

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

In the Matter of

HENSEL PHELPS CONSTRUCTION CO.,

Petitioner,

vs.

STATE OF HAWAII, DEPARTMENT OF
TRANSPORTATION,

Respondent,

and

NAN, INC.,

Intervenor.

PDH-2021-002

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
FINAL ORDER (1) GRANTING
RESPONDENT'S MOTION TO DISMISS
PETITIONER'S REQUEST FOR
HEARING FILED JANUARY 13, 2021,
OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT FILED ON
JANUARY 22, 2021; (2) GRANTING
INTERVENOR NAN, INC.'S MOTION TO
DISMISS, OR IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT
FILED ON JANUARY 22, 2021; AND (3)
DENYING PETITIONER'S CROSS-
MOTION FOR SUMMARY JUDGMENT
FILED ON JANUARY 25, 2021

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER (1) GRANTING RESPONDENT'S MOTION
TO DISMISS PETITIONER'S REQUEST FOR HEARING FILED
JANUARY 13, 2021, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
FILED ON JANUARY 22, 2021; (2) GRANTING INTERVENOR
NAN, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT FILED ON JANUARY 22, 2021;
AND (3) DENYING PETITIONER'S CROSS-MOTION
FOR SUMMARY JUDGMENT FILED ON JANUARY 25, 2021

I. INTRODUCTION

On January 13, 2021, Petitioner HENSEL PHELPS CONSTRUCTION CO. ("Petitioner")
filed a request for administrative review to contest the STATE OF HAWAII, DEPARTMENT OF

TRANSPORTATION's, ("Respondent" or "DOT") January 26, 2021 denial of its protest in connection with a Request for Proposals for the Honolulu Ticket Lobby Renovations and Baggage Handling System Improvements, Phase 2, at the Daniel K. Inouye International Airport, Project No. AO1033-22 ("RFP" or "solicitation"). Petitioner's request was made pursuant to Hawaii Revised Statutes ("HRS") §§ 103D-709, and Hawaii Administrative Rules ("HAR") §§ 3-126-42 and 3-126-59.

The Office of Administrative Hearings issued a Notice of Hearing and Prehearing Conference which was duly served upon the parties. A prehearing conference was scheduled for January 20, 2021 and the hearing was scheduled for February 2, 2021.

Respondent filed Respondent's Response to Petitioner's Request for Hearing on January 19, 2021. Intervenor NAN, INC. ("Intervenor") intervened by stipulation on January 19, 2021. Intervenor filed Intervenor's Response to Petitioner's Request for Hearing on January 20, 2021.

A prehearing conference was conducted by telephone on January 20, 2021 before the undersigned Hearings Officer. Daniel T. Kim, Esquire, appeared on behalf of Petitioner. Yvonne R. Shinmura, Esquire, and Duane M. Kokesch, Esquire, appeared on behalf of Respondent ("Respondent"). Wyeth M. Matsubara, Esquire, and Micah P. K. Aiu, Esquire, appeared on behalf of Intervenor.

On October 13, 2020, Governor David Y. Ige issued his Fourteenth Emergency Proclamation which, among other things, limited the suspension of Hawaii Revised Statutes Chapter 103D to solicitations necessary to procure goods and services in direct response to COVID-19; to procure goods and services using funding that must be expended on or before December 31, 2020; and to procure goods and services not in direct response to COVID-19 but for which certain procurement requirements cannot reasonably be met through the regular procurement process due to the emergency.¹ The parties agreed that the subject solicitation does not involve any of these conditions and that the suspension of Chapter 103D is inapplicable in this case.

At the prehearing conference Respondent and Intervenor indicated that they intended to file dispositive motions. The parties were ordered to file motions by January 22, 2021. The parties were further ordered to file memoranda in opposition and/or joinder(s) to the motion(s), if any, by January 25, 2021 and reply memoranda by 10:00 a.m. on January 26, 2021.

On January 22, 2021, Respondent filed Respondent's Motion to Dismiss Petitioner's Request for Hearing filed January 13, 2021, or in the Alternative for Summary Judgment. On January 22, 2021,

¹ The limited suspension of HRS Chapter 103D has been extended through April 13, 2021 by the Governor's Sixteenth, Seventeenth, and Eighteenth Proclamations.

