



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

HOOKLIFTS HAWAII, LLC,

Petitioner.

vs.

COUNTY OF KAUAI, a Political
Subdivision of the State of Hawaii,

Respondent.

PDH-2019-008

HEARINGS OFFICER'S
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER
GRANTING RESPONDENT'S
MOTION TO DISMISS

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I. INTRODUCTION:

On December 9, 2019, Hooklifts Hawaii, LLC, ("Petitioner"), filed a request for administrative hearing to contest the County of Kauai's, a political subdivision of the State of Hawaii ("Respondent") denial of Petitioner's protests regarding Respondent's Solicitation for Services to Load and Haul White Goods and Scrap Metal from Hanalei, Kapa'a and Hanapepe Refuse Transfer Stations and Kekaha Landfill to the Metals Recycling Center, Solicitation # IFB 3655 ("Project").

Petitioner had filed its Protests on October 7, 2019, and November 8, 2019. Petitioner had asserted in the December 9, 2019 Petition that its August 23, 2019 letter to Respondent was its first of three bid protests. However, in its December 23, 2019 First Amended Petition, Petitioner re-labeled the October 7, 2019 bid protest as the First Bid Protest, and the November 8, 2019 bid protest as the Second Bid Protest.

Throughout these proceedings, Respondent denied that the August 23, 2019 letter was a bid protest.

On December 2, 2019, Petitioner received Respondent's denial of Petitioner's Protests.

After Petitioner filed its December 9, 2019 Petition for Administrative Review and Hearing Relief, the matter was set for a December 16, 2019 Pre-Hearing Conference and December 23, 2019 hearing. At the December 16, 2019 Pre-Hearing Conference, a motions deadline, a response to motions deadline, a hearing on motions, and hearing and further hearing dates were scheduled. Because one of Respondent's witnesses was scheduled to be off-island, the December 23, 2019 hearing date was continued to December 30, 2019 and a further hearing date was scheduled on January 7, 2020.

A. MOTION FILED

On December 23, 2019, Respondent filed Respondent County of Kauai's Motion to Dismiss.

On December 27, 2019, Petitioner filed its Memorandum in Opposition.

The above-referenced motion came on for hearing before the undersigned Hearings Officer on December 30, 2019 in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Respondent was represented by Todd K Jenson, Esq. by telephone conference call. Petitioner was represented by Loren Seehase, Esq. During arguments on the motion, the Hearings Officer raised the issue as to whether the October 7, 2019 bid protest was untimely. At Petitioner's request, further briefing on this issue was ordered; and the parties submitted supplemental briefs on January 3, 2020.

Having reviewed and considered the motion and memoranda, exhibits, and declarations attached thereto, the supplemental briefs, and 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 July 17, 2019, Respondent had posted a Solicitation for Services to Load and Haul White Goods and Scrap Metal from Hanalei, Kapa'a and Hanapepe Refuse Transfer Stations and Kekaha Landfill to the Metals Recycling Center, Solicitation # IFB 3655 ("Project"). The bids were due by August 12, 2019.

2. On August 4, 2019, Petitioner submitted its bid of \$2,179,798.40 on the Project.

3. One of the provisions in the requirements and specifications section of the Project, IFB 3655, Section V, noted that the bidder had to have a PUC license to transfer recyclable materials. However, the solicitation specifications allowed for the winning bidder to provide proof of a PUC license within 14 days following the Notice of Award.

4. Respondent opened the bids on August 12, 2019. The low bidder on the Project, with a bid of \$1,887,340.00, was Green Earth Matters ("GEM").

5. Petitioner was the second lowest bidder.

6. In its questionnaire, GEM stated that it had applied for a PUC license and expected to have it within 14 days of the notification of award. The questionnaire specified that GEM had applied for its PUC license on May 3, 2019 and that the application was pending.

7. On prior projects, Respondent had issued a notice of award within a week of opening bids. However, in this case, Respondent did not issue a notice of award within a week of opening the bids. Instead, on September 19, 2019, Respondent extended Petitioner's existing contract to provide loading and hauling services until December 24, 2019.

8. Petitioner's existing contract with the County allowed for this (and a further) extension. However, this extension allowed GEM more time to obtain its PUC license.

9. On August 23, 2019, Petitioner, through its first attorney, Laurel Loo, Esq., sent a letter to Mr. Ernest Barreira, the Assistant Chief Procurement Officer, Purchasing Division, County of Kauai, noting that no bid had been awarded on the Project. The letter further states that a rejection letter to GEM had been rescinded by the County, and that Petitioner was requesting an issuance of the Notice of Award today, noting that GEM would then have to furnish the required licenses within 14 days, as noted in the offer documents. The letter further states that Petitioner is the lowest responsive/responsible bidder, has the required PUC license, and that for there to be

no break in the provision of service, it would be unreasonable for Respondent to hope that a particular bidder would secure a license.

10. In its December 9, 2019 request for hearing, Petitioner had asserted that the August 23, 2019 letter was a bid protest. However, in a First Amended Petition for Administrative Review and Hearing Relief filed on December 23, 2019, Petitioner asserts that there were only 2 bid protests, dated October 7, 2019 and November 8, 2019.

11. In its response, and throughout the hearing on the motion, Respondent asserts that the August 23, 2019 letter was not a bid protest.

12. Respondent did not respond to Petitioner's August 23, 2019 letter.

13. Keola Aki, the Recycling Program Coordinator for the Solid Waste Management Division for Respondent, compared the bids which showed annual savings to the County of approximately \$60,000.00 per year if the Project was awarded to GEM.

14. On September 25, 2019, the Solid Waste Management Division for Respondent received notice that GEM had obtained its PUC certification.

15. On October 4, 2019, Respondent issued a Notice of Contract Award, awarding the Project to GEM.

16. In the Petition, Petitioner had asserted that the issuance of the Notice of Contract Award is in violation of the Procurement Code as the rules state that no further action on a bid is allowed once a protest has been submitted.

17. On October 7, 2019, Petitioner, again through its original attorney, Laurel Loo, Esq., filed its Bid Protest. In the October 7, 2019 letter, Petitioner asserts that Respondent failed to issue a prompt award. It is noted that Respondent had entered into a 3-month extension of the existing contract to load and haul recyclables with Petitioner. The letter further states that Respondent failed to timely issue an award to the responsible, responsive offeror. In this letter, Petitioner acknowledges that IFB 3665 recognized that the offeror was not required to have a PUC license at the time the bid was submitted, but noted that GEM did not obtain its PUC license until more than a month after the offer deadline,

18. GEM had obtained its PUC license on September 24, 2019.

19. The October 7, 2019 letter further asserts that Respondent engaged in anticompetitive practices and a lack of good faith. Petitioner asserts that the delay in awarding the bid and the extension of the existing contract for the services, provided GEM additional time to

become properly licensed, favoring one bidder. Petitioner requested that the chief procurement officer address this protest of the award of IFB 3655 to GEM.

20. On October 17, 2019, Respondent sent a letter to Petitioner's original attorney, Laurel Loo, Esq., stating that Petitioner could withdraw its Protest as a resolution of this matter. Respondent further wrote that if the Protest was not withdrawn, Respondent's counsel would recommend that the Protest be denied.

21. The October 17, 2019 letter also points out that Section V of the IFB states that it was not necessary to have a license at the time of bid submission, and that the Motor Carrier Certification from the PUC must be completed within 14 days of the Notice of Award.

22. It is noted that Respondent's October 17, 2019 letter also states that the bid award was not unreasonably delayed, as the evaluation process took some time, but not an unreasonable amount of time.

23. Sometime between October 17, 2019 and November 8, 2019, Petitioner changed counsel from Ms. Loo to Anna Oshiro, Esq. and Ms. Seehase.

24. The Petition further asserts that Respondent's actions were intentional to favor one bidder (GEM) and keep the contract away from Petitioner.

25. On November 8, 2019, Petitioner's current counsel, Ms. Oshiro, sent its Bid Protest to Respondent, stating that it protests the award of the contract for the Project to any entity other than the sole low responsible, responsive bidder, Hooklifts. In this letter, Petitioner asserts that it had just learned that the County's time frame for review and award is usually no more than 7 days; that the County was told it should issue an award and should not stall the award to provide GEM with more time to get its PUC license; and that despite this, the County stayed the award for the benefit of a single bidder, GEM.

26. In its November 8, 2019 letter, Petitioner asserts that the County favored one bidder over other bidders. Petitioner requests that the Notice of Award be rescinded and that the bid for this job be awarded to Hooklifts, as the sole responsive/responsible bidder.

27. In a November 27, 2019 letter, Respondent rejected both Petitioner's October 7, 2019 and November 8, 2019 bid protests. The November 8, 2019 bid protest was rejected as untimely, as under HRS Section 103D-701(a), "a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts

giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract...”

28. In the November 27, 2019 letter, Respondent also rejected Petitioner’s October 7, 2019 bid protest as it asserted that any delays were not unreasonable. Further, Respondent argued that it has the right to create specification in the IFB process, which in this case was the requirement of the PUC license.

29. The issue raised by the Hearings Officer during the December 30, 2019 hearing on the motion to dismiss, was whether the October 7, 2019 bid protest was also untimely as the statute also has a requirement that “a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto”. See, HRS Section 103D-701(a).

30. Additionally, at the December 30, 2019 hearing on the motion to dismiss, Respondent argued that the November 8, 2019 bid protest was also untimely as it did not meet the requirement that “a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract...” . See, HRS Section 103D-701(a).

31. On December 9, 2019, Petitioner filed a Petition for Administrative Review and Hearing Relief.

III. CONCLUSIONS OF LAW:

In its December 9, 2019 Petition, Petitioner raised the following claims and issues:

1. That Respondent failed to issue a bid award to the lowest responsible and responsive bidder;
2. That Respondent favored one bidder over another;
3. That Respondent willfully failed to award the bid to the low responsible, responsive bidder;
4. That Respondent violated the Procurement Code by awarding the contract while ignoring and not answering a bid protest;
5. That Respondent wrongfully claimed that Petitioner’s bid protest was untimely; and
6. That Respondent’s direct, intentional and willful favoritism of one bidder violates the language and intent of the Procurement Code.

Through its December 23, 2019 First Amended Petition, Petitioner now asserts that there were only 2 bid protests, dated October 7, 2019 and November 8, 2019. Because Petitioner acknowledges that its August 23, 2019 letter was not a bid protest, Petitioner is no longer asserting that Respondent violated the stay provision to HRS Section 103D-701.

The instant motion, Respondent's December 23, 2019 Motion to Dismiss, asserts 2 bases to grant its motion:

- A. Petitioner did not timely file its protest; and
- B. Respondent has the right to create specification in the IFB process, which in this case was the requirement of the PUC license.

Additionally, the Hearings Officer noted at the hearing on the motion, that the failure to timely file a bid protest is a jurisdictional matter and applies to both the October 7, 2019 bid protest and the November 8, 2019 bid protest.

As Respondent argues in its Supplemental Memorandum, "...jurisdiction is a statutory matter and cannot be conferred by the stipulation or agreement of the parties. Time requirements under the code are mandatory and not subject to waiver – they cannot be waived." *See, Respondent's Supplemental Brief at page 6.* Further, "Time constraints must be strictly adhered to, in order to accomplish the underlying objectives of the Code, regarding the initiation and prosecution of protests." *See, Respondent's Supplemental Brief at page 9; citing GTE Hawaiian Telephone C., v. County of Maui, PCH 98-6 (December 1998).*

As an initial conclusion, the Hearings Officer notes that Petitioner's August 23, 2019 letter was not a bid protest. Petitioner's first attorney, Laurel Loo, Esq., had sent an August 23, 2019 letter to Mr. Ernest Barreira, Respondent's Assistant Chief Procurement Officer, stating that no bid had been awarded on the Project. It is noted that this letter was sent 11 days after the opening of the bids.

The August 23, 2019 letter further states that Petitioner is requesting an issuance of the Notice of Award today, noting that GEM would then have to furnish the required licensees within 14 days, as noted in the offer documents. The letter further states that Petitioner is the lowest responsive/responsible bidder, has the required PUC license, and that for there to be no break in the provision of service, it would be unreasonable for Respondent to hope that a particular bidder would secure a license.

As noted above, Petitioner's December 23, 2019 First Amended Petition now asserts that there are 2 bid protests, dated October 7, 2019 and November 8, 2019.

The issue is whether these bid protests were timely filed.

