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HEARINGS OFFICE



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

In the Matter of

57 ENGINEERING, INC.,

Petitioner,

vs.

DEPARTMENT OF EDUCATION,  
STATE OF HAWAII,

Respondent.

PDH-2018-009

HEARINGS OFFICER'S  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND FINAL ORDER GRANTING  
RESPONDENT HAWAII  
DEPARTMENT OF EDUCATION,  
STATE OF HAWAII'S MOTION  
TO DISMISS PETITIONER'S  
REQUEST FOR  
ADMINISTRATIVE HEARING

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND FINAL ORDER GRANTING  
RESPONDENT HAWAII DEPARTMENT OF EDUCATION,  
STATE OF HAWAII'S MOTION TO DISMISS  
PETITIONER'S REQUEST FOR ADMINISTRATIVE HEARING

**I. INTRODUCTION:**

On September 21, 2018, 57 Engineering, ("Petitioner"), filed a request for administrative hearing to contest the Hawaii Department of Education, State of Hawaii's ("Respondent" or "DOE") denial of Petitioner's July 10, 2018 protest regarding Respondent's Solicitation for the construction of an Eight Classroom Building at Honowai Elementary School, DOE Job # Q86002-14. On September 14, 2018, Respondent had denied Petitioner's Protest.

The matter was thereafter set for an October 1, 2018 Pre-Hearing Conference. At the October 1, 2018 Pre-Hearing Conference, a motions deadline, a response to motions deadline, and hearing on motion and hearing dates were scheduled. On October 4, 2018, Respondent filed its Motion to Dismiss Petitioner's Request for

Administrative Hearing, Memorandum in Support of Motion, Declaration of Benjamin Miura, Exhibits “A” – “J”. On October 9, 2018, Petitioner filed its Memorandum in Opposition to the Motion to Dismiss, Declaration of Jonathan Lin, Exhibits “1” – “8”, Declaration of Saori Takahashi, Exhibits “9” – “10”.

The motion to dismiss came on for hearing before the undersigned Hearings Officer on October 10, 2018 in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D. Respondent was represented by James Raymond, Esq. and Benjamin Miura. Petitioner was represented by Saori Takahashi, Esq.

Having reviewed and considered the motion and memoranda, exhibits and declarations attached thereto, the arguments of counsel, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

## **II. FINDINGS OF FACT:**

1. On April 30, 2018, Respondent had posted a Solicitation for the construction of an Eight Classroom Building at Honowai Elementary School, DOE Job # Q86002-14 (the Invitation For Bids “IFB”). The bids were due on June 20, 2018.

2. One of provisions in the requirements and specifications section of the IFB concerned the roofing system subcontractor, who was to install a certain type of roof (Thermoplastic-Polyolefin Roofing (TPO) system). Section 07-5423-4, paragraph 1.05B.2(a) required the bidder to submit the roofing subcontractor’s manufacturer’s certification to install this type of roofing at the time of the bid.

3. Petitioner’s bid did not contain the required roofing subcontractor’s manufacturer’s certification.

4. Of the 9 bidders on the project, only 2 bidders had submitted bids that contained the required roofing subcontractor’s manufacturer’s certification.

5. Petitioner was the low bidder on the project with a bid of \$9,837,580.00.

6. The other bidders, and their bids on DOE Job # Q86002-14 were:  
Index Builders, Inc.                      \$10,200,000

Nakasato Contracting, LLC	\$10,250,000
S & M Sakamoto, Inc.	\$11,787,000
Ralph S. Inouye Co., Ltd.	\$12,000,000
Maryl Group Construction	\$12,097,013
T. Iida Contracting, Ltd.	\$12,380,000
F & H Construction	\$13,243,000
Hawaiian Dredging Const. Co.	\$13,626,479.

7. The fourth lowest bidder, S & M Sakamoto, Inc., was the lowest bidder to submit a bid which contained the required roofing subcontractor's manufacturer's certification.

8. The DOE's consultant, Cumming, had estimated that the value of the roofing work to be performed under the contract was \$115,837.00. *See, Declaration of Benjamin Miura, and Exhibit F.*

9. Further, the subcontractor, for both Petitioner and S & M Sakamoto, Inc., Alcal Specialty Contracting, had submitted a proposal to do the roofing work for \$161,103.00. *See, Exhibit G.*

10. On July 5, 2018, the DOE sent Petitioner a Notice of Bid Rejection for failure to submit the roofing subcontractor's manufacturer's certification with the bid. The July 5, 2018 letter states, in part, "Your bid did not include a submittal of the roofing manufacturer's certification and therefore does not meet the requirements and criteria set forth in the solicitation documents."