Intervenor filed Intervenor Nan, Inc.'s Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Intervenor filed a Joinder to Respondent's Motion to Dismiss on January 22, 2021. On January 25, 2021, Petitioner filed Petitioner's Omnibus Memorandum in Opposition to (1) Respondent's Motion to Dismiss Petitioner's Request for Hearing filed January 13, 2021, or in the Alternative for Summary Judgment filed January 22, 2021 and Intervenor's Substantive Joinder filed January 22, 2021, (2) Intervenor's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment filed January 22, 2021 and Respondent's Joinder filed January 25, 2021, and (3) Cross-Motion for Summary Judgment ("Petitioner's Omnibus Memorandum"). Respondent filed its Joinder to Intervenor's Motion to Dismiss on January 25, 2021. On January 26, 2021, Intervenor filed Intervenor Nan, Inc.'s Reply Memorandum, re: Nan, Inc.'s Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. On January 26, 2021, Respondent filed its Reply Memorandum to Petitioner's Omnibus Memorandum.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following Findings of Fact, Conclusions of Law and Final Order (1) Granting Respondent's Motion to Dismiss Petitioner's Request for Hearing Filed January 13, 2021, or in the Alternative for Summary Judgment Filed on January 22, 2021; (2) Granting Intervenor Nan, Inc.'s Motion to Dismiss, or in the Alternative, Motion for Summary Judgment Filed on January 22, 2021; and (3) Denying Petitioner's Cross-Motion for Summary Judgment Filed on January 25, 2021.

II. FINDINGS OF FACT

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

1. The RFP was for ticket lobby renovations and baggage handling system improvements at the Daniel K. Inouye International Airport ("project"). The scope of work at Terminal 1 was for:

"new construction of Transportation Security Administration (TSA) baggage screening spaces including equipment; six baggage makeup carousels; new United States Department of Agriculture (USDA) spaces and related work; demolition/reconstruction of existing tenant spaces for new Baggage Handling System (BHS) corridor; demolition of existing TSA baggage screening spaces; demolition of existing baggage makeup carousels; construction of BHS; Closed Circuit Television (CCTV); Access Control, mechanical and electrical systems and all associated work."

2. On April 17, 2020, Addendum 4 to the RFP was issued. Addendum 4 stated,

Section 2.01.A: Delete BHS Contractors and Integrators paragraph in its entirety and replace with the following:

A. BHS Contractors:

1. Subject to compliance with requirements, the following firms or approved equal are qualified to perform as BHS contractors. **The firms must possess a State of Hawaii Specialty Contractor’s “C-16a” License prior to bid opening. Failure to obtain the State of Hawaii Specialty Contractor’s “C-16a” License prior to bid opening will result in a non-responsive bid.**

- a. Beumer, Arlington, Tx
- b. Daifuku – Jervis B. Webb, Inc., Farmington Hills, MI
- c. Daifuku – Logan Teleflex, Inc., Louisville, KY
- d. Five Star Airport Alliance, Salt Lake City, UT
- e. ~~Glidepath LLC, Auckland, NZ~~
- f. Pteris Global (USA), Inc., Charlotte, NC
- g. Siemens Airport Logistics, DFW Airport, TX
- h. Vanderlande Industries, Inc., Marietta, GA

(Emphasis added).

3. On April 24, 2020, Petitioner emailed DOT. The email stated,

“As a majority of the BHS “contractors” listed in the bid addenda do not self-perform their own installation and do not possess a 16a specialty license, please confirm it is not the State’s intent to limit the approved BHS contractors to only those two firms, but rather that the installation of the BHS shall be completed by a licensed 16a Contractor in the State of Hawaii, pursuant to the State of Hawaii Department of Commerce and Consumer Affairs Professional and Vocational Licensing Division and the HRS, and that said contractors “shall utilize one of the following BHS Systems pre-approved manufacturers.”

4. DOT responded to Petitioner’s April 24, 2020 email on April 29, 2020 by email, stating,

“The requirements stated in Addendum No. 4 will remain “as is”. Based on our investigation through the Hawaii Business Express website, more than two firms possess the 16a specialty contractor license.”

5. On April 29, 2020, Petitioner emailed DOT. The email stated,

“The only two baggage handling suppliers that have the 16a Contractors Specialty License that the RFI identifies can be used and be considered “responsive” are Five Star and Daifuku

(Webb/Logan -same company)(sic) The other baggage handling system suppliers that you list as approved BHS contractors including Beumer, Pteris Global, Siemens, Vanderlande do not possess a 16a license and therefore by the response you have deemed to be Non-responsive if the Contractors list any of these others. If you are saying that we only need to use one of these approved manufacturers and any contractor for the installation with a 16a license then we would certainly agree that there are several valid 16a contractors. However that is not the way that the RFI response reads. By leaving the language as it stands now you are either limiting the two responsive bidders for the baggage handling system, or you are leaving the job open to a lengthy protest process.

We would request that you provide additional clarification.”

6. DOT did not respond to Petitioner’s email dated April 29, 2020.

7. HPCC submitted a bid proposal dated May 5, 2020. The contract amount was \$144,894,000.00. HPCC’s bid proposal named the following subcontractors:

Name of Subcontractor	Nature and Scope of Work
Western Industrial Contractors Inc	Baggage Handling System Installer
Pacific Power Electrical Contracting LLC	Baggage Handling Controls and Electrical
Beumer Corporation	Baggage Handling System Supplier/Integrator

8. Beumer Corporation (“Beumer”) did not possess a C-16a specialty license at the time of bid opening.

9. Western Industrial Contractors, Inc. (“Western”) possessed a C-16a specialty license at the time of bid opening.

10. Petitioner possessed a C-16a specialty license at the time of bid opening.

11. Petitioner had experience installing BHS systems at several other airport projects.

12. Section 2.01A of the solicitation allowed for other contractors not on the prequalified BHS contractor list to be approved as an “approved equal”.

13. Despite the fact that both Petitioner and Western possessed a C-16a specialty license, Petitioner did not request that DOT qualify Petitioner or Western as an “approved equal” BHS contractor.

14. Intervenor submitted a bid proposal for the project on May 5, 2020. The contract amount was \$146,000,000.00. Intervenor's bid proposal named Five Star Airport Alliance as its BHS contractor.

15. By letter dated June 24, 2020, Respondent rejected Petitioner's bid for the project. The letter stated,

“The rejection is based upon your failure to list an approved BHS Contractor as specified in the project specifications Section 14520, Subsection 2.01A, as amended.”

16. The contract for the project was awarded to Intervenor on June 25, 2020.

17. Petitioner protested the rejection of its bid by letter dated June 29, 2020.

18. The June 29, 2020 protest letter stated, in pertinent part²,

“Although DOT's letter did not state a specific reason for the rejection of its bid, HPCC surmises that, based on DOT's notice of award to second low bidder Nan, Inc. (“Nan”) on June 25, 2020, the reason is that HPCC's listed BHS Contractor does not possess a C-16a specialty contractor license. However, when the project specifications, Hawai'i law relating to the interpretation of specifications, Hawaii law concerning contractor licensing and Hawai'i procurement law are construed together, the C-16a specialty license is a bidder responsibility issue and is not a responsiveness issue. Whether the BHS Contractor itself possesses the C-16a license is also, at best, directory and not mandatory. A contrary interpretation will result in a sole source BHS Contractor procurement without legal justification, create a situation that invites the possibility of bid rigging, and violate public policy reasons for free and open competition by allowing a contractor to engage highly qualified subcontractors. Simply stated, HPCC is a responsible bidder who submitted a responsive bid and HPCC is entitled to have its bid reinstated, and the award of the contract to Nan should be rescinded/cancelled.

19. The protest letter further argued that specification subsection 2.01A (as amended in Addendum 4), is directory and not mandatory. Specifically, the letter stated,

“Whether Beumer possesses a C-16a specialty contractor license is also immaterial when the specifications are interpreted in harmony with the law. In other words, the C-16a license is directory and not mandatory under the circumstances of this solicitation.”

² The protest letter also argued that Intervenor did not meet certain statutory requirements in order to apply the 5% Apprenticeship Agreement Preference to its bid proposal and contract award.

“Addendum No. 4 is silent as to the disposition of the C-13 license necessary to execute the work under former Subsection 2.01(C)(1) and 1.03(C)(2)...”

“If read literally, the specifications require the BHS Contractor to perform all BHS installation work and possess not only a C-16a specialty license but to also possess a C-13 specialty license. Note that none of the vendors listed in Subsection 2.01(A) possesses a C-13 license, including Nan’s and RSI’s BHS Contractor, Five Star Airport Alliance.”

20. The protest letter noted that Addendum 4 was issued while the Contractors License Board meetings had been cancelled for April and May 2020 due to the Governor’s Covid-19 Proclamation, thereby preventing other contractors from obtaining a C-16a license.

21. The protest letter further argued that only one vendor on the prequalified list in Addendum 4 held the C-16a license *and* intended to perform the BHS installation – Five Star Airport Alliance. The protest letter stated,

“[i]f the DOT should choose to ignore the directory nature of the C-16a designation, it will have issued a sole source procurement of the BHS scope of work without any legal justification in violation of the Hawai’i Public Procurement Code and thereby have issued specifications that stymie competition instead of foster it. A further issue is that HPCC requested a proposal from Five Star Airport Alliance but was rebuffed just before bid opening. If this is, indeed, a sole source subcontractor/vendor procurement where that subcontractor/vendor refuses to furnish a proposal to one or more bidders, the possibility and danger of bid rigging will be created (footnote omitted).”

22. The protest letter noted that,

“HPCC’s bid establishes that all of the contractor license classifications necessary to execute the project are possessed by HPCC for the portions that it intends to self-perform and by its listed subcontractors. Beumer and C-16a contractor Western...are proceeding together under a teaming agreement to furnish and install the baggage handling system as they had done on previous and more substantial baggage handling system projects. Pacific Power Electrical Contracting LLC is HPCC’s its baggage handling system control and electrical

subcontractor and possesses a C-13 license. Accordingly, HPCC is a responsible bidder and its bid is responsive in all respects and should not have been rejected by DOT.”

23. Petitioner supplemented its protest by letter dated July 1, 2020 which included supporting exhibits.

24. On July 17, 2020, Petitioner submitted an additional supplemental letter in which it argued that its bid proposal would provide DOT with a completed project in full accordance with all design parameters, and that DOT’s rejection of its bid due to an “immaterial deviation of form over substance” was improper.

25. On January 6, 2021, Respondent issued a denial of Petitioner’s protest (“denial”).

26. The denial stated,

“On April 17, 2020, Addendum 4 notified bidders that use of BHS subcontractors without a valid C-16a license at the time of the bid submission deadline would result in HDOT deeming its bid non-responsive.

In an April 24, 2020 e-mail from HPCC to HDOT, HPCC stated it claim that there were only two BHS suppliers with the C-16a specialty contractor license since it viewed Daifuku (Jervis B. Webb, Inc (sic)) and Daifuku (Logan Teleflex, Inc (sic)) as the same company. (Five Star Alliance was the other subcontractor who held a C-16a license.) HDOT responded that the specifications would remain “as is”.

Thus, on April 29, 2020, HPCC knew that its bid would be determined nonresponsive by listing Beumer who did not possess a C-16A specialty license. In an e-mail to HDOT on that date, HPCC reiterated its concerns that there were only two BHS suppliers with the C-16a s licenses. In that same e-mail, HPCC’s Senior Estimator, stated its perceived concerns that HDOT was restricting the procurement process and was ‘leaving the job open to a lengthy protest process.’

Despite its April 29th e-mail exchange with HDOT, HPCC did not then file a procurement protest knowing that its bid would be rejected for nonresponsiveness if it named Beumer, a BHS subcontractor that did not possess a C-16a license. May 5, 2020 was the final bid submission deadline.

* * *

HPCC should have filed a procurement protest, at the latest, before the May 5, 2020 deadline for submission of bid offers. The submission of HPCC’s bid protest by its letter, dated June

24, 2020, and its July 1, 2020, and July 17, 2020 letter ‘supplements’ are all untimely as to procurement issues See §3-126-4, HAR. To be considered, the supplemental letters must independently meet the timeliness requirement for the filing of protests. The time limitation for filing a valid protest is not tolled by an initial incomplete filing. ... Even assuming arguendo that solicitation issues were timely raised, those claims are unmeritorious.”

27. The denial further stated that HPCC’s naming of Beumer Corporation was nonresponsive to the specifications,

“HPCC named Beumer, an unlicensed C-16a contractor, and which was nonresponsive to the bid specifications. If HPCC perceived the bid specifications to be restrictive and limiting, it should have filed a procurement protest no later than May 5, 2020.”

28. Petitioner filed its request for administrative review to the Office of Administrative Hearings by email on January 13, 2021. Petitioner also filed by email copies of Petitioner’s check for the administrative filing fee and Petitioner’s Procurement Protest Bond on January 13, 2021.

29. Petitioner’s check for the administrative filing fee and the Procurement Protest Bond was received by the Office of Administrative Hearings on January 15, 2021.

III. CONCLUSIONS OF LAW

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

Respondent’s and Intervenor’s Motions are based upon the timeliness of Petitioner’s request for administrative review. Respondent and Intervenor argue that Petitioner’s protest is based on Petitioner’s challenge to the content of the solicitation raised in its emails to DOT shortly after Addendum 4 was issued on April 17, 2020. Respondent and Intervenor argue that Petitioner should have protested the content of the solicitation within five working days after its communications with DOT, or, at the latest, before bid opening on May 5, 2020. Petitioner argues that it is not contesting the content of the solicitation but rather Respondent’s rejection of Petitioner’s interpretation of the requirements in the solicitation. For the foregoing reasons, the Hearings Officer finds that Petitioner’s protest was untimely.

HRS Chapter 103D was drafted to ensure the timely resolution of government contract disputes. As such, Chapter 103D provides for expedited deadlines at all stages of the procurement process. In *GTE Hawaiian Telephone Company Inc. v. Dept. of Finance, County of Maui, PCH-98-6*

(December 9, 1998), the Hearings Officer discussed the importance of the time constraints in fulfilling the purpose of the Procurement Code. The Hearings Officer stated,

“In determining whether Petitioner filed its protest within the required period, the Hearings Officer is mindful of the purpose of the HRS Chapter 103D and its implementing rules ‘to promote economy, efficiency, and effectiveness in the procurement of goods and services.’ (citations omitted). Moreover, it is significant to note that R9-101.03.1 of the Recommended Regulations for the American Bar Association’s Model Procurement Code for State and Local Governments (footnote omitted) suggests a 14-day period within which to file protests rather than the shorter 5-day period provided in HAR §3-126-3(a). It is also noteworthy that although the Recommended Regulations in an Editorial Note suggest that ‘[j]urisdictions may wish to allow consideration of protest filed after [14 days] for good cause shown’, no such exception was included in HAR §3-126-3. **These considerations underscore the importance the Legislature placed on the expeditious processing of protest through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. Those considerations also support the notion that government is entitled to know, with some degree of certainty, when cases may be brought and when they may not. The accomplishment of these objectives requires strict adherence to time constraints for the initiation and prosecution of protests (footnote omitted). (Emphasis added).**”

This Office has consistently held that strict compliance with the time constraints set forth in HRS Chapter 103D is required to effectuate the statute’s underlying purpose. *GTE Hawaiian Telephone Co., Inc., supra*; *Clinical Laboratories of Hawaii, Inc. v. City and County of Honolulu, Dept. of Budget & Fiscal Services, PCH-200-8 (October 17, 2000)*; *CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-007 (December 12, 2007)*; *Paradigm Construction LLC v. Dept of Hawaiian Home Lands, et al., PCH-2009-16 (October 7, 2009)*; *Diversified Plumbing & Air Conditioning v. Hawaii Housing Finance and Development Corp., PCH-2009-11 (June 30, 2009)*; *Maui County Community Television, Inc. dba Akaku Maui Community Television v. Dept. of Accounting and General Services, PCX-2010-3 (July 9, 2010)*.

HRS § 103D-701(a) states in relevant part 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; ...**provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.** (Emphasis added).

The above requirement was designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to minimize the disruption to procurements and contract performance. The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *See, Clinical Laboratories of Hawaii*; PCH 2000-8.

Petitioner argues that it is “challenging the rejection of its bid based on its interpretation of the specifications, which result in [Petitioner’s] position that its bid meets the requirements of responsibility and responsiveness.” Memo in Opp at 25. In support of its position, Petitioner asserts that *Certified Construction, Inc. v. Crawford*, 138 Haw. 315, 382 P.3d 127 (2016) is the controlling authority applicable to this case. In *Certified*, the County of Hawaii included a Special Notice in its bid specifications which identified specialty contractor classifications C-33, C-44, and C-48 as qualified to perform the work and meeting the minimum licensing requirements. The instructions in the solicitation further stated,

“Each of the following specialty contractors listed in the table below have been determined by the County of Hawai’i as qualified to perform all of the work on this project based on the project’s scope and the County’s understanding of the State’s licensing requirements and specialty contractor classifications’ scopes of work. By way of the minimum licensing requirement stated for this project, no additional specialty contractor classifications are required to perform the work; however, the Bidder may list additional licensed subcontractors at its discretion.”

138 Haw. at 128, 382 P.3d at 316.

Certified’s bid was rejected for failing to list a C-44 licensed contractor. Certified argued that the work could have been performed with its C-42 or C-44A licenses. The Hawaii Supreme Court noted that Certified maintained in its protest letter that,

“[t]he Special Notice stated only that the County ‘believes that C-44 contractors are qualified to perform certain work for the project based on the County’s understanding of the State’s licensing requirements.’ However, Certified argued, ‘[T]hat the county believes a certain type of construction work can be performed under a particular license in no way means that the same work cannot be performed under another specialty contractor license.’ Thus, Certified’s protest challenged the disqualification of its bid.”

Id.

The Court further noted that,

“merely because a protest implicates an interpretation of the bid solicitation, it does not mean that it necessarily challenges the contents of the bid solicitation. **There is a significant distinction between the contention that the terms of a bid solicitation are invalid and the contention that the terms of the solicitation are being misinterpreted and thus misapplied. This case clearly involves the latter situation.**”

(Emphasis added). 128 Haw. at 132-133, 382 P.3d at 320-321.

Petitioner argues that its protest was based on its contention that the terms of the solicitation were misinterpreted and misapplied. Although Petitioner argues that there were several ambiguities or deficiencies in the solicitation, Petitioner asserts that its protest did not seek to revise the content of the solicitation and therefore does not challenge the validity of the content. The protest challenged the C-16a requirement, asserting that if the requirement were followed literally, there would only be one prequalified BHS contractor that possessed the C-16a license and intended to install the BHS. Petitioner therefore concluded that the C-16a requirement should be treated as directory and not mandatory to avoid a potential “sole source” procurement. On this basis, Petitioner argues that its protest does not challenge the content of the solicitation, and accordingly pursuant to the *Certified* decision, its protest is timely.

Intervenor argues that this case should be distinguished from *Certified*. Intervenor argues that the bid solicitation in *Certified* contained no specific license requirement, unlike the solicitation in the instant matter. Intervenor argues that the solicitation in this matter clearly specified that all bidders must list an approved BHS contractor from a pre-qualified list who also possessed a State of Hawaii C-16a license. Intervenor notes that the Hawaii Supreme Court also made this distinction in Footnote 9 of the decision. The Supreme Court distinguished *Ludwig Construction, Inc. v. County of Hawaii, Dept. of Public Works*; PCX-2009-006 (December 21, 2009) where the solicitation in question clearly required a C-37 license and the protest argued that the license requirement was improper. Intervenor argues that *Ludwig* is directly applicable to this case.

The Special Notice in *Ludwig* stated,

“In addition to the “A” General Engineering license, *the following specialty licenses have been determined by the County to be required.*

- *C-32 Ornamental, guardrail, signs and fencing*
- *C-37 Plumbing*

Anyone who disagrees with this determination shall submit written comments at least 10 days prior to bid opening.

The protestor's bid was disqualified for failing to include a contractor with the required C-37 specialty license. The protestor's protest letter alleged that "in the bid documents the county asked to use an improper license class on this project."

The Hearings Officer noted that the protest was untimely as the "facts giving rise to Petitioner's protest were known or should have been known by Petitioner at least by September 23, 2009 when Petitioner submitted its Intent to Bid on the Project. Petitioner was therefore required to file its protest by September 30, 2009." The Hearings Officer stated,

"Petitioner attempts to characterize its protest as one based on Respondent's determination that Petitioner is not qualified to perform the required work, rather than on one based on the content of the IFB. According to Petitioner, HRS Chapter 444 and its implementing rules do not require a C-37 specialty license to perform the work called for by the IFB. **Notwithstanding this argument, however, the IFB unequivocally required a C-37 specialty contractor's license. Thus, if Petitioner believed that that requirement was improper, it was obligated to protest within 5 working days, and, in any event, prior to the submission of bids. Rather than submit such a protest, however, Petitioner apparently ignored that requirement and instead, indicated to Respondent its intent to bid.** Having failed to file a timely protest, Petitioner is now barred from contesting the requirement in the solicitation calling for a C-37 specialty contractor's license."

(Emphasis added).

In this matter, Addendum 4 of the solicitation stated:

- A. BHS Contractors:
 - 1. Subject to compliance with requirements, the following firms or approved equal are qualified to perform as BHS contractors. The firms must possess a State of Hawaii Specialty Contractor's "C-16a" License prior to bid opening. Failure to obtain the State of Hawaii Specialty Contractor's "C-16a" License prior to bid opening will result in a non-responsive bid.
 - a. Beumer, Arlington, Tx
 - b. Daifuku – Jervis B. Webb, Inc., Farmington Hills, Mi
 - c. Daifuku – Logan Teleflex, Inc., Louisville, KY
 - d. Five Star Airport Alliance, Salt Lake City, UT
 - e. ~~Glidepath LLC, Auckland, NZ~~
 - f. Pteris Global (USA), Inc., Charlotte, NC
 - g. Siemens Airport Logistics, DFW Airport, TX
 - h. Vanderlande Industries, Inc., Marietta, GA

As in *Ludwig*, the solicitation in this matter clearly required all bidders to identify a BHS contractor from the pre-qualified contractor list that *also* possessed a C-16a specialty license prior to bid opening. The requirement further stated, “[f]ailure to obtain the State of Hawaii Specialty Contractor’s “C-16a” License prior to bid opening will result in a non-responsive bid.”

It is undisputed that Petitioner’s bid proposal did not comply with the C-16a requirement in Addendum 4 as it did not identify a BHS contractor from the approved list that possessed the C-16a license at bid opening. Petitioner also admits that it did not request an “approved equal” designation for Western or itself, despite the fact that both possessed a C-16a license.

Petitioner’s protest argues that there are several deficiencies in the solicitation which forced Petitioner to submit a bid that did not comply with the above requirement:

1. There was allegedly only one pre-qualified BHS contractor that possessed the C-16a license that intended to install the BHS itself;
2. There was not enough time for other BHS Contractors to obtain a C-16a license prior to bid opening; and
3. The project required a C-13 specialty license, but the solicitation did not require a C-13 license and none of the pre-qualified BHS Contractors possessed a C-13 license.

The protest argued,

“Whether the BHS Contractor itself possesses the C-16a license is also, at best, directory and not mandatory. A contrary interpretation will result in a sole source BHS Contractor procurement without legal justification, create a situation that invites the possibility of bid rigging, and violate public policy reasons for free and open competition by allowing a contractor to engage highly qualified subcontractors.”

“Whether Beumer possesses a C-16a specialty contractor license is also immaterial when the specifications are interpreted in harmony with the law. In other words, the C-16a license is directory and not mandatory under the circumstances of this solicitation.”

Petitioner’s protest argues that the solicitation, if read literally, will result in a sole source solicitation because only one BHS contractor on the pre-qualified list possessed the C-16a license and intended to install the BHS itself. The protest argued that the requirement violated the purpose of the procurement code, which is to facilitate competition in government contracts. In effect, Petitioner is arguing that Addendum 4 requirement is *invalid*, which is distinguished from the factual situation *Certified*. As stated in *Ludwig*, if Petitioner believed the C-16a requirement was invalid, it should have

protested the issue prior to bid opening rather than rely on its own interpretation that the requirement must somehow be directory in nature, a conclusion that flies in the face of the plain language of Addendum 4.

Respondent argued in its Motion that the instant case is distinguished from *Certified* because, in *Certified*, the Supreme Court's decision was based upon a finding that the protest did not *challenge* or seek modification of the requirements of the bid solicitation. Respondent argues that Petitioner challenged the requirements of the bid solicitation prior to bid opening by questioning DOT about its intent in requiring a pre-qualified BHS contractor that possessed the C-16a license. Respondent argues that Petitioner's protest "relates back" to the concerns raised by Petitioner in these emails. Respondent argues that *Interior Showplace, Ltd. v. Dept. of Human Services, State of Hawaii*; PCY-2012-009 (April 2, 2012) is instructive on this issue.

In *Interior Showplace*, the Hearings Officer rejected the Petitioner's argument that the C-25 license was not required by the terms of the IFB where the IFB specification stated, "The following information is required:" and a line for "Contractor's C-25 License No." was provided. The Hearings Officer stated, "in a pre-bid period, Petitioner knew that the DHS was insisting on the possession of a C-25 license and Petitioner even asked the DHS to eliminate the requirement. Accordingly, if Petitioner's complaint is that a C-25 license should not have been required, its protest is clearly untimely[.]"

Similarly, in this case, Petitioner was aware of the C-16a requirement when Addendum 4 was issued on April 17, 2020. Petitioner sought to clarify the DOT's intent in requiring the C-16a license and naming a prequalified contractor. Petitioner's emails to DOT sought to confirm that "any contractor for the installation with a 16a license" could be used *in conjunction with* one of the approved BHS contractors. Petitioner further stated,

"However, that is not the way that the RFI reads. By leaving the language as it stands now you are either limiting the two responsive bidders for the baggage handling system, or you are leaving the job open to a lengthy protest process."

Petitioner was clearly concerned about a *literal* application of the C-16a requirement at the time Addendum 4 was issued. As in *Interior Showplace*, Petitioner sought to remove the restrictive application of the requirement. Petitioner even suggested that it may protest the solicitation, obviously in an effort to invalidate the requirement. However, instead of protesting the content of the solicitation at that time, Petitioner chose to ignore the requirement and submitted a bid proposal that did not include a pre-qualified BHS contractor that possessed a C-16a license. Petitioner argues that the C-16a

requirement is not mandatory and its bid proposal was therefore responsive. On that basis, Petitioner argues that its protest does not challenge the content of the solicitation. However, as noted above, this argument was rejected in *Interior* and *Ludwig*.

In this case, Petitioner was aware of the facts giving rise to the protest when DOT responded to Petitioner's email inquiry, which was April 29, 2020. Petitioner's protest should have been filed within 5 working days of that date, or at the latest, by the bid opening date of May 5, 2020. Accordingly, Petitioner is now barred from contesting the requirement in the solicitation calling for a pre-qualified BHS contractor possessing a C-16a license.


On this record, the Hearings Officer finds that the protest that Petitioner's protest was untimely. The Hearings Officer consequently lacks jurisdiction to hear the request. Having found that the protest was untimely and lacking jurisdiction to hear this matter, the Hearings Officer need not address Intervenor's motion on the merits. Similarly, based on the foregoing findings, Petitioner's cross-motion for summary judgment is denied.

IV. DECISION/ORDER

Based on the foregoing considerations, Respondent's Motion to Dismiss Petitioner's Request for Hearing is granted. Intervenor's Motion to Dismiss is granted as discussed herein. Petitioner's Cross-Motion for Summary Judgment is denied. Petitioner's request for hearing in this matter is hereby dismissed. Each party shall bear its own attorney's fees and costs incurred in this matter.

Pursuant to HRS § 103D-709(e), the Procurement Protest Bond shall be deposited into the general fund.

DATED: Honolulu, Hawai' i, _____ February 26, 2021 _____.



DENISE P. BALANAY
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs