the court approved the final sale of Rolloffs Hawaii to West Oahu Aggregate.

In its Memorandum in Opposition to Respondent's Motion, Petitioner asserts that "in its request for an administrative hearing, Petitioner is not protesting the award of the Windward District to Rolloffs Hawaii, but is protesting the final disposition and subsequent conveyance of the Windward District contract to West Oahu Aggregate upon its concluded purchase of Rolloffs Hawaii, allowing it to have both Groups A and B, in contravention of IFB D17-029's special Condition 30." Petitioner argues that the HIDOE should be equitably estopped from asserting that Petitioner did not timely file its protest. Petitioner argues that its claim was not ripe until February 1, 2017, and it is unfair for Petitioner to have to file a protest before then.

However, the doctrine of equitable estoppel involves an omission, misconduct, or misrepresentation misleading another who relied upon such. Although Petitioners seek equitable estoppel, the facts do not support that the HIDOE made any omission, misconduct, or misrepresentation which mislead Petitioner, or that Petitioner relied upon such conduct.

In determining the appropriateness of the bid award, the time period to consider is at the time of the bid award. Even assuming that the facts upon which Petitioner bases its argument

for equitable estoppel have been established, Petitioner still has not shown that HIDEO's bid award of the Group A contract, the Honolulu/Kailua District, to West Oahu Aggregate; and HIDEO's bid award of the Group B contract, the Windward/Kailua District, to Rolloffs Hawaii, violated Special Condition 30 of IFB D17-029 at the time the bids were awarded.

In its February 8, 2017 protest letter to the HIDEO, Petitioner first protested the January 4, 2017 bid award of Group B, the Windward/Kailua District award to Rolloffs Hawaii. Petitioner contends that West Oahu Aggregate and Rolloffs Hawaii were the same legal entity as of February 1, 2017. In its February 8, 2017 letter to the HIDEO, Petitioner writes, "Thus, as of February 1, 2017, West Oahu Aggregate has both the Honolulu/Kailua and Honolulu/Windward Districts, in violation of Special Condition 30."

Petitioner further contends that because West Oahu Aggregate had, in June 2016, been awarded refuse contracts for 2 other Oahu districts, this further flouts the time is of the essence clause.

However, as the HIDEO responded in its March 8, 2017 letter denying the protest,

"Rolloffs Hawaii, LLC was an Offeror for IFB D17-029 and WOA was an Offeror for IFB D17-029. On January 4, 2017, an award to Offeror, Rolloffs Hawaii, LLC was made for Group B and an award to Offeror WOA was made for Group A... Aloha Waste Systems states that February 1, 2017 was the date of the closing of the sale of Rolloffs Hawaii, LLC to WOA. HIDEO did not know that there would be just one bidder for Rolloffs Hawaii, LLC at the courthouse auction nor did HIDEO know that the U.S. Bankruptcy Court judge would approve the sale of Rolloffs Hawaii, LLC to WOA. Therefore, for purposes of this solicitation, the firms were still separate entities." *Respondent's March 8, 2017 letter to Petitioner at page 5.*

In its Response, the HIDEO also argues that Petitioner's assertion that the HIDEO was actually awarding the Group B contract to West Oahu Aggregate (when it was, in fact, awarded to Rolloffs Hawaii) asserts hindsight. Respondent argues that by Petitioner's own admission, West Oahu Aggregate and Rolloffs Hawaii were not the same legal entity until February 1, 2017. However, the bid awards of January 4, 2017 preceded February 1, 2017 by almost a month. HIDEO argues that it cannot be expected to know at the time the bids were submitted, and then subsequently awarded, that West Oahu Aggregate would acquire Rolloffs Hawaii. The HIDEO notes that it could not have known that West Oahu Aggregate would be the winning bidder at the auction, and that the court would approve the sale.

The Hearings Officer agrees with Respondent that at the time of the bid awards, the HIDEO could not have known that West Oahu Aggregate would acquire Rolloffs Hawaii, and that the court would approve the sale. The Hearings Officer concludes that HIDEO's award of Group A and Group B contracts did not violate the terms of IFB D17-029.

HRS Section 103D-701 is the statutory provision entitled, "Authority to resolve protested solicitations and awards." Under subsection (a), "Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest...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..." HRS Section 103D-701(a).

Clearly, the facts of this case show that Petitioner's February 8, 2017 protest was untimely, as it exceeded 5 working days after the January 4, 2017 posting of the award. Based


upon the untimely filing of the protest, the Hearings Officer lacks the authority to resolve the protested award.

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 to Dismiss, or in the Alternative, for Summary Judgment as to All Claims. 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 \$2,000.00 Procurement Protest Bond shall be deposited into the general fund.

DATED: Honolulu, Hawaii, APR 17 2017.



RICHARD A. YOUNG
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs