



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

DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2018 FEB 26 A 9:20

HEARINGS OFFICE

In the Matter of	)	PDH-2018-003
	)	
HI-BUILT, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
DEPARTMENT OF FINANCE,	)	
DEPARTMENT OF PUBLIC WORKS,	)	
COUNTY OF MAUI,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
GOODFELLOW BROS., INC.,	)	
	)	
Intervenor.	)	
_____	)	

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

I. INTRODUCTION

On or about January 16, 2018, HI-Built, LLC ("Petitioner"), filed a request for administrative review to contest Respondents Department of Public Works and Department of Finance, County of Maui's ("Respondents") denial of Petitioner's protest in connection with a project designated as Pavement Rehabilitation of Various S. Maui Roads, Federal Air Project No. STP-0900(090) ("Project"). The matter was

thereafter set for a pre-hearing conference on January 22, 2018 and hearing on January 26, 2018. A Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

Pre-Hearing Conferences were held on January 22 and, again, on 24, 2018. Based on discussions with the parties, the Hearings Officer removed the January 26, 2018 hearing from the calendar and scheduled oral argument on the parties' anticipated motions on January 31, 2018.

On January 24, 2018, the parties submitted a stipulation allowing Goodfellow Bros., Inc. ("Intervenor") to intervene in this matter ("Intervenor").

On January 26, 2018, Petitioner filed a motion for summary judgment and Intervenor filed a motion to dismiss Petitioner's request for administrative review. On January 29, 2018, Respondents filed a motion for summary judgment. On January 30, 2018, Petitioner filed its memoranda in opposition to Intervenor's motion to dismiss and Respondents' motion for summary judgment, and Intervenor filed its memorandum in response to Petitioner's and Respondents' motions for summary judgment. Respondents' memorandum in opposition to Petitioner's motion for summary judgment was received on January 31, 2018.

The motions came on for hearing before the undersigned Hearings Officer on January 31, 2018 in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by Anna H. Oshiro, Esq. and Loren A. Seehase, Esq. Respondents were represented by John K. Holiona, Esq. and Intervenor was represented by Addison D. Bonner, Esq. and Kourtney H. Wong, Esq.

Having considered the motions along with the memoranda, declarations and exhibits attached thereto, together with the argument of counsel and the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision.

## II. FINDINGS OF FACT

1. On or about September 5, 2017, Respondents issued an Invitation for Bids ("IFB") for the Project.

2. The Project was to be partially funded by \$5,448,985.87 in federal funds. The total estimated project cost was \$7,660,554.71.

3. The Project involved reconstruction and rehabilitation road work for several Maui streets located between South Kihei Road and Piilani Highway.

4. The reconstruction work for the Project generally involved the removal of existing pavement of subgrade and replacement with new asphalt concrete pavement, hot mix asphalt concrete base course, aggregate base and a reinforcing geogrid.

5. The rehabilitation road work for the Project generally involved cold planning 2.5" of the existing pavement and overlaying with 2.5" new asphalt concrete pavement.

6. The IFB, among other things, included a Notice to Bidders, General Provisions, Special Provisions, Proposal, Proposal Schedule, and various forms including one for the contemplated contract.

7. Section 102.04 of the Special Provisions provided:

**102.04 Estimated Quantities.** The quantities shown in the contract are approximate and are for the comparison of bids only. The actual quantity of work may not correspond with the quantities shown in the contract. No change in the contract unit price will occur for overruns or underruns. The Department will make payment to the Contractor for unit price items according to the contract for only the following:

- (1) Actual quantities or work done and accepted, not the estimated quantities, or
- (2) Actual quantities of materials furnished, not the estimated quantities.

The Department may increase, decrease, or omit each scheduled quantities of work to be done and materials to be furnished. When the Department increases or decreases the estimated quantity of a contract item by more than 15% the Department will make payment of such items according to Subsection 104.09 - Method of Price Adjustment.

8. Section 104.07 of the Special Provisions provided:

**Variations in Estimated Quantities.** Where the quantity of a unit price item in this contract is estimated on the proposal schedule and where the actual quantity of such pay item varies more than 15 percent above or below the estimated quantity stated in this contract, an adjustment in the contract price shall be made upon demand of the party. The adjustment shall be limited to any increase or decrease in direct costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. The adjustment shall be subject to Subsection 104.06 - Methods of Price Adjustment and Subsection 109.05 - Allowance of Overhead Profit.

9. The Proposal form included in the IFB provided in pertinent part:

\* \* \* \*

The undersigned bidder further agrees to the following:

1. If this proposal is accepted, it shall execute a contract with the Department to provide all necessary labor, machinery, tools, equipment, apparatus and any other means of construction, to do all the work and to furnish all the materials specified in the contract in the manner and within the time therein prescribed in the contract, and that it shall accept in full payment therefore the sum of the unit and/or lump sum prices as set forth in the attached proposal schedule for the actual quantities of work performed and materials furnished and furnish satisfactory security in accordance with Section 103D-324, Hawaii Revised Statutes, within 10 days after the award of the contract or within such time as the Director of Finance may allow after the undersigned has received the contract documents for execution, and is fully aware that non-compliance with the aforementioned terms will result in the forfeiture of the full amount of the bid guarantee required under Section 103D-323, Hawaii Revised Statutes.
2. That the quantities in the attached proposal schedule are approximate only and are intended principally to serve as a guide in determining and comparing bids.

3. That the Department does not either expressly or by implication, agree that the actual amount of work will correspond therewith, but reserves the right to increase or decrease the amount of any class or portion of the work, or to omit portions of the work, as may be deemed necessary or advisable by the Director of Transportation, and that all increased or decreased quantities of work shall be performed at the unit prices set forth in the attached proposal schedule except as provided for in the specifications.

\* \* \* \*

10. The quantity given by Respondents for Item No. 415.1000 of the Proposal Schedule entitled, "Cold Planing of Existing Pavement", was 2,150 square yards.

11. On October 2, 2017, Respondents issued an Addendum to the IFB ("Addendum No. 1"). Addendum No. 1, among other things, revised the bid opening date from October 4, 2017 to October 10, 2017.

12. On or about October 5, 2017, Respondents issued Addendum No. 2 to the IFB which revised a portion of the plans and proposal included in the IFB for the Project.

13. According to the IFB, the total estimated construction cost for the work required for the Project was between \$5,000,000 and \$10,000,000.

14. On October 10, 2017, the bids submitted in response to the IFB were opened. Petitioner was determined to be the apparent lowest, responsive, responsible bidder for the Project having submitted a bid for \$4,467,992.00. Intervenor was the apparent second lowest bidder having submitted a bid for \$5,100,937.25, followed by Maui Paving with a bid of \$5,415,729.00.

15. On or about October 13, 2017, after the bids were opened, Respondents determined that the estimated quantity provided for Item No. 415.1000 of the Proposal Schedule should have been 29,320 square yards rather than 2,150 square yards.

16. On October 16, 2017, Wendy Kobashigawa, Project Manager for Respondent Department of Public Works, emailed Holly Yuen at the State of Hawaii, Department of Transportation ("DOT") and said:

\* \* \* \*

I need some advice...

We had bid opening for this project and the 2nd bidder, GBI, asked about the cold planing quantity which is noted as 2,150 s.y. GBI's estimate for cold planing is approximately 28,000+ s.y. Low bidder Hi-Built's unit price is \$30/s.y. compared to the other 2 bidders unit prices of \$3.50 and \$6.00 (see partial bid tab). Our consultant informed me that the 2,150 quantity is supposed to be C.Y. not S.Y. but was not revised to reflect this on the proposal schedule or the special provision.

\* \* \* \*

17. On October 17, 2017, Christine Yamasaki from the State of Hawaii responded to Kobashigawa's request for advice:

\* \* \* \*

First of all, Wendy has to check for mathematical unbalancing of bids. If everything looks okay, below are the County's options.

- 1) Assuming the quantity is supposed to be 28,000 SY, does the County have enough funds to negotiate a change order with HI-Built after the contract is awarded?
- 2) If #1 is no, then their only choice is to reject all bids and rebid the project with the corrected cold-plane amount.

\* \* \* \*

18. On October 20, 2017, Kobashigawa emailed Yuen and stated:

Just spoke with Chico and found out that for a significant increase in a work item, a new unit price is typically negotiated for anything over 115% of the original amount.

19. By letter dated October 31, 2017 to the DOT, Respondent Department of Public Works requested the DOT's concurrence in rejecting all bids received in response to the IFB:

\* \* \* \*

We recommend rejection of all bids due to a significant discrepancy in the estimated quantity for Item No. 415.1000 - Cold Planing of Existing Pavement. The recommendation is being made on the following basis:

- The quantity for Item No. 415.1000 - Cold Planing of Existing Pavement was noted on the Proposal Schedule as 2,150 square yards. The low bidder, Hi-Built, LLC, submitted a unit price of \$30.00 per square yards. The other two bidders, Goodfellow Brothers and Maui Paving, LLC submitted unit prices of \$3.50 per square yard and \$6.00 per square yard, respectively, which is more in line with the average cost for cold planing work. It was later determined that the 2,150 quantity was measured in cubic yards instead of square yards. The quantity in square yards was supposed to be 29,430 square yards.

- We understand that we can negotiate a lower unit price with the low bidder for the difference in quantity but believe that the County can obtain a better unit price by rebidding.

\* \* \* \*

20. By letter dated December 4, 2017 from Respondent Department of Finance, Petitioner was informed that the IFB would be cancelled because of the quantity mistake for Item No. 415.1000. The letter stated in relevant part:

The County of Maui is canceling this solicitation in accordance with Hawaii Administrative Rules HAR 3-122-96(a)(2)(B), which states in part: "Ambiguous or otherwise inadequate specifications were part of the solicitation". Under item no. 4.15.1000, Cold Planing of Existing Pavement, the quantity was noted on the proposal schedule as 2,150 square yards. After opening the bids, it was determined that the quantity was supposed to be 29,430 square yards.

\* \* \* \*

21. On December 15, 2017, Petitioner protested the cancellation of the

IFB. Petitioner's protest letter stated in part:

In this case, the cited reason for cancelling the bids is the [Respondents'] discovered error in quantities for cold planing. However, this does not render the bid ambiguous: the amount of the bid is still evident from the face of the bid. As to the contract price effect of the discovered quantity error, the bid documents already provide for such a scenario: the bid documents make reference to standard specifications governing the job. These specifications provide that "where the quantity of a unit price in this contract is estimated on the proposal schedule and where the actual quantity of such pay item varies more than 15 percent above or below the estimated quantity stated in this contract, an adjustment in the contact price shall be made upon demand of the party. The adjustment shall be limited to any increase or decrease in direct costs due solely to the variation above 115 percent or below 85% of the estimated quantity." See Standard Specifications, § 104, Scope of Work. Ex. "C" hereto. In short, if there is truly an error in quantity, as the [Respondents] proclaims, it has the ability to demand an adjustment in the low bidder's contract price. If the [Respondents] were to simply have discretion to throw out all bids after every solicitation in which it determines an error in quantity has been made, it would (1) render meaningless the unit pricing aspect of the bid; and (2) provide public agencies with unfettered discretion to pick and choose amongst low bidders and decide when they wanted to throw out bids vs. keep them. In this case, the bid item prices have been opened for other contractors to view since this was a publicly opened bid, as are the subcontractors HI-Built utilized. The bid items were very detailed and contained pricing that can now be duplicated or lowered by competing bidders if a rebid is allowed. Allowing a rebid now would discourage fair competition. Moreover, once bids are opened, bidders have the opportunity to see the low bidder pricing, and this invites bid and cost shaving and may injure the quality of work - this too is not in the public's best interest.

\* \* \* \*



22. By letter dated January 8, 2018 to Petitioner, Respondents denied Petitioner's protest:

\* \* \* \*

Our decision to cancel the solicitation is in the public's best interest as well as in the interest of Hi-Built and the other bidders that submitted bids for the following reasons:

1. The quantity of the cold planing work was significantly incorrect. The actual amount of 29,320 square yards is 13.64 times the quantity listed in our specifications. This quantity clearly needed to be corrected.

2. The unit price of the cold planing work offered by Hi-Built was \$30.00 per square yard, which was dramatically higher than the \$3.50 per square yard offered by Goodfellow Brothers and the \$6.00 per square yard offered by Maui Paving. If the County of Maui were able to apply the offered unit costs to the correct square yards, the Hi-Built offer would no longer be the lowest responsive bid as follows:

\* \* \* \*

3. If the numbers were different and Hi-Built's corrected bid amount remained the lowest responsive bid, the County of Maui disagrees with the protestor that Section 104 of the Standard Specifications applies to his situation. Section 104 of the Standard Specifications applies to changes in the contact price, and not the bid price, and thus it presumes that a contract is already in place. For the fair treatment of all bidders and the taxpayers, the County of Maui is not allowed to negotiate pricing or make any adjustments other than to correct obvious (non-mathematical) mistakes or price extension errors prior to the contract award and execution for competitive sealed bidding procurements.

\* \* \* \*

23. On January 16, 2018, Petitioner filed the instant request for administrative review.

III. CONCLUSIONS OF LAW

The issue here is whether Respondents' decision to cancel the solicitation was consistent with HRS Chapter 103D and its implementing rules. 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 *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: 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. Among other things, cancellation of a solicitation means that bidders have expended labor and incurred costs in the preparation of their bids without

the possibility of acceptance. Accordingly, where it is determined that the specifications contained in a solicitation do not adequately describe the government's actual minimum needs, the best interests of the government require cancellation of the solicitation. On the other hand, the fact that a solicitation is defective in some way does not justify cancellation after bid opening if award of the contract would meet the agency's actual minimum needs, and there is no showing of prejudice to the other bidders. As the party challenging the cancellation, Petitioner bears the burden of showing that the cancellation of the solicitation was contrary to HRS Chapter §103D or its implementing rules.

In opting to cancel the solicitation, Respondents first point to the fact that the IFB erroneously understated the Estimated Quantity for Item No. 415.1000 as 2,150 square yards rather than 29,320 square yards. According to Respondents, this discrepancy was a "significant" one and, consequently, rendered the specifications inadequate.<sup>1</sup>

Specifications are inadequate when they do not state the government's actual minimum needs. *Phillip G. Kuchler, Inc., supra*. In this case, despite the apparently erroneous estimated amount for Item No. 415.1000, the IFB made clear that the amount was only an estimate, that Respondents had the ability to adjust the estimated quantity upward or downward based on actual quantities needed, and provided that any adjustment exceeding 15% would be addressed by demand upon the contractor, negotiations, and change orders. Respondents also contend that the solicitation did not adequately describe Respondents' minimum needs because the discrepancy was such a "significant" one. According to Respondents, the corrected amount is approximately 14 times more than what was mistakenly set forth in the solicitation. The IFB, however, contemplated that increases in the estimated quantities of *15% or more* might be necessary and, consequently, provided a detailed method by which prices could be adjusted accordingly<sup>2</sup>. Moreover, there is no dispute that Respondents were well aware

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<sup>1</sup> Furthermore, there was nothing in the record to indicate that the specifications were made ambiguous by the quantity discrepancy. A specification is ambiguous if it is susceptible to more than one reasonable meaning when read in the context of the solicitation as a whole. *Prometheus Constr. v. Univ. of Hawaii, PCH-2008-5 (May 28, 2008)*.

