



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-2018-002
	)	
CERTIFIED CONSTRUCTION, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND
	)	FINAL ORDER GRANTING
	)	RESPONDENT DEPARTMENT
	)	OF TRANSPORTATION'S
Petitioner,	)	MOTION TO DISMISS, OR IN
	)	THE ALTERNATIVE, FOR
	)	SUMMARY JUDGMENT;
	)	
vs.	)	and
	)	
	)	DENYING PETITIONER'S
SARAH ALLEN, AS ADMINISTRATOR	)	MOTION FOR SUMMARY
OF THE STATE PROCUREMENT	)	JUDGMENT
OFFICE, DEPARTMENT OF	)	
ACCOUNTING & GENERAL	)	and
SERVICES, STATE OF HAWAII, AND	)	
JADE BUTAY, AS INTERIM	)	GRANTING
DIRECTOR OF THE DEPARTMENT	)	RESPONDENT DEPARTMENT
OF TRANSPORTATION, STATE OF	)	OF ACCOUNTING & GENERAL
HAWAII,	)	SERVICES, STATE OF HAWAII'S
	)	MOTION TO DISMISS, OR IN
	)	THE ALTERNATIVE, FOR
	)	SUMMARY JUDGMENT
	)	
	)	
	)	
	)	
Respondents.	)	
	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND FINAL ORDER GRANTING

RESPONDENT DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS,  
OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT;

And

DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

And

GRANTING RESPONDENT DEPARTMENT  
OF ACCOUNTING & GENERAL SERVICE'S  
MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. INTRODUCTION:

On January 11, 2018, Certified Construction, Inc. ("Petitioner"), filed a request for hearing to contest Sarah Allen as Administrator of the State Procurement Office, Department of Accounting & General Services, State of Hawaii ("Respondent Department of Accounting & General Services"), and Jade Butay as Interim Director of the Department of Transportation, State of Hawaii's ("Respondent Department of Transportation") denial of Petitioner's protest in connection with Respondent Department of Transportation's cancellation of the solicitation for a project referred to as the Ewa and Diamond Head Terminal Re-roofing and Roadway Improvement at the Honolulu International Airport, project #AO1043-29 ("Project"). The matter was thereafter set for a January 22, 2018 Pre-Hearing Conference, and Hearing on January 29, 2018. At the January 22, 2018 Pre-Hearing Conference, motions and response deadlines were scheduled. All parties filed motions to dismiss and/or for summary judgment.

The motions came on for hearing before the undersigned Hearings Officer on January 29, 2018 in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by Jefree Juliano, Esq. and Kristi Arakaki, Esq.; Respondent Department of Transportation was represented by Michael Lau, Esq. and Julia Verbrugge, Esq. Respondent Department of Accounting & General Services was represented by Stella Kam, Esq.

Petitioner did not object to the dismissing of Sarah Allen, as Administrator of the State Procurement Office, Department of Accounting and General Services from

Petitioner's Request for Hearing filed January 11, 2018. It is noted that Petitioner did not file a memorandum in opposition to Respondent Department of Accounting & General Services Motion to Dismiss, or in the Alternative, for Summary Judgment.

Based upon the above, the Hearings Officer ordered that Sarah Allen, as Administrator of the State Procurement Office, Department of Accounting and General Services, State of Hawaii, dismissed from Petitioner's Request for Hearing filed January 11, 2018.

Having reviewed and considered the motions and memoranda, exhibits and declarations attached thereto, the arguments of counsel, 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. On February 22, 2017, Respondent Department of Transportation issued a solicitation for bids for the Project ("IFB"). Bids were due and scheduled to be opened on April 20, 2017.