11. On July 10, 2018, Petitioner sent a letter to the DOE protesting the bid rejection, stating 4 reasons why the protest was being made. The 4 reasons listed were:

- (1) The requirement that the certification from the roofing manufacturer be submitted at the time of bid was very uncommon; the requirement was in a roofing specification in a total of 1,228 pages of project specifications; and the checklist for bidders did not mention the requirement;
- (2) To submit the subcontractor qualification at the time of the bid is not a DOE requirement and is not consistent with the interim general

conditions which call for submission during the construction phase so that qualified manufacturers will not be discriminated against, and will allow more time to obtain the best suitable material;

(3) That electronic bid submission does not provide a means to upload the certification letter; and

(4) That under HAR Section 3-122-31(c)(1)(C), the DOE may waive a mistake in the bid if the waiver serves the best interest of the State.

Petitioner argues that rejecting its bid and awarding the project to the 4<sup>th</sup> lowest bidder will cost the State nearly \$2 million.

12. In its July 10, 2018 letter, Petitioner requests that Respondent's decision to reject Petitioner's bid be rescinded, or that Petitioner be granted an administrative hearing.

13. On September 14, 2018, Respondent denied Petitioner's Protest.

14. On September 21, 2018, Petitioner filed a Petition for Request for Administrative Hearing ("RFAH") to review the denial of its bid Protest. Petitioner's September 21, 2018 RFAH, states that 57 Engineering received a July 5, 2018 rejection letter from the DOE, a protest was submitted, and on September 14, 2018 a denial of protest was received from the DOE.

15. The September 21, 2018 RFAH does not state the reason for the requested hearing, or the requested relief.

16. Petitioner submitted a \$10,000.00 Procurement Protest Bond with its request for hearing.

17. On September 28, 2018, Respondent filed the DOE's Response to Petitioner's Request for Administrative Hearing. In this response, the DOE states that it will seek dismissal of the RFAH on 2 bases:

(1) that the Office of Administrative Hearings does not have jurisdiction over this matter as the protest concerns a matter that is equal to no less than 10% of the estimated value of the contract; and

(2) that the RFAH does not meet the requirements of HAR Section 3-126-59.

18. On October 3, 2018, Petitioner filed Petitioner 57 Engineering, Inc.'s Supplemental Submission to its Request for Administrative Hearing. In this pleading, Petitioner, for the first time, states facts regarding the reason for the appeal. Further, in this pleading, Petitioner states that its requested relief is to have the rejection of Petitioner's bid be reconsidered and overturned.

19. On October 4, 2018, Respondent filed its Motion to Dismiss Petitioner's Request for Administrative Hearing, Memorandum in Support of Motion, Declaration of Benjamin Miura, Exhibits "A" – "J".

20. On October 9, 2018, Petitioner filed its Memorandum in Opposition to the Motion to Dismiss, Declaration of Jonathan Lin, Exhibits "1" – "8", Declaration of Saori Takahashi, Exhibits "9" – "10".

### **III. CONCLUSIONS OF LAW:**

In its Motion to Dismiss, Respondent asserts 2 bases for dismissal:

- A. That the RFAH is defective under Hawaii Administrative Rules ("HAR") Section 3-126-59; and
- B. That the Office of Administrative Hearings lacks jurisdiction in this matter under HRS Section 103D-709(d)(2), as the Protest is in regards to a subcontractor's work, but does not concern a matter greater than 10% of the estimated value of the contract.

#### **A. WHETHER THE RFAH COMPLIED WITH THE RULES**

Under HAR Section 3-126-59, the Request for Administrative Hearing shall "state plainly and precisely the facts and circumstances of the person's grievance, the laws and rules involved, and the relief sought."

The September 21, 2018 RFAH states, that 57 Engineering received a July 5, 2018 rejection letter from the DOE, a protest was submitted, and on September 14, 2018 a denial of protest was received from the DOE. The RFAH further states, in part, "Pursuant to Section 103D-709, HRS, 57 Engineering hereby requests an

administrative hearing to review the denial of the protest. As required, please find enclosed, a cashier's check for TEN THOUSAND and 0/100 DOLLARS (\$10,000.00) payable to the Department of Commerce and Consumer Affairs," *See, Respondent's Exhibit "A"*.

Clearly, this does not meet the standard under HAR Section 3-126-59, which states that the Request for Administrative Hearing shall "state plainly and precisely the facts and circumstances of the person's grievance, the laws and rules involved, and the relief sought."