<sup>2</sup> Under Respondents' theory, any "significant" discrepancy in an estimated quantity would render the specifications inadequate. Notwithstanding that the quantities are only estimates to begin with and the IFB addressed price adjustments for variations in the estimated quantities, one wonders what Respondents would consider to be a "significant" discrepancy? For instance, would a quantity discrepancy that is only twice the estimated quantity in the IFB constitute a "significant" discrepancy that justifies the cancellation of a solicitation?

that they had the ability<sup>3</sup>, pursuant to the terms of the IFB, to make demand upon and negotiate with the low bidder in order to address the discrepancy<sup>4</sup>. Nevertheless, Respondents decided to cancel and rebid the solicitation on the chance they would be able to solicit a lower bid. Once the bids have been opened, the mere chance or hope of obtaining a lower bid does not render a solicitation inadequate and, without more, cannot constitute a legitimate basis upon which to cancel the solicitation. Based on these considerations, the Hearings Officer concludes that the IFB met Respondents' minimum needs vis a vis the discrepancy in Item No. 415.1000.

In addition, Respondents allege that Section 104 of the Special Provisions does not apply here because no award has been made. According to Respondents, "[i]f the County had awarded the contract to Petitioner prior to discovering the discrepancy in the cold planing quantity, then Petitioner would have a strong argument. However, the County notified all bidders of the cancellation of the solicitation prior to any contract being awarded." This argument is a red herring. The dispositive question here is whether the solicitation was rendered inadequate by the discrepancy in the estimated quantity for Item No. 415.1000. In order to make that determination, fairness and common sense dictate that the Hearings Officer consider the solicitation in its entirety. There can be no legitimate dispute that the Special Provisions, including Section 104, are a part of the solicitation. There is also no dispute that Respondents understood that they had the ability, under the terms of the solicitation, to "negotiate a lower unit price with the low bidder for the difference in quantity . . .". Clearly, Section 104 was applicable and relevant to an accurate assessment of the adequacy of the solicitation. The fact that the contemplated negotiation and resulting change orders would occur *after* the contract was awarded is immaterial to this determination.

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<sup>3</sup> Respondents do not challenge the fact that they had the funds necessary to negotiate a change order with Petitioner to account for the apparent discrepancy. According to the uncontroverted evidence, Petitioner's bid comparison amount was \$4,467,992.00; the estimated cost of construction was between 5 and 10 million dollars; the Project was partially funded by \$5,448,985.87 in federal dollars; and Respondents' total estimated project cost was \$7,660,554.71.

<sup>4</sup> Respondent Department of Public Works' October 31, 2017 letter to the DOT said in relevant part: "We understand that we can negotiate a lower unit price with the low bidder for the difference in quantity but believe that the County can obtain a better unit price by rebidding."

Respondents' assertion that cancellation of the solicitation would be in the public's and agency's best interest is equally unpersuasive. According to Respondents, they opted to cancel the solicitation in the hope of obtaining a better unit price by rebidding the contract. Respondents' optimism that rebidding may increase competition is, however, speculative at best. There is nothing in the record that supports a conclusion that rebidding will increase competition and result in a lower unit price. Furthermore, it seems certain that Petitioner would be unfairly disadvantaged in any such rebidding after having its bid opened and revealed to its competitors. As Petitioner correctly notes, this would be akin to a contractor revealing and then using the price of one subcontractor to bid shop for a lower one. On the other hand, the record was completely devoid of any indication that the other bidders would be placed at an unfair disadvantage by proceeding with the solicitation. A best interest determination must be consistent with the underlying purposes of the 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. *Phillip G. Kuchler, Inc., supra*. Here, there is no question that all bidders had the same opportunity to bid for precisely the same thing and on precisely the same footing.

