



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

In the Matter of	)	PDH-2021-008
)	
NAN, INC.)	
	)	HEARINGS OFFICER’S FINDINGS
Petitioner,	)	OF FACT, CONCLUSIONS OF LAW,
	)	AND FINAL ORDER: 1) GRANTING
vs.	)	PETITIONER’S MOTION FOR
	)	SUMMARY JUDGMENT; 2) DENYING
BOARD OF WATER SUPPLY,	)	RESPONDENT’S MOTION FOR
	)	DISMISSAL OR IN THE
Respondent,	)	ALTERNATIVE SUMMARY
	)	JUDGMENT; AND 3) DENYING
and	)	INTERVENOR’S MOTION FOR
	)	DISMISSAL OR, ALTERNATIVELY
HAWAIIAN DREDGING	)	SUMMARY JUDGMENT
CONSTRUCTION COMPANY, INC.,)	
)	
Intervenor.)	
)	

HEARINGS OFFICER’S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
FINAL ORDER: 1) GRANTING PETITIONER’S MOTION FOR SUMMARY JUDGMENT;
2) DENYING RESPONDENT’S MOTION FOR DISMISSAL OR IN THE ALTERNATIVE
SUMMARY JUDGMENT; AND 3) DENYING INTERVENOR’S MOTION FOR DISMISSAL
OR, ALTERNATIVELY, SUMMARY JUDGMENT

I. INTRODUCTION

On June 25, 2021, Nan, Inc. (“Petitioner”) filed a request for administrative review of Respondent Board of Water Supply’s (“Respondent”) determination of nonresponsibility related to an Invitation for Bids (“IFB”) for Job No.21-053A Kalawahine 180 2.0 MG Reservoir, Honolulu, Hawaii. The matter was thereafter set for a pre-hearing conference on July 6, 2021, and hearing on July 14, 2021. A Notice of Hearing and Pre-Hearing Conference

was duly served on the parties. On July 2, 2021, a stipulation and order was filed permitting Hawaiian Dredging Construction Company, Inc. (“Intervenor”) to intervene in the matter.

On July 6, 2021, a pre-hearing conference was conducted by telephone. Petitioner was represented by its attorneys Micah P. K. Aiu, Esq. and Wyeth M. Matsubara, Esq.; Moana A. Yost, Esq. and Ryan H. Ota, Esq. appeared for Respondent; and Jeffrey M. Osterkamp, Esq. and Keith Y. Yamada, Esq. appeared on behalf of Intervenor. Based on a discussion with the parties, hearing in the matter was continued to July 20, 2021, and deadlines were issued for filing dispositive motions and responses. Hearing on dispositive motions was scheduled for July 16, 2021.

On July 12, 2021, the following motions were filed:

- Petitioner Nan, Inc.’s Motion for Summary Judgment Re: Request for Administrative Proceeding for Review from June 18, 2021 Board of Water Supply Determination of Nonresponsibility, E-filed June 25, 2021;
- Respondent Board of Water Supply’s Motion to Dismiss or in the Alternative Motion for Summary Judgment; and
- Intervenor Hawaiian Dredging Construction Company, Inc.’s Motion for Dismissal or, Alternatively, Summary Judgment.

On July 14, 2021, Petitioner filed its opposition to Respondent and Intervenor’s motions; Intervenor filed its joinder in Respondent’s motion; and Respondent and Intervenor filed their respective oppositions to Petitioner’s motion.

On July 16, 2021, oral argument on the parties’ motions was convened before the undersigned Hearings Officer with Micah P. K. Aiu, Esq. representing Petitioner, Moana A. Yost, Esq. representing Respondent, and Jeffrey M. Osterkamp, Esq. representing Intervenor.

At the conclusion of oral argument on the motions, all parties agreed that there were no disputed issues of material fact and that an evidentiary hearing was not necessary. Based on the parties’ agreement, the July 20, 2021 hearing in the matter was taken off calendar and the Hearings Officer took the parties’ motions under advisement.

Having considered the evidence and arguments presented, along with the memorandum, declaration of counsel, and exhibits attached thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and final order.