A. Whether Petitioner Timely Filed its October 7, 2019 Bid Protest

At the December 30, 2019 hearing on the motion, the Hearings Officer raised the question as to whether there are jurisdictional bases to dismiss the Petition as both the October 7, 2019 Bid Protest and the November 8, 2019 Bid Protest may have been untimely.

The Hearings Officer was concerned that the October 7, 2019 Bid Protest may have been untimely as it did not meet the requirement that "a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto". See, HRS Section 103D-701(a).

In this case, with the submittal of its August 23, 2019 letter, Petitioner is indicating that it is an aggrieved person as the contract has not yet been awarded. The letter further requests that an issuance of the Notice of Award be made immediately ("today"), noting that GEM would then have to furnish the required licenses within 14 days, as noted in the offer documents. The letter further states that Petitioner is the lowest responsive/responsible bidder, has the required PUC license, and that for there to be no break in the provision of service, it would be unreasonable for Respondent to hope that a particular bidder would secure a license.

The content of the August 23, 2019 letter shows that Petitioner is an aggrieved person as Petitioner is requesting that the bid be awarded that day, and Petitioner is arguing that it was unreasonable to delay the award in the hope that the low bidder would obtain its PUC license. This commences the 5 working days that Petitioner has to submit a written protest. Petitioner's first bid protest was on October 7, 2019, well after 5 working days of the August 23, 2019 letter.

Although Petitioner originally asserted in its Petition that the August 23, 2019 letter was a bid protest, the contents of the letter show that Petitioner is aware that no bid award has been made, and Petitioner is not complaining about the terms of the IFB. Although the letter requests an issuance of the Notice of Award today, and shows Petitioner's awareness of the 14-day requirement to furnish the required licenses, the letter does not protest any bid or any other thing. Additionally, in this letter, Petitioner also states that it would be unreasonable for Respondent to hope that a particular bidder would secure a license.

The Hearings Officer concludes that although the August 23, 2019 letter was not a bid protest, it does show that Petitioner is an aggrieved person. HRS Section 103D-701 is the statutory provision entitled, "Authority to resolve protested solicitations and awards." Under subsection (a), "Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest...a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of the award of the contract..." HRS Section 103D-701(a).

The August 23, 2019 letter shows that Petitioner is an aggrieved person as it requests that Respondent issue the Notice of Award "today", and that it would be unreasonable for Respondent to hope that a particular bidder would secure a license. Therefore, the Hearings Officer concludes that October 7, 2019 bid protest was untimely as it was not filed within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.

In its Supplemental Memorandum, Petitioner argues that the declarations of Hooklifts employees show that because the County had not taken any definitive action in August 2019, Petitioner was not aggrieved until the bid award of October 4, 2019.

However, as Respondent argues in its supplemental brief, a timely protest must be filed when the protester knew or should have known about facts that provided a reasonable basis for filing a protest. As Respondent argues, the August 23, 2019 letter fixes the time when Petitioner knew of the County's intent to award the contract to the lowest bidder, GEM. As Respondent argues, the August 23, 2019 letter alleged that the County was improperly delaying the Notice of Award, waiting for the PUC certificate to be awarded to GEM. "Despite this admitted grievance...Petitioner waited more than a month, until after the award, until October 7, 2019, to submit its First Protest regarding the alleged improperly delayed issuance of the Notice of Award." *See, Respondent's Supplemental Brief at page 7.*

Therefore, the Hearings Officer concludes that the October 7, 2019 Bid Protest was untimely.

B. Whether Petitioner Timely Filed its November 8, 2019 Bid Protest

In its Supplemental Memorandum to its Motion to Dismiss, Respondent argues that the November 8, 2019 Bid Protest was not timely filed. The facts showed that bids were due and opened on August 12, 2019. The Notice of Award was issued to GEM on October 4, 2019. The November 8, 2019 Bid Protest was made over a month after the Notice of Award was issued.

Under HRS Section 103D-701(a) “a protest shall be submitted in writing within five working days after the aggrieved person knows or should have of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of the award of the contract...” *See also*, Hawaii Administrative Rules (“HAR”) Section 3-126-4.

Clearly, in this case, the November 8, 2019 Bid Protest was made over a month after the October 4, 2019 Notice of Award. Therefore, because Petitioner did not meet the requirement that the “protest of an award ... shall in any event be submitted in writing within five working days after the posting of the award of the contract...”, the November 8, 2019 Bid Protest was untimely.

C. Whether Respondent Had the Right to Create Specification in the IFB Process

In its Motion to Dismiss, Respondent asserts that it has the discretion and leeway in preparing the IFB specifications, such as specifying when the Motor Vehicle Certificate from the PUC must be obtained. Under HAR Section 3-122-11, in preparing the IFB and other procurement documents, the chief procurement officer, with the assistance of the using agency shall prepare and approve specifications.

HRS Section 103D-104, defines “Specifications” as any description of the physical or functional characteristics, or of the nature of a good, service, or construction item. The term includes descriptions of any requirement for inspecting, testing, or preparing a good, service, or construction item for delivery.”

Respondent argues that the Department of Solid Waste, as the using agency, prepared the specifications that did not require a PUC Certificate before a bid was submitted. The specification in the IFB stated the PUC license had to be issued within 14 days of the Notice of Award.

Respondent cites the above-stated rule and statute to support its authority to develop bid specifications. As noted above, in its December 23, 2019 Motion to Dismiss, Respondent's argument to dismiss the October 7, 2019 bid protest is that Respondent has the right to create specification in the IFB process. At the hearing on the motion to dismiss, Petitioner's counsel appeared to correctly characterize this basis to dismiss as a "failure to state a claim upon which relief can be granted".

At the hearing on the motion to dismiss, Petitioner argued that Respondent acted unreasonably in its delays in awarding the bid. Additionally, Petitioner argued, a "reasonableness" determination is usually made at a hearing, not through a motion to dismiss. The Hearings Officer agrees, and therefore, at this time, makes no determination as to whether the time it took for Respondent to award the bid was reasonable or not.

Again, the facts showed that on October 4, 2019, Respondent issued a Notice of Contract Award, awarding the Project to GEM. GEM had obtained its PUC license on September 24, 2019.

Petitioner filed its first bid protest on October 7, 2019, 3 days after the Notice of Award. The October 7, 2019 letter asserts that Respondent engaged in anticompetitive practices and a lack of good faith. Petitioner asserts that the delay in awarding the bid and the extension of the existing contract for the services, provided GEM additional time to become properly licensed, favoring one bidder.

In response, Respondent sent Petitioner an October 17, 2019 letter which states that Section V of the IFB states that it was not necessary to have a license at the time of bid submission, and that the Motor Carrier Certification from the PUC must be completed within 14 days of the Notice of Award. It is noted that Respondent's October 17, 2019 letter also stated that the bid award was not unreasonably delayed, as the evaluation process took some time, but not an unreasonable amount of time.

Additionally, in its November 27, 2019 letter, Respondent rejected Petitioner's October 7, 2019 bid protest as it asserted that any delays were not unreasonable. Further, Respondent argued that it has the right to create specification in the IFB process, which in this case was the requirement of the PUC license.

Further, the facts show that Keola Aki, the Recycling Program Coordinator for the Solid Waste Management Division for Respondent, compared the bids which showed annual savings to the County of approximately \$60,000.00 per year if the bid was awarded to GEM.

Respondent argues that it has discretion and leeway in preparing the IFB specifications. Under HAR Section 3-122-11, in preparing IFB and other procurement documents, the chief procurement officer, with the assistance of the using agency shall prepare and approve specifications. Further, under HRS Section 103D-104, specifications "includes descriptions of any requirement for inspecting, testing, or preparing a good, service, or construction item for delivery."

However, as noted above, at this time, the issues of the reasonableness of the delay and the authority to create specifications are not reached.


Petitioner must meet the jurisdictional requirement of filing a timely bid protest. Clearly, the facts of this case show that both the October 7, 2019 Bid Protest and the November 8, 2019 Bid Protest were untimely. Based upon the untimely filings of the protests, the Hearings Officer lacks jurisdiction in this matter.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that Respondent's denial of Petitioner's protests was proper and grants Respondent's Motion to Dismiss. Accordingly, Respondent's denial of Petitioner's bid protests is affirmed, and the December 9, 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, JAN 17 2020



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

In Re Hooklifts Hawaii, LLC v. County of Kauai PDH-2019-008; Hearings Officer's Findings of Fact, Conclusions of Law, and Final Order.