2. The IFB included a Notice to Bidders, Special Provisions, and other terms and conditions. The Notice to Bidders stated that, "Estimated construction cost is between \$8,000,000 and \$10,000,000." *Respondent Department of Transportation's Exhibit 20 at page 2.*

3. By letter dated February 10, 2016 to the Governor, Respondent Department of Transportation had stated that construction costs are estimated at \$10,460,000. *Respondent Department of Transportation's Exhibit 1 at page 2.* The letter further stated, "If the lowest bid is higher than the basic bid estimate and available appropriation, we will not award the contract and notify you immediately to recommend suitable funding alternatives." *Id., at page 3.*

4. On March 21, 2017, Respondent Department of Transportation issued Addendum No. 2 to the solicitation, which called for retrofitting drains instead of replacing drains. Question and Answer #9 of Addendum No. 2 states, "Question: The DH Concourse calls for retro drains but the Ewa is calling for replacement. What is the reasoning?"

Answer: The drains on the aircraft ramp side of the Ewa Concourse will be revised to use retro drains similar to the DH Concourse. Existing drains on the Sterile Corridor side will remain.”

5. The apparent lowest bidder was Nakasato Contracting, LLC, with a bid of \$9,294,989.00. However, on April 27, 2017, Nakasato Contracting, LLC withdrew its bid.

6. The apparent second lowest bidder was Petitioner, having submitted a bid of \$11,877,594.00.

7. Nan, Inc. was the apparent third lowest bidder, with a bid of \$14,574,162.00. In an April 27, 2017 letter to Respondent Department of Transportation, Nan, Inc. claimed that Petitioner’s bid was non-responsive as it did not list a C-37 plumbing licensee.

8. Through a May 9, 2017 letter to Respondent Department of Transportation, Petitioner responded that a C-37 plumbing licensee was no longer needed as Addendum No. 2 to the solicitation changed the drainage work from drain replacement to drain retrofitting. Petitioner asserted that its C-42 roofing license allows it to do drain retrofitting work. Alternatively, Petitioner argued that drainage work would be incidental and supplemental to the roofing work; and also noted that the drainage work is far less than 1% of its bid price. These circumstances would exempt Petitioner, who holds a C-42 roofing contractor’s license, from needing a C-37 plumber licensee on the project. Petitioner further argued that the roof drain installation is so closely connected and intertwined with the roof structure, that installation of the drains by a C-42 licensee is preferred.

9. The first page of the Notice to Bidders, Instructions for Contractor’s Licensing, Airports Division Supplement, Special Provisions, under the heading Instructions for Contractor’s Licensing, states, in part, “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.” *See, Petitioner’s Exhibit 25, and Petitioner’s Exhibit P-14.*

10. Despite receiving bids on the Project, Respondent Department of Transportation did not award the project to any bidder.

11. Through a September 15, 2017 letter to Nan, Inc., Respondent Department of Transportation cancelled the solicitation. In this letter, Respondent Department of Transportation cites its authority to cancel the solicitation under Hawaii Administrative Rules (“HAR”) Sections 3-122-96(a)(2)(B), (C), and (G).

12. On September 22, 2017, Petitioner protested the cancellation of the solicitation.

13. Through a November 8, 2017 letter to Respondents, Petitioner questioned Respondent Department of Transportation about the status of the Project. Respondent Department of Transportation did not respond. Petitioner filed a circuit court motion to compel Respondent Department of Transportation to respond.

14. On January 4, 2018, Respondent Department of Transportation issued a bid protest denial letter. In this letter, Respondent Department of Transportation states that under HRS Section 103D-308, an invitation for bids or other solicitation may be cancelled when it is in the best interests of the governmental body who issued the solicitation to do so. Respondent Department of Transportation further refers to HAR Sections 3-122-96(a) (2)(B)(C), and (G) as bases to cancel a solicitation.

15. On January 11, 2018, Petitioner filed a timely request for hearing with the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs.

16. The matter was thereafter set for a January 22, 2018 Pre-Hearing Conference, and Hearing on January 29, 2018. On January 29, 2018, prior to the start of the hearing, oral arguments on the motions were heard.