II. FINDINGS OF FACT

1. On April 7, 2021, Respondent Board of Water Supply (“Respondent” or “BWS”) posted an Invitation for Bids (“IFB” or “Solicitation”) for Job 21-053A Kalawahine 180 2.0 MG Reservoir (Est. Cost \$19,423,985) (“Project”) on the Hawaii eProcurement Systems (“HePS”).

2. The IFB describes the Project as “CONSTRUCT A 2.0 MG TYPE 1 PRESTRESSED CONCRETE RESERVOIR.”

3. Included as a file attachment to the IFB is “General Instructions to Bidders for Construction Services Rev. 8/2020” (“General Instructions to Bidders”). Also attached to the IFB are the following file attachments:

- Job 21-053A Contractor Questionnaire
- Job 21-053A Tabulation Excel Spreadsheet
- Job 21-053A Prebid Meeting Information
- Job 21-053A Bid Supporting Documents
- Job 21-053A Specifications
- Job 21-053A Plans

4. Section 1.1(C) Qualifications of Bidders, in the General Instructions to Bidders states the following:

Qualification Questionnaire. The Contracting Officer shall determine whether the bidder or prospective bidder has the financial ability, resources, skills, capability, and business integrity to perform the work intended. For this purpose, the Contracting Officer may require any bidder or prospective bidder to submit answers, under oath, to questions contained in a questionnaire prepared by the Contracting Officer. If upon review of the questionnaire or otherwise, the bidder or prospective bidder appears not to be fully qualified or able to perform the intended work, the Contracting Officer shall, after affording the bidder an opportunity to be heard and if still of the opinion that the bidder is not fully qualified to perform the work, refuse to receive or to consider any bid offered by the prospective bidder. Failure to complete the questionnaire will be sufficient cause for the Contracting Officer to disqualify a bidder.

5. The Special Provisions of the IFB, under Section SP-1, Instructions to Bidders, defines the scope of work for the Project as follows:

1. SCOPE OF WORK:
 - A. Transmission Main

- a. Install 24-inch water main, including connections to water mains, valves and valve boxes, manholes, reaction blocks, concrete jackets, pipe corrosion protection.
 - b. Provide traffic control for water main connection.
 - c. Repave all trenches within the roads created from the installation of the water main.
 - d. Reconstruct driveways, sidewalks, curbs and gutters.
 - e. Install concrete jackets for existing crossing sewer lines.
 - f. Provide Horizontal Directional Drilling beneath existing stream for new water main.
 - g. Chlorinate and flush water line.
- B. Reservoir
- a. Perform site demolition, clearing and grubbing.
 - b. Install site erosion control.
 - c. Perform site excavation and grading.
 - d. Install water lines, including reaction blocks, valves and valve boxes, manholes, and vaults.
 - e. Construct site access roads, driveway, and reservoir perimeter roadway.
 - f. Install chain-link fence, security mesh fence and gates.
 - g. Construct concrete swales, rock riprap.
 - h. Construct trench drains, perimeter drains, drain lines and connections to drain inlets.
 - i. Install reservoir piping and appurtenances, including concrete jackets, boxes.
 - j. Chlorinate and flush water lines,
 - k. Construct rock wall and curb and gutter at property lines.
 - l. Construct storm drain manholes, storm drain inlets,
 - m. Construct a 2.0 MG Type 1 prestressed concrete reservoir (Spillway elevation = 180'), deep foundations, and all appurtenances.
 - n. Construct instrument house.
 - o. Construct tieback retaining wall and cantilevered retaining walls.
 - p. Provide landscaping, including irrigation, plantings, relocations of existing trees.
 - q. Install electrical equipment for reservoir operations.

6. The Contractor Questionnaire attached to the IFB provides the following:

Section 3-122-108 of the Hawaii Administrative Rules provides that a determination of responsibility or non-responsibility of an Offeror or prospective Offeror to perform work called for in the solicitation shall be made by the procurement officer on the basis of available information. It is the sole responsibility of the Offeror to review the requirements of the Contractor Questionnaire and complete the required forms in their entirety, and ensure all responses are legible. **Offerors must use the forms provided herein and provide the complete forms with their bid.**

By submitting the Contractor Questionnaire, the Offeror guarantees the truth and accuracy of all statements and answers provided.