Under HRS 103D-712(a), requests for administrative review under section 103D-709 shall be made within 7 calendar days. In this case, the September 21, 2018 RFAH was made 7 days after the September 14, 2018 denial of protest.

In Petitioner's October 3, 2018 Supplemental Submission to its Request for Administrative Hearing, Petitioner provides a "Statement of Relevant Facts". In this section, Petitioner states that nine contractors submitted bids, with Petitioner's bid the lowest at \$9,837,580.00. The 4<sup>th</sup> lowest bidder, S & M Sakamoto, Inc., with a bid of \$11,787,000.00, was the lowest bid which contained the required roofing subcontractor's manufacturer's certification. The highest bid was \$13,626.479. The other bidding contractors and their bids are also listed. Other facts which Petitioner states in this supplemental submission are that the specifications were 1,228 pages long, and that only 2 of the 9 contractors submitting bids submitted the necessary manufacture's certification with their bids.

However, the October 3, 2018 Supplemental Submission was not timely filed and an initial incomplete filing does not toll the time limitation for filing a valid protest. *See, Friends of He'eia State Park v. Department of Land and Natural Resources, PCX-2009-4 at p.4 (November 19, 2009).*

Petitioner argues that the requirement that the manufacture's certification be submitted at the time of the bid was contrary to normal practices and that Petitioner's mistake in omitting the manufacturer's certification should be waived.

At the hearing on the motion and in its October 3, 2018 Supplemental Submission to its Request for Administrative Hearing, Petitioner asserts that the DOE has

had sufficient notice of the arguments to be made by 57 Engineering and has not suffered any prejudice.

However, as Respondent argues in the memorandum in support of the motion to dismiss, the July 10, 2018 Protest to the bid rejection included at least four independent bases as grounds for rescinding the DOE's denial of Petitioner's bid.

The 4 reasons listed were:

- (1) The requirement that the certification from the roofing manufacturer be submitted at the time of bid was very uncommon; the requirement was in a roofing specification in a total of 1,228 pages of project specifications; and the checklist for bidders did not mention the requirement;
- (2) To submit the subcontractor qualification at the time of the bid is not a DOE requirement and is not consistent with the interim general conditions which call for submission during the construction phase so that qualified manufacturers will not be discriminated against, and will allow more time to obtain the best suitable material;
- (3) That electronic bid submission does not provide a means to upload the certification letter; and
- (4) That under HAR Section 3-122-31(c)(1)(C), the DOE may waive a mistake in the bid if the waiver serves the best interest of the State. Petitioner argues that rejecting its bid and awarding the project to the 4<sup>th</sup> lowest bidder will cost the State nearly \$2 million.

In its July 10, 2018 letter, Petitioner requests that Respondent's decision to reject Petitioner's bid be rescinded, or that Petitioner be granted an administrative hearing. The DOE responded to the July 10, 2018 Protest in its September 14, 2018 letter to Petitioners denying the Protest.

Although Petitioner asserts that the DOE had sufficient notice of the arguments to be made by 57 Engineering as the DOE had Petitioner's July 10, 2018 letter, under HAR Section 3-126-59, the RFAH shall "state plainly and precisely the facts and circumstances of the person's grievance, the laws and rules involved, and the relief sought." Clearly, Petitioner's September 21, 2018 RFAH does not do so. Further, the



prior July 10, 2018 correspondence was not attached to the RFAH, nor was the July 10, 2018 Protest letter specifically mentioned in the RFAH.

As Respondent argues, the DOE should not be forced to assume or speculate on which of the bases 57 Engineering advanced in its protest. “The element of timing is critical with respect to notices when resolving procurement disputes...A key element in expediting the resolution of requests for administrative review is to provide the respondent with timely notice of the specifics of the petitioner’s complaint ... If the notice containing the specifics of petitioner’s complaint is not provided with the RFAH, then respondent’s time to respond is compromised.” *Respondent’s memorandum in Support at page 9.*

The Hearings Officer agrees with Respondent that “Because 57 Engineering failed in this critical step of the dispute resolution process, required under HAR Section 3-126-59...the RFAH (should) be dismissed.” *Id.*

**B. WHETHER THE OFFICE OF ADMINISTRATIVE HEARINGS HAS JURISDICTION IN THIS MATTER**

Respondent also asserts that the Office of Administrative Hearings lacks jurisdiction in this matter as the Protest is solely in regards to a subcontractor’s work, but does not concern a matter no less than 10% of the estimated value of the contract.