Respondents also point out that *if* they were allowed to replace the erroneous quantity with the corrected amount, Intervenor would be the low bidder, not Petitioner. In that event, Respondents claim that they would be placed in the precarious situation of either awarding the contract to Intervenor as the low bidder or awarding the contract to Petitioner at a higher unit price and even though it was no longer the low bidder. Either way, according to Respondents, the decision would be contrary to the fair treatment of the bidders and the public interest. This argument is just another red herring. Respondents do not point to, and the Hearings Officer cannot find, any authority allowing Respondents to simply recalculate the bids based on the corrected quantity and award the contract accordingly. Respondents obviously recognized as much when they attempted to cancel the solicitation rather than award based on a recalculation of the bid prices. This argument is undoubtedly without legal basis and is irrelevant to a determination of

whether the cancellation of the solicitation would be in the public interest. The question here is whether the cancellation of the solicitation is justified by the public interest. On balance and for the reasons expressed earlier, the Hearings Officer concludes that the cancellation is not in the public's and Respondents' best interest.

Finally, if the cancellation of the solicitation is vacated, Intervenor urges the Hearings Officer to award the contract to Intervenor as the lowest, responsive and responsible bidder. Intervenor's argument is apparently based on the assertion that Petitioner did not meet the Disadvantaged Business Enterprise ("DBE") Requirements which are a part of the IFB. Petitioner, however, correctly points out, and Intervenor and Respondents do not dispute, that this issue was never raised in this action by way of a protest and, consequently, was not the subject of any determination by Respondents' chief procurement officer. This Office has repeatedly held that the Hearings Officer's jurisdiction is limited by HRS §103D-709 and therefore the Hearings Officer can only make decisions about the "determinations" of the chief procurement officer who can only make "determinations" about complaints properly before her. The statute literally leaves no room for the Hearings Officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer. *Kiewit Infrastructure West Co. v. Dep't of Transportation and Goodfellow Bros., Inc. v. Dep't of Transportation and Hawaiian Dredging Construction, Co., PCX-2011-2/PCX-2011-3 (June 6, 2011); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014). See also, Akal Security, Inc. v. Dept. of Transportation; PCH-2004-10 (August 23, 2004)(in order for Hearings Officer to review Petitioner's claims, Petitioner must have first raised those issues in a timely bid protest to the agency).* For these reasons, the issue as to whether Petitioner met the DBE requirements of the IFB, having been raised by Intervenor for the first time in this appeal, is not properly before the Hearings Officer<sup>5</sup>.

Based on all of these considerations, the Hearings Officer concludes that the undisputed facts presented here have established that Respondents lacked a reasonable basis to justify the cancellation of the solicitation, and the cancellation is therefore contrary to HRS Chapter 103D and its implementing rules.

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<sup>5</sup> Respondents took no position on this issue.

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 Petitioner is entitled to judgment in its favor as a matter of law.

Accordingly, the Hearings Officer orders as follows:

1. Petitioner's Motion for Summary Judgment is hereby granted, and Respondent's January 8, 2018 denial of Petitioner's December 15, 2017 protest is reversed and this matter is remanded to Respondents for further evaluation of Petitioner's bid consistent with this decision. Thereafter, Respondents shall award the contract to the lowest responsive, responsible bidder pursuant to HRS §103D-302;

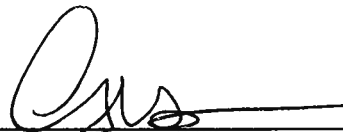
2. Respondents' Motion for Summary Judgment is denied;

3. Intervenor's Motion to Dismiss Petitioner's Request for Administrative Review is denied;

4. Each party shall bear its own attorney's fees and costs incurred in this matter; and

5. Petitioner's cash bond shall be returned upon the filing of a declaration of counsel attesting that the time to appeal 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 appropriate court.

DATED: Honolulu, Hawaii, FEB 26 2018.



CRAIG H. UYEHARA  
Senior Hearings Officer  
Department of Commerce  
and Consumer Affairs