The Board of Water Supply (BWS) reserves the right to verify any of the information provided and/or request additional, clarifying or supplemental information.

FACTOR 1: EXPERIENCE

A **Contract Data Sheet** (Attachment 1) shall be completed for a minimum of three (3) and maximum of five (5) contracts performed that are **equal or equivalent** to this project's scope of work as defined in SP-01 Instruction to Bidders, including but not limited to BWS projects.

If the BWS's advertised project work items includes water well/booster replacement, associated valve and piping replacement, Motor Control Center (MCC) upgrades/replacements, Supervisory Control and Data Acquisition (SCADA) control systems upgrades/replacements, electrical systems upgrades, various type pump upgrades/replacements, granular activated carbon (GAC) treatment work, flow tube equipment work, roadway work, drainage work, reservoir repairs, dam repairs/improvements, new reservoir and new facilities, pipeline work, etc. then similar contracts being used as reference to document demonstrated experience are to be provided.

7. Petitioner submitted its bid on May 27, 2021, along with a completed Contractor Questionnaire which included five contract data sheets.

8. Bids for the Project were opened on May 27, 2021. Petitioner's bid of \$18,570,704.70 was the lowest bid followed by Goodfellow Brothers, LLC at \$20,636,745, Kiewit Infrastructure West Co. at \$20,742,752, Intervenor at \$21,107,000, and Ralph S. Inouye Co., Ltd. at \$23,079,583.82.

9. On June 11, 2021, Petitioner received an email from Respondent requesting Petitioner submit one additional project that involves Horizontal Directional Drilling ("HDD").

10. By email dated June 16, 2021, Petitioner responded to Respondent's June 11, 2021 email. Petitioner's response includes the following:

- Scope of HDD on the subject project is \$263K based on our subcontractor Island Mechanical quotation, Nan bid was

\$18,570,704.70 so this is only 1.4%, minor scope, of the Project.

- From our experience with BWS on Hoopili Water System for large diameter pipe, BWS prefers Micro-Tunneling over Horizontal Directional Drilling. MT provides more accurate installation “line and grade” with less tolerances in comparison to HDD. This what we experienced on Hoopili Water System attached, we provided DR Horton with MT & HDD and BWS only approved MT.
- In the subject project spec ‘attached Section SP 29,4 – HDD”, it clearly indicates the qualification requirement for HDD workforce / subcontractor not for the general contractor, because this is specialty work **and all general listed Island Mechanical** as there is not too many specialty contractor perform this work. We intend to use our subcontractor for this scope of work.
- Regardless of all comments above, Nan is providing a project experience for trenchless pipe installation “MT” which is technically exceeds the HDD because it provides more accurate installation method “line & grade” and requires more complex equipment. Typically trenchless pipe installation is performed by a specialty contractor which requires specialty license C68HD which most of general engineering contractors do not have, general contractor role in trenchless pipe installation is ONLY to provide support to specialty contractor performs the work by providing (survey control points, site access, pothole and locate existing utilities, pits excavations, backfill, concrete encasement, excavation shoring, equipment support to offload equipment and delivered materials, traffic control, water source, haul and dispose spoils, dewatering, field testing, and any other minor items that normally excluded by specialty trenchless subcontractor). Please note that MT method requires more support from the general contractor than HDD. Therefore, we believe Hoopili Water System - MT installation exceeds the HDD requirement on this project due to method of installation, complexity, depth, pipe size, length, site condition & soil condition.

11. By letter dated June 18, 2021, Respondent informed Petitioner that it determined Petitioner was nonresponsible.

12. Respondent's June 18, 2021 letter notifies Petitioner that Respondent reviewed the contracts Petitioner submitted in its Contractor Questionnaire and the information provided in Petitioner's June 16, 2021 supplemental responsive. The June 18, 2021 letter includes the following:

While the five projects showed adequate experience working with larger water mains and prestressed concrete reservoirs, none of the projects included any relevant HDD-related work experience.

On June 11, 2021, Nan was asked to submit one (1) additional project Contract Data Sheet to satisfy the requirement of equal or equivalent scope of work. Nan submitted one (1) Contractor Questionnaire response amending their original submission.

- 1) Hoopili Off-Site Water System – Nan described the scope of work as follows:

The Nan Civil Team constructed a 2.5 MG prestressed concrete tank and booster pump station in Kunia. Micro-tunneling under the H-1 Freeway included approximate 810 linear feet of ductile iron pipe, which involved excavation and shoring of the jacking pit and receiving pit, boring a 72-inch diameter tunnel, installing the 72inch steel casing pipe, and filling the void with annulus grouting.

BWS reviewed the additional information and determined that micro-tunneling work was not equivalent to HDD-related work. Therefore the additional contract information submitted by Nan also failed to demonstrate equal or equivalent scope of the Project as required to determine contractor responsibility, thus rendering Nan non responsible.

Pursuant to HAR § 3-122-108(d), "Upon determination of nonresponsibility, the offeror or prospective offeror shall be notified in writing. The decision shall be final unless the offeror or prospective offeror applies for administrative hearing pursuant to section 3-126-42." Nan may request an administrative hearing with the State of Hawaii, Department of Commerce and Consumer Affairs, Office of Administrative Hearings in accordance with HAR § 3-126-42 and HRS §1030-702.

13. Petitioner included with its bid a List of Joint Contractors and Subcontractors form listing Island Mechanical Corporation, specialty contractor classification C-68HD, to perform the Horizontal Directional Drilling (“HDD”) work for the Project.

14. All bidders for the Project, including Intervenor, list Island Mechanical Corporation on their respective subcontractor listing forms to perform the HDD work for the Project.

15. SP 29.4 Horizontal Directional Drilling in the Special Provisions of the IFB details contract requirements for HDD. SP 29.4 provides in part:

B. SUBMITTALS

Prior to commencing work, the Contractor shall submit to the Engineer a minimum of 60 calendar days prior to mobilization of any HDD equipment:

1. Qualification for HDD work force including but not limited to HDD Project Manager, Superintendent, Drill Rig Operator and Tracking Specialist, The Drill Rig Operator and Tracking Specialist can be the same person. Qualifications for each HDD work force member shall include resumes and listing of qualifying projects with descriptions.

16. On June 18, 2021, Intervenor was awarded the contract for the Project.

17. On June 25, 2021, Petitioner filed a request for administrative review of Respondent’s June 18, 2021 determination of nonresponsibility with the Department of Commerce and Consumer Affairs, Office of Administrative Hearings.¹

18. In Petitioner’s June 25, 2018 request for administrative review, Petitioner states:

Nan files the instant request because, first, BWS is required to make an award to the lowest responsive, responsible bidder based on the **criteria set forth in the IFB**. BWS improperly disqualified Nan's bid based on an experience requirement not stated in the IFB and not in conformance with the State law/procurement policy. To the extent that the IFB does not set forth a specific criteria, BWS is without any authority to create criteria for evaluating a bid

¹ On the same date, Respondent protested the award of the contract to Intervenor for the same reasons stated in the instant request for administrative review. On the date of oral argument on the parties’ motions, Respondent had not issued a decision on the Petitioner’s protest of the contract award to Intervenor.

subsequent to bid opening. Secondly, BWS' determination that Nan is non responsible was improper and beyond what is legally permissible rendering its decision, improper, arbitrary and capricious. While BWS may request further determinations of a bidders responsibility, it is clear that such a request must be approved by the Policy Board. HRS §103D-310 is clear that the procurement officer may only “require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board.” The Policy Board has established and published its standard form of questionnaire in which each procurement officer may require any prospective offeror to submit answers. BWS wrongly awarded the Project to Hawaiian Dredging and BWS must rescind its award to Hawaiian Dredging and/or terminate any contract entered into with Hawaiian Dredging for this IFB.

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.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702. The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations and the terms and conditions of the solicitation or contract. HRS §103D-709(i).

A motion for dismissal, or other summary disposition, may be granted as a matter of law where the non-moving party cannot establish a material actual controversy when the motion is viewed in the light most favorable to the non-moving party. *Clinical Laboratories of Hawai'i v. City & County of Honolulu, Dept. of Budget & Fiscal Services, PCH-2000-8 (October 17, 2000) quoting Brewer Environmental Industries, Inc. v. County of Kauai, PCH-96-9 (November 20, 1996).*

Respondent and Intervenor contend that Petitioner's protest was untimely under HRS 103D-701(a). HRS §103D-701(a) states:

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, **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 under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; 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).

According to Respondent and Intervenor, Petitioner's request for review includes complaints that Respondent "cannot lawfully require bidders to show specific experiences in regards to a bidder's responsibility to qualify to bid," that Respondent established "strict specific and arbitrary experience requirements," and that Respondent is precluded from asking bidders to complete any questionnaire other than that represented by Procurement Policy Board's Standard Qualification Questionnaire; and is therefore a protest based on the content of the Solicitation. As such, Petitioner was required to submit its protest within five day working days following the April 7, 2021 posting of the IFB when Petitioner knew or should have known of the facts giving rise to its protest, and, in any event, no later than the May 27, 2021 opening of the bids.

Respondent and Intervenor's argue that the protest is based on the Contractor Questionnaire and therefore a protest of the content of the Solicitation. Petitioner disagrees, and states that it is not protesting the Contractor Questionnaire, per se, but rather that Respondent's determination of nonresponsibility was based on criteria allegedly not included in the IFB.

Respondent and Intervenor contend the Contractor Questionnaire requires bidders provide HDD experience, therefore the Solicitation requires bidders provide specific HDD experience. Intervenor contends the Solicitation requires HDD experience because bidder responsibility was to be determined in part through the Contractor Questionnaire, and the

Contractor Questionnaire required bidders to provide experience in the HDD work. Intervenor argues that the IFB's General Instructions to Bidders make clear that Respondent intended to determine bidder responsibility based on a questionnaire. Intervenor argues that because the Contractor Questionnaire requires bidders to demonstrate experience in the scope of work set forth in Section SP-1, and SP-1's scope of work includes HDD work, the Solicitation required bidder HDD experience. Petitioner disagrees with this interpretation and argues that Respondent does not provide any part of the Solicitation that clearly states that a prospective offeror is required to have HDD experience prior to bid opening, and that Respondent "instead points to a number of different sections when read together should imply that HDD experience was required."

The Hearings Officer agrees with Petitioner. The Hearings Officer can find no language, nor can Respondent or Intervenor point to any part of the Solicitation that clearly requires bidders provide specific HDD experience. The Hearings Officer does note that in addition to being listed in SP-1 Instructions to Bidders, HDD is also referenced in the Special Provisions of the IFB under Section SP 29.4 Horizontal Directional Drilling. While the contract submittals section of SP 29.4 does require the contractor (bidder) to submit qualifications for the HDD work force prior to commencing work, SP 29.4 is absent any requirement that a bidder possess or demonstrate bidder HDD experience. Further, Respondent acknowledges that SP 29.4 is a contractual performance requirement and not a responsibility requirement. Accordingly, the Hearings Officer concludes that there is no requirement in Solicitation that a bidder have HDD experience.

Respondent also contends that Respondent has wide discretion to determine relevant project experience, and that its Contractor Questionnaire requires bidders provide HDD experience. Respondent argues that HRS §103D-310(b), along with HAR §§3-122-108 and 3-122-109 allow Respondent to request additional information necessary for determination of responsibility. Respondent contends that the Contractor Questionnaire provides Respondent with information as to whether a bidder is a responsible bidder for the Project.

HRS §103D-310(b) provides in part:

Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity

necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board.

HAR §3-122-108(b) provides,

If the procurement officer requires additional information, the offeror or prospective offeror may be required to answer questions contained in the sample questionnaire provided by the policy board.

Petitioner disagrees and asserts that HRS §103D-310(b) does not allow the procurement officer to establish additional experience requirements that are arbitrary and capricious and not contemplated in the standard form questionnaire prepared by the Policy Board. Petitioner asserts that Respondent is not permitted to implement additional requirements not expressly stated in the Solicitation.

In determining bidder responsibility, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. HRS §103D-310(b). Pursuant to HAR §3-122-108, the Procurement Officer is required to make its determination of responsibility on the basis of available information, and if additional information is required, may require bidders answer questions contained in the sample questionnaire provided by the policy board. According to HAR §3-122-109, the questionnaire shall request information for the following categories:

- (1) Financial ability;
- (2) Ability to meet material, equipment, facility, and personnel contract requirements;
- (3) References for performance determination;
- (4) References for integrity determination;
- (5) Legal qualifications; and
- (6) Additional information necessary for a determination of responsibility.

HAR §3-122-109 limits the questions and information the procurement officer may ask in the questionnaire. This rule limiting the category and types of additional questions is

consistent with the legislative intent of the Procurement Code to provide for fair and equitable treatment of all persons dealing with the procurement code.

In this case, bids were opened May 27, 2021, and Petitioner's bid of \$18,570,704.70 was the apparent lowest bid for the Project. Along with its bid, Petitioner submitted a List of Joint Contractors and Subcontractors form listing Island Mechanical Corporation, specialty contractor classification C-68HD, to provide the HDD work for the Project. All of the bidders for the Project, including Intervenor, list Island Mechanical Corporation on their respective listing forms to provide the specialty HDD work for the Project. Pursuant to HRS §103D-302(f), Respondent is required to evaluate bids based on the requirements set forth in the IFB. The Hearings Officer notes that Respondent does not claim it was unable to evaluate the bids based upon the available information. Accordingly, the Hearings Officer concludes that the use of the Contractor Questionnaire to determine responsibility was improper. The Hearings Officer further notes that although HRS §103D-310(b) allows for the procurement officer to require offerors submit answers to questions contained in a standard form of questionnaire to be prepared by the policy board to determine responsibility, the Contractor Questionnaire used by Respondent was not the Policy Board's Standard Qualification Questionnaire.

Even if the Hearings Officer determined Respondent was justified in using its Contractor Questionnaire, it is unclear why the Contractor Questionnaire includes an additional requirement not included in the Solicitation, specifically, requiring bidders, rather than subcontractors, to demonstrate HDD experience. Based on the foregoing, the Hearings Officer concludes that Petitioner's appeal is not based on the Contractor Questionnaire, per se, but rather on Respondent's determination of nonresponsibility using criteria allegedly not included in the IFB. Accordingly, the Hearings Officer concludes that Petitioner's protest was not a protest based on the content of the Solicitation. See generally, *Kiewit Pacific Co. v Dept. of Land and Natural Resources, State of Hawaii, et al. PCH-2008-20 (February 20, 2009) (protest of Intervenor's listing of two subcontractors for same scope of work and allegedly ambiguous general building contractor scope of work was not a protest of the application of the Interim General Conditions and Subcontractor Listing form, therefore not a protest based on the content of the solicitation); Frank Coluccio Construction Company v. City & County of Honolulu, et al,*

PCH-2002-7 (August 2, 2002)(because the protest was based in part on information that was not included in the bid documents, the protest was not a protest based on the content of the solicitation).

Notwithstanding the foregoing conclusion, Petitioner was still required to submit its protest within five working days after it knew or should have known of the facts giving rise to the protest.

Respondent notified Petitioner of its determination of nonresponsibility by letter dated June 18, 2021. In its letter to Respondent, Petitioner informs Respondent that pursuant to HAR § 3-122-108(d), the determination of nonresponsibility is final unless Petitioner requests an administrative hearing. On receipt of Respondent's June 18, 2021 letter to Petitioner, Petitioner knew, