

2019 SEP 27 A 8:22

HEARINGS OFFICE



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

In the Matter of	)	PDH-2019-004
)	
MEI CORPORATION,)	
	)	HEARINGS OFFICER'S FINDINGS
Petitioner,	)	OF FACT, CONCLUSIONS OF
	)	LAW, AND FINAL ORDER
vs.	)	GRANTING RESPONDENT'S
	)	MOTION TO DISMISS, OR, IN
DEPARTMENT OF BUDGET AND FISCAL	)	THE ALTERNATIVE, FOR
SERVICES, CITY AND COUNTY OF	)	SUMMARY JUDGMENT, AND
HONOLULU,	)	INTERVENOR'S MOTION TO
	)	DISMISS; AND DENYING
Respondent,	)	PETITIONER'S MOTION FOR
	)	SUMMARY JUDGMENT
and)	
)	
C C ENGINEERING & CONSTRUCTION,	)	Administrative Hearings Officer:
INC.,	)	Richard A. Young
)	
Intervenor.)	
)	

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, AND INTERVENOR'S MOTION TO DISMISS; AND
DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION:

On August 15, 2019, MEI Corporation, ("Petitioner"), filed a request for administrative hearing to contest the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") denial of Petitioner's July 3, 2019 protest regarding Respondent's Solicitation for the Honolulu Police Department Chinatown

Police Station and Heritage Center Reroof and Air Conditioning Improvements project, Solicitation # RFB-DDC-1172310.

On August 9, 2019, Respondent had denied Petitioner's Protest.

After Petitioner filed its August 15, 2019 Petition for Administrative Review and Hearing Relief, the matter was set for an August 26, 2019 Pre-Hearing Conference and an August 30, 2019 hearing date. At the August 26, 2019 Pre-Hearing Conference, a motions deadline, a response to motions deadline, and hearing on motions and hearing date were scheduled. Because Respondent's counsel was scheduled in another hearing, the August 30, 2019 hearing date was furthered until September 17, 2019.

A. MOTIONS FILED

On August 23, 2019, C C Engineering & Construction, Inc. ("Intervenor") had filed a Motion to Intervene. At the August 26, 2019 pre-hearing conference, neither Petitioner nor Respondent objected to the Motion to Intervene. Subsequently, the Intervenor filed a stipulation allowing the intervention.

Also, on August 23, 2019, C C Engineering & Construction, Inc. had filed a Motion to Dismiss MEI Corporation's Petition for Administrative Review and Hearing Relief, Filed August 15, 2019, Memorandum in Support of Motion, Declaration of Grant Fasi Allison, and Exhibits A-B.

On September 3, 2019, Respondent filed its Motion to Dismiss MEI Corporation's Petition for Administrative Review and Hearing Relief, Filed August 15, 2019, or, in the Alternative, Motion for Summary Judgment, Memorandum in Support of Motion, Declaration of John Francis Sapigao, and Exhibits,

Also, on September 3, 2019, Petitioner filed its Motion for Summary Judgment, Memorandum in Support of Motion, Declaration of Anna H. Oshiro; Declaration of Reynaldo Morales; and Exhibits "A" – "K".

The parties and intervenor filed memorandums in opposition. Both Respondent and Intervenor joined in the other's Motion to Dismiss.

The above-referenced motions came on for hearing before the undersigned Hearings Officer on September 9, 2019 in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by Anna Oshiro,

Esq. and Loren Seehase, Esq. Respondent was represented by Ryan Ota, Esq. The Intervenor was represented by Sarah Love, Esq.

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 renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT:

1. On February 20, 2019, Respondent had posted a Solicitation for the construction of the Honolulu Police Department Chinatown Police Station and Heritage Center Reroof and A C Improvements project, Solicitation # RFB-DDC-1232802 (which was subsequently amended to Solicitation # RFB-DDC-1172310) ("Project"). The bids were due on April 2, 2019.

2. Petitioner submitted its bid of \$2,325,128.00 on the Project on April 2, 2019.

3. One of the provisions in the requirements and specifications section of the IFB, Section 06917, concerned the Historic Wood treatment. Only 4 subcontracting firms were approved to do this work.

4. The low bidder on the Project was A's Mechanical & Builders, Inc. The second lowest bidder was United General Contracting. However, both these bidders had bid discrepancies.

5. On April 19, 2019, Petitioner filed its first protest, claiming to be the low responsive bidder and that it should be awarded the project.

6. On June 17, 2019, Respondent upheld Petitioner's April 19, 2019 protest.

7. On June 19, 2019, Respondent sent an e-mail to Petitioner stating that Petitioner had failed to list a subcontractor for the historic wood treatment, and that only 4 contractors were approved to do this type of work.

8. In this June 19, 2019 e-mail, Respondent requested that Petitioner provide proof within 24 hours that the cost of the historic wood treatment was less than 1% of the total bid price.

9. Reynaldo Morales is an employee of Petitioner.
10. John F. Sapigao is a procurement and specification specialist for Respondent.
11. Capital improvement funds set to lapse on June 30, 2019, were to be used for the construction work relating to the Project. *See, Declaration of John Francis Sapigao, attached to Respondent's Motion to Dismiss, or in the Alternative, for Summary Judgment.*
12. On June 19, 2019, Mr. Sapigao sent Mr. Morales an e-mail noting that Petitioner had not listed a subcontractor for the historic wood treatment work, and that its bid could be rejected for non-responsiveness. Petitioner was asked to provide a quote from the subcontractor that the work was under 1% of the cost. Mr. Morales was asked to let Mr. Sapigao know how he planned to handle this by June 20, 2019, 4:30 p.m. or Petitioner's bid may be rejected for non-responsiveness. *See, Declaration of John Francis Sapigao, Exhibit R5, attached to Respondent's Motion to Dismiss, or in the Alternative, for Summary Judgment.*
13. As noted in the Declaration of Reynaldo Morales, on June 19, 2019, John F. Sapigao called him stating that Petitioner's bid was missing a subcontractor for the historic wood repair work. Mr. Morales told Mr. Sapigao that the work was much less than 1% of the total bid price. Mr. Sapigao asked for a quote, and Mr. Morales said Petitioner would get that to him. *See, Declaration of Reynaldo Morales, attached to Petitioner's Motion for Summary Judgment.*
14. On June 20, 2019, Petitioner attempted to send an e-mail response to Respondent, which stated that Petitioner had obtained a quote from an approved firm who did the historic wood treatment work, Close Construction; and that the quote affirmed that the historic wood treatment subcontracting work was less than 1% of the total bid price.
15. Close Construction had valued the historic wood treatment work at \$4,075.00.
16. However, Respondent did not receive Petitioner's June 20, 2019 e-mail on June 20, 2019. Petitioner had mistakenly sent the June 20, 2019 e-mail to a John "Sapiago". This was a misspelling of John Sapigao, who works for Respondent.

17. On June 28, 2019, Petitioner received an e-mail from Respondent, rejecting Petitioner's bid for failure to list the historic wood treatment subcontractor. Respondent asserts that Petitioner's bid was rendered unresponsive.

18. Also, on June 28, 2019, Respondent awarded the contract for the Project to C C Engineering and Construction, Inc., the 4th highest bidder, and the intervenor in this case. The Intervenor had bid \$2,418,000.00,

19. On July 1, 2019, Petitioner resent its June 20, 2019 e-mail letter to Respondent. However, Respondent refused to respond to this letter.

20. On July 3, 2019, Petitioner filed its bid protest arguing that Respondent should have considered all grounds asserted by Petitioner, including the fact that the historic wood treatment subcontracting work was less than 1% of the total bid price; and that Respondent's 24-hour deadline to respond was artificial and unreasonable.

21. In an August 9, 2019 letter, Respondent rejected Petitioner's bid protest on the basis that Petitioner failed to respond within the 24-hour deadline. In this letter, Respondent did not consider as a basis for rejection of Petitioner's bid, Petitioner's argument that the historic wood treatment subcontracting work was less than 1% of the total bid price.

22. Although Petitioner requested confirmation that Respondent was refusing to consider its 1% argument, Respondent referred Petitioner to its letter's conclusion as Respondent's final response.

23. On August 15, 2019, Petitioner filed a Petition for Administrative Review and Hearing Relief.

III. CONCLUSIONS OF LAW:

In its Petition, Petitioner argues that Respondent failed to respond substantively to Petitioner's claim that the unlisted subcontractor's work scope was less than one percent (1%) of Petitioner's total bid price. Petitioner asserts that a procuring agency is required to respond to all claims raised in a bid protest decision and that failure to do so constitutes a waiver of the agency's right to challenge those claims.

Petitioner also argues that Respondent's arbitrary and unreasonable 24-hour deadline in which to respond to Respondent's questions about subcontractor listing, was

not a basis for refusing to hear and issue a ruling that fully and fairly addressed Respondent's concerns.

Additionally, Petitioner asserts that the intent of the Procurement Code is supposed to be to allow for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State.

As relief sought, Petitioner argues that the procuring agency should be required to comply with the procurement code, and the project should be awarded to Petitioner, as well as costs Petitioner incurred to satisfy the bond requirements of Hawaii's procurement code.

In their respective Motions to Dismiss, both Respondent and the Intervenor assert that the Office of Administrative Hearings ("OAH") lacks jurisdiction to hear this matter. 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. Both Respondent and Intervenor argue that this protest does not concern a matter which meets this threshold amount. Therefore, OAH lacks jurisdiction in this matter.

Respondent also moves to dismiss this appeal for failure to state a claim upon which relief can be granted. Respondent argues that since the bid was awarded to Intervenor, Petitioner's requested relief, to award the project to Petitioner, cannot be granted under HRS Section 103D-707.

A. WHETHER THE HEARINGS OFFICER HAS JURISDICTION IN THIS MATTER

The first issue that is raised and addressed is whether the Office of Administrative Hearings has jurisdiction in this matter.

Both Respondent and Intervenor assert that the Office of Administrative Hearings lacks jurisdiction in this matter because Petitioner's Protest does not concern a matter which is at least 10% of the estimated value of the contract.

Respondent and Intervenor argue 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.

Under the undisputed facts of this case, the estimated value of the contract is the amount bid on the solicitation by Petitioner - \$2,325,128.00. Ten per cent of this amount is \$232,512.80.

Under HRS Section 103D-302(b), Petitioner was required to list the names of all of its subcontractors in its bid. An exemption to this requirement is that the subcontractor's work does not concern a matter greater than 1% of the total bid amount, and if acceptance is in the best interests of the State. Petitioner failed to list the historic wood treatment subcontractor in its April 2, 2019 bid. Petitioner asserts that this failure can be waived as subcontractor Close Construction had valued the historic wood treatment subcontracting work at \$4,075.00. Petitioner argues, because this amount is less than 1% of the total bid amount, Petitioner falls within the exemption to listing the subcontractor in its bid.

However, this is also the matter that the protest concerns. This is well below the threshold amount of \$232,512.80. Therefore, as Respondent and Intervenor argue, the Hearings Officer lacks jurisdiction in this matter as the estimated value of the contract is more than \$1,000,000.00, but the protest only 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 the matter at issue was the entire amount of the contract. In its Memorandum in Opposition, Petitioner argues, "in this case, 'the matter' is the bid process, and the City's unlawful actions herein. The jurisdictional threshold is the contract as a whole...the issue in this case involves the bid process employed by the City. The City's actions are 'the matter,' and thus the entire contract amount is 'the matter' and

jurisdiction is proper here.” Petitioner’s Opposition to Respondent’s Motion to Dismiss, at page 9.

Petitioner argues that even though the City did not receive a written response from Petitioner regarding the historic wood treatment work by June 20, 2019, the City did not do anything about this for 8 days. However, neither did Petitioner do anything to assure itself that the City had received its June 20, 2019 e-mail. It is Petitioner who sent the e-mail to the wrong address, causing it not to be received by the City. It was Petitioner’s promise to send the City proof that it had used an approved subcontractor and that the value of the subcontracting work was less than 1% of the total amount of the bid. Further, the City did not even have to call or e-mail Petitioner that it had failed to list the historic wood treatment subcontractor in its bid. It was Petitioner’s responsibility to correctly identify all contractors and subcontractors in its bid.

Regardless, under HRS Section 103D-709(d)(2) the Hearings Officer lacks jurisdiction in this matter. Under the statute, the protest shall concern 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 - \$2,325,128.00; 10% of this amount is \$232,512.80; and the protest concerns Petitioner’s failure to list the historic wood treatment subcontractor, which was valued at \$4,075.00. This is the matter that the protest concerns. This is well below the threshold amount of \$232,512.80. Therefore, the Hearings Officer lacks jurisdiction in this matter.

The legislative intent regarding HRS Section 103D-709(d)(2) is to eliminate protests involving relatively minor issues so the procurement is not delayed.

IV. FINAL ORDER


Based upon the above, the Hearings Officer orders as follows:

- Respondent’s September 3, 2019 Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, is granted;
- Intervenor’s August 23, 2019 Motion to Dismiss is granted; and
- Petitioner’s September 3, 2019 Motion for Summary Judgment is denied.

Respondent's August 9, 2019 denial of Petitioner's July 3, 2019 Protest is affirmed; and Petitioner's August 15, 2019 Request for Administrative Hearing is dismissed.

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, SEP 27 2019.



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