

2018 MAR 14 A 11: 35

HEARINGS OFFICE



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

In the Matter of:	)	PDH-2018-004
	)	
FV COLUCCIO CONSTRUCTION	)	HEARINGS OFFICER'S
COMPANY, INC.,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Petitioner,	)	AND DECISION
vs.	)	
	)	
CITY AND COUNTY OF HONOLULU,	)	
DEPARTMENT OF ENVIRONMENTAL	)	
SERVICES AND DEPARTMENT OF	)	
BUDGET AND FISCAL SERVICES,	)	
	)	
Respondents.	)	
	)	

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

I. INTRODUCTION

On February 26, 2018, FV Coluccio Construction Company, Inc., ("Petitioner"), filed a Request for Administrative Hearing ("Petition") to contest the City and County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services' ("Respondent") letter dated February 20, 2018 which: 1) rescinded the 12/12/2017 letter of qualification of Petitioner to bid on Solicitation No. RFB-ENV-1121610 and 2) rejected Petitioner's winning Bid. On March 8, 2018, Respondents filed a Response to the Petition. The matter was set for hearing on March

19, 2018 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On March 9, 2018, a pre-hearing conference was held in this matter. Gerald S. Clay, Esq. and Scott I. Batterman, Esq. appeared on behalf of Petitioner with Tim Pearia and Frank V. Coluccio present. Deputies Corporation Counsel Ryan H. Ota, Esq. and Moana A. Yost, Esq. appeared on behalf of Respondents with Guy Inouye and Wes Yokoyama of Environmental Services present. The parties agreed to dismiss the Petition without prejudice based on the following.

II. FINDINGS OF FACT (UNDISPUTED).

1. On October 19, 2017, Solicitation No. RFB-ENV-1121610 was posted in this matter.

2. On October 27, 2017, Addendum 2, requiring submission of an Offeror's Statement of Qualification, was issued in this matter.

3. By letter dated December 12, 2017, Respondents determined that Petitioner is qualified to submit a bid in this matter.

4. On December 19, 2017, the bids were opened. Petitioner was the lowest bidder.

5. By letter dated February 20, 2018, Respondents rescinded their 12/12/2017 qualification letter ("qualification rescission") and reject Petitioner's Bid ("bid rejection").

6. On February 22 and/or 23, 2018, Petitioner filed a letter(s) of protest with Respondents.

7. On February 26, 2018, Petitioner filed the instant Petition with this Office.

8. Respondents have not issued a decision in writing upholding or denying Petitioner's February 22 and/or 23, 2018 letter(s) of protest.

### III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

#### A. JURISDICTION AND BURDEN OF PROOF

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§ 103D-310, 103D-701 or 103D-702. The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate. See §HRS 103D-709(h).

Petitioner has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of proof shall be a preponderance of the evidence. See §HRS 103D-709(c).

#### B. THE PETITION IS PRE-MATURE

The Hearings Officer concludes that Respondents' 2/20/2018 letter, puts Petitioner on notice of two things: 1) rescission of the 12/12/2017 qualification letter and

rejection of Petitioner's winning Bid. Pursuant to Hawaii Revised Statutes ("HRS") §103D-701(a), the aggrieved bidder, Petitioner, has 5 working days to protest those decisions to the chief procurement officer of the agency, which they did. On February 22 and/or 23, 2018, Petitioner filed a timely protest letter<sup>1</sup> with Respondents. However, because Respondents' 2/20/2018 letter also says that its decision is "final and conclusive" and that Petitioner has the "right to appeal this determination for an administrative hearing", the instant action was filed. Respondents have not issued a decision in writing upholding or denying Petitioner's February 22 and/or 23, 2018 letter(s) of protest.

At the pre-hearing, Mr. Ota clarified that the 2/20/2018 letter was meant to inform Petitioner that Respondents' decision on the qualification rescission issue was "final and conclusive" and that Petitioner had the right to appeal *that* determination to this Office pursuant to HRS §103D-310(b). The Hearings Officer concludes that Respondents' 2/20/2018 letter was not a proper *written decision upholding or denying the protest* because it *pre-dated* Petitioner's letter(s) of protest. Assuming *arguendo*, that this Office has jurisdiction over the qualification rescission determination, the 2/20/2018 letter also rejected Petitioner's winning Bid to which Petitioner filed a letter of protest which has not been addressed at the agency level. Because the qualification rescission issue is intertwined with the bid rejection issue, the Hearings Officer concludes that it is consistent with the underlying policies of the Procurement Code for all matters to be resolved in an expeditious manner.

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<sup>1</sup> It should be noted that both parties referenced a February 22 and/or 23, 2018 letter(s) of protest in their pleadings, but neither party produced a copy of said letter(s) in their exhibits.

The Hearings Officer concludes that this Office does not have jurisdiction over the matter because the agency level protest has not yet been addressed by the agency. Pursuant to HRS §103D-701(b), Respondents may settle and resolve the protest and if the protest is not resolved by mutual agreement, Respondents shall promptly issue a written decision upholding or denying the protest. The written decision shall state the reasons for the action taken and inform protestor of their right to an administrative proceeding under section 103D-709. See HRS §103D-701(c).

HRS §103D-709(h) states that “[t]he hearings officer shall decide whether the *determinations* of the chief procurement officer or the chief procurement officer’s designee were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.” (Emphasis added.) It is axiomatic that the Hearings Officer cannot decide if the determinations of Respondents’ chief procurement officer were in accordance with the Constitution, statutes, rules and terms and conditions of the solicitation or contract pursuant to 103D-709 (h) if those determinations were not properly made (pre-dated the protest) and/or not made at all.

#### IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. The Petition is dismissed without prejudice;
2. Each party shall bear its own attorneys’ fees and costs; and
3. Petitioner’s cash bond shall be returned upon the filing of a declaration by Petitioner attesting that the time to appeal to Circuit Court has lapsed and that no

appeal has been timely filed. In the event of a timely application for judicial review of the decision herein, the disposition of the bond shall be subject to determination by the Circuit Court.

4. The March 19, 2018 Hearing is taken off the calendar.

Dated at Honolulu, Hawaii: MAR 14 2018

  
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RODNEY K.F. CHING  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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*Hearings Officer's Findings of Fact, Conclusions of Law, and Decision;  
In Re FV Coluccio Construction Co., PDH-2018-004.*