Respondent argues that under the Hawaii Public Procurement Code there is a minimum amount that must be in controversy before a party may submit a request for administrative hearing. Under HRS Section 103D-709(d)(2) a bidder protesting an award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding provided that for contracts with an estimated value of \$1,000,000.00 or more, the protest concerns a matter that is equal to or no less than 10% of the estimated value of the contract. This requirement was designed to eliminate appeals involving relatively minor issues so that the procurement is not delayed. *See Air Rescue Systems Corp. v. Finance Dept., PDH-2012-006 (12/12/2012).*

Under the facts of this case, the estimated value of the contract is the amount bid on the solicitation by Petitioner - \$9,837,580.00. Ten per cent of this amount



is \$983,758.00. Further, the DOE had rejected Petitioner's bid as Petitioner had failed to submit the roofing subcontractor's certification with its bid. This is the matter that the protest concerns.

The DOE's consultant, Cumming, had estimated the value of the roofing work to be performed under the contract was \$115,837.00. *See, Declaration of Benjamin Miura, and Exhibit F.* Further, subcontractor Alcal Specialty Contracting had submitted a proposal to do the roofing work for \$161,103.00. *See, Exhibit G.*

The value of the roofing subcontracting work was at most, \$161,103.00, This is well below the threshold amount of \$983,758.00. Therefore, as Respondent argues, the Office of Administrative Hearings lacks jurisdiction in this matter as the estimated value of the project is more than \$1,000,000.00, but the protest concerns a matter involving a subcontractor in an amount that is far less than 10% of the estimated value of the contract.

At the hearing on the motion, and in its Memorandum in Opposition, Petitioner argued that because Petitioner was attempting to revive its low bid, the amount in controversy should be the difference between the lowest responsible and responsive bid and what the lowest bidder bid. In this case, that would be S & M Sakamoto, Inc.'s \$11,787,000.00 bid minus Petitioner's bid of \$9,837,580.00, which equals \$1,949,420.00. Petitioner asserts that this is the amount in controversy. Because \$1,949,420.00 is greater than 10% of \$11,787,000.00 (\$1,178,700.00), Petitioner contends that it has met the threshold amount.

However, this is not a proper analysis under HRS Section 103D-709(d)(2), which states that the protest concerns a matter that is equal to or no less than 10% of the estimated value of the contract. Respondent's application of the facts to this statute is correct, as the estimated value of the contract is the amount bid on the solicitation by Petitioner - \$9,837,580.00; 10 % of this amount is \$983,758.00; the protest concerns Petitioner's failure to submit the roofing subcontractor's certification with its bid; and the value of the roofing subcontracting work was at most, \$161,103.00; and this is well below the threshold amount of \$983,758.00.<sup>1</sup>

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<sup>11</sup> HRS Section 103D-709(j) defines "estimated value of the contract" as the lowest responsible and responsive bid. Even if this was determined to be S & M Sakamoto's

Therefore, the Office of Administrative Hearings lacks jurisdiction in this matter.

As Respondent notes in its memorandum in support of its motion to dismiss, the public policy in avoiding construction delays on public projects supports its motion to dismiss by requiring protestors to follow the requirements of the statute in regards to specifying the reason for the protest and the relief sought; and in meeting threshold amounts.

#### **IV. FINAL ORDER**

Based upon the foregoing findings and conclusions, the Hearings Officer grants Respondent's Motion to Dismiss, both because:

- A. The RFAH is defective under HAR Section 3-126-59 as it does not "state plainly and precisely the facts and circumstances of the person's grievance, the laws and rules involved, and the relief sought."; and
- B. The Office of Administrative Hearings lacks jurisdiction in this matter as the Protest is in regards to a subcontractor's work, but does not concern a matter greater than 10% of the estimated value of the contract.

Accordingly, the Hearings Officer orders as follows:

- Respondent's October 4, 2018 Motion to Dismiss is granted;
- Respondent's September 14, 2018 denial of Petitioner's July 10, 2018 Protest is affirmed; and
- Petitioner's September 21, 2018 Request for Administrative Hearing is dismissed.

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\$11,787,000.00 bid, 10 % of this would be \$1,178,700.00 and would also greatly exceed the \$161,103.00 proposal to do the roofing work.

The parties will bear their own attorney's fees and costs incurred in pursuing this matter. Pursuant to HRS § 103D-709(e), the \$10,000.00 Procurement Protest Bond shall be deposited into the general fund.

DATED: Honolulu, Hawaii, OCT 23 2018.



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

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*In Re 57 Engineering v. Departments of Education, State of Hawaii; PDH-2018-009; Hearings Officer's Findings of Fact, Conclusions of Law, and Final Order.*