### III. ANALYSIS:

The issue is whether Respondent Department of Transportation’s decision to cancel the solicitation and resolicit bids for the Project was proper. The cancellation of solicitations is governed by HRS §103D-308 which provides:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the governmental body* which issued the invitation, request, or other solicitation, in accordance with rules adopted by the

policy board. The reasons therefore shall be made part of the contract file.

(Emphasis added).

In *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004)*, the Hearings Officer noted that HRS §103D-308 “reflects a policy of giving precedence to the government’s ability to cancel a solicitation over a bidder’s interest in having the solicitation go forward where the government’s ‘best interests’ would be served.”

In determining whether the cancellation of a solicitation after bid opening is in the government’s best interest, Hawaii Administrative Rule (“HAR”) §3-122-96(a)(2) provides, in relevant part:

Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:

\* \* \* \*

(2) Cancellation after opening but prior to award:

- (A) The goods, services, or construction being procured are no longer required;
- (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;*
- (C) The solicitation did not provide for consideration of all factors of significance to the agency;*
- (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) All otherwise acceptable offers received are at clearly unreasonable prices;
- (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or
- (G) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.*

\* \* \* \*

(Emphasis added).

In promulgating HAR §3-122-96(a)(2), the Procurement Policy Board (“Board”):

presumably was cognizant of the potentially serious adverse impact a cancellation might have on the integrity of the competitive sealed bidding system once bids are revealed. Among other things, the cancellation of a solicitation after bid opening tends to discourage competition because it results in making all bidders’ prices and competitive positions public without an award. With that in mind, the Board identified certain specific circumstances in HAR §3-122-96 (a)(2) where the cancellation of a solicitation *may* be in the best interests of the agency and therefore justified, even after bid opening. Such a determination, however, must be consistent with the underlying purposes of the Procurement Code, including, but not limited to, the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public’s confidence in the integrity of the system (footnote omitted).

*Phillip G. Kuchler, Inc., supra.*

Thus, although the procuring agency generally has broad discretion to cancel a solicitation, its determination that cancellation is in the best interests of the government must have a reasonable basis because of the potential adverse impact of cancellation on the competitive bidding system after the bids have been opened and the prices have been exposed<sup>1</sup>.

In its memorandum in support of its motion for summary judgment, Petitioner asserts that Respondent Department of Transportation should not be allowed to cancel the solicitation. Petitioner argues against that the reasons for cancellation in Respondent Department of Transportation’s September 15, 2017 cancellation letter. Specifically, Petitioner argues that:

- A. The solicitation is not ambiguous and cannot be cancelled under HAR Section 3-122-96(a)(2)(B);
- B. Respondent Department of Transportation misinterprets and misapplies HAR Section 3-122-96(a)(2)(C); and

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<sup>1</sup> Cancellation of a solicitation also means that bidders have expended labor and incurred costs in the preparation of their bids without the possibility of acceptance.

C. Cancellation of the solicitation is not in the public's interest.

Respondent Department of Transportation, in both its September 15, 2017 cancellation letter, and its January 4, 2018 bid protest denial letter, as well as in its memorandum in support of its motion to dismiss, or in the alternative, for summary judgment, makes the opposing argument:

- A. That with the addition of Addendum No. 2, the solicitation became ambiguous as the issue of whether a C-37 plumber's contractor license was still required arose; and therefore, the solicitation was subject to cancellation under HAR Section 3-122-96(a)(2)(B);
- B. That HAR Section 3-122-96(a)(2)(C), which allows for cancellation of the solicitation if the solicitation did not provide for consideration of all factors of significance to the agency is applicable, and therefore, allows for cancellation; and
- C. Cancellation of the solicitation is in the public's interest.

**A. Whether the Solicitation is Ambiguous**

HAR §3-122-96(a)(2)(B) provides in relevant part:

Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:

\* \* \* \*

(2) Cancellation after opening but prior to award:

\* \* \* \*

(B) Ambiguous or otherwise inadequate specifications were part of the solicitation.

Petitioner argues that the addition of Addendum No. 2 to the solicitation did not cause any ambiguity in the solicitation. However, the facts show that the bidders viewed Addendum No. 2 to the solicitation differently. Addendum No. 2, called for retrofitting drains instead of replacing drains. Question and Answer #9 states, "Question:



The DH Concourse calls for retro drains but the Ewa is calling for replacement. What is the reasoning? Answer: The drains on the aircraft ramp side of the Ewa Concourse will be revised to use retro drains similar to the DH Concourse. Existing drains on the Sterile Corridor side will remain.”

Nan, Inc. concluded that even with the change from replacing drains to retrofitting drains, a C-37 plumber’s license was still required. As Respondent Department of Transportation’s Motion to Dismiss argues, it is also undisputed that all other bidders listed C-37 licensed plumbers on their bids.

While this is true, Petitioner argues that just because 4 of the 5 bidders had a C-37 licensed plumber on their bids, this does not necessarily mean that a C-37 license was actually required. Petitioner concluded that the change from replacing to retrofitting drains resulted in a C-37 plumber’s license not being required, and that it could do the work under the scope of its roofing contractor’s license. Petitioner further argues that the drainage work would be incidental and supplemental to the roofing work; and also states that the drainage work is far less than 1% of its bid price. These circumstances would exempt Petitioner, who holds a C-42 roofing contractor’s license, from requiring a C-37 plumber contractor on the Project.

Although Petitioner argues that Nan Inc.’s improper reading of the addendum does not make the solicitation ambiguous, it was not unreasonable for Nan, Inc. (and all other bidders on the project, except Petitioner) to interpret the addendum to mean that the project still requires a C-37 plumber’s license. Nor is it unreasonable to interpret Addendum No. 2 as Petitioner did - to mean that a C-37 plumber’s license was no longer required. The fact that the addition of Addendum No. 2 made it possible that the solicitation could be reasonably read to mean that either a C-37 plumber’s contractor license was still or no longer required, shows that an ambiguity had been created.

Petitioner further argues that as stated in the solicitation, it is up to the bidder to decide what licenses are required. While this is true, regardless of which party is responsible to determine which licenses are needed for the Project, the Project must be done with the required licensed contractors. The issue for this hearing is whether an ambiguity existed so that the solicitation may be cancelled. Whether a C-37 plumber’s

license is required with the addition of Addendum No. 2 is not the critical issue. The fact that Addendum No. 2 created an ambiguous situation is the main point.

The Hearings Officer concludes Addendum No. 2 resulted in ambiguous or otherwise inadequate specifications justifying the cancellation of the solicitation.

**B. Whether the Solicitation Considered All Factors of Significance**

HAR Section 3-122-96(a)(2)(C) states that the solicitation may be cancelled if the solicitation did not provide for consideration of all factors of significance to the agency.

Respondent Department of Transportation argues, in this case, that all responsive bidders exceeded funds available for the project. Because of this, Respondent Department of Transportation intends to separate the project and rebid it so that the more urgent Diamond Head project with an expanded scope can be done. Later, more funds can be obtained for the remainder of the project, which can also be expanded.

Petitioner asserts that Respondent misinterprets and misapplies HAR Section 3-122-96(a)(2)(C). Petitioner argues that this right to cancellation should not apply if an agency changes the scope of the project after the bids are opened. *See, Petitioner's Memorandum in Support of its Motion for Summary Judgment at page 14.* According to Petitioner, to allow cancellation after the bids are opened would aid corruption and collusion, as it would expose pricing strategies. This would discourage competition, and unfairly have bidders reveal cost and pricing information.

While Petitioner does raise concerns over the need for competition and fairness, the rules and statutory protections for the agency cannot be overlooked. HAR Section 3-122-96(a)(2) considers situations where bids are opened, but the contract has not been awarded, and lists situations where the solicitation can be cancelled.

Further, as Respondent Department of Transportation argues, it cannot be required to award a bidder a contract it cannot afford. The facts showed that when the invitation for bids was made, the projected construction costs were between \$8 and \$10 million. Because the construction costs budgeted for this project (\$10.46 million) was below the lowest bid price, no bid was awarded. Respondent Department of

Transportation cannot award the project without being able to completely pay for it. As Respondent Department of Transportation argues, a contract is not binding without sufficient appropriation.

The Hearings Officer concludes that Petitioner has not shown that Respondent Department of Transportation misinterpreted or misapplied HAR Sections 3-122-96(a)(2)(C). Under this rule, the solicitation may be cancelled if the solicitation did not provide for consideration of all factors of significance to the agency. Because Respondent Department of Transportation could not have known that all bids on the project would be greater than its \$10.46 Million budget, and over the \$8 and \$10 million projected construction cost stated in the Notice to Bidders, the solicitation did not provide for consideration of all factors of significance to the agency. Respondent Department of Transportation now intends to separate the project and rebid it so that the more urgent Diamond Head portion of the project with an expanded scope can be done. Later, more funds can be obtained for the remainder of the project, which can also be expanded.

**C. Whether the Cancellation of the Solicitation is in the Public's Interest.**

Under the statute, the cancellation of solicitations is governed by HRS §103D-308, which provides:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the governmental body* which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefore shall be made part of the contract file.

In this case, it is in Respondent Department of Transportation's best interest to do what it now proposes: split the contract into 2 parts, the DH and Ewa concourses, and do work on the more urgently needed project, the DH portion, first. Further, the scope of the split project can now be expanded, so that the leaking problems can be addressed in such a way that it provides a more permanent fix by finding the source of the leaking, and does not affect work already done.

In its January 4, 2018 bid cancellation letter regarding the Project, Respondent Department of Transportation cites its authority to cancel the solicitation under HAR Sections 3-122-96(a)(2)(G), which states that cancellation may be made upon a determination by the chief procurement officer or a designee that a cancellation is in the public's interest.

In its Request for hearing, Petitioner argues that it is in the public's interest to award the contract, and not cancel the solicitation, as the roof at the airport is leaking. While repairing a leaking airport roof is in the public's interest; in a broader sense, the public's interest is better served in this situation where the bid prices exceeded the budget for the project, by splitting the project and obtaining contracting services which fix the leaking problem in a long-term, more permanent manner. As stated in Respondent Department of Transportation's memorandum, by doing only a portion of the project, yet expanding its scope so that the leaking problems can be better and more permanently addressed in the future, while protecting other work already done, the public interest is better served.

Further, excluding the Nakasato Contracting, LLC bid, which was withdrawn on April 27, 2017, all other bids were greater than the amount appropriated. As Respondent Department of Transportation argues, to uphold the protest and to void the cancellation, would allow Petitioner to be the winning bidder, upholding a bid that is more than the amount appropriated. To allow this is against the public's interest.

Rather, it is in the public's interest to do what Respondent Department of Transportation currently proposes - to split the project, and take care of the most pressing need by expanding the scope of the partial project to ensure that the leaking problems are better and more permanently addressed, while protecting work already done.

Based on all of these considerations, the Hearings Officer concludes that the cancellation of the solicitation was consistent with HRS Chapter 103D and its implementing rules.

#### IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer concludes that there are no genuine issues of material fact left for determination at

hearing and that Respondent Department of Transportation and Respondent Department of Accounting & General Services are entitled to judgment in their favor as a matter of law. Accordingly, the Hearings Officer orders as follows:

1. Respondent Department of Transportation's Motion to Dismiss, or in the alternative, for Summary Judgement is hereby granted, and Respondent's January 4, 2018 denial of Petitioner's September 22, 2017 protest is affirmed;
2. Petitioner's Motion for Summary Judgment is denied;
3. Respondent Department of Accounting & General Services' Motion to Dismiss, or in the alternative, for Summary Judgement is hereby granted, and
4. Each party shall bear its own attorney's fees and costs incurred in this matter; and
5. Petitioner's cash bond shall be deposited into the General Fund.

Dated at Honolulu, Hawaii: FEB 15 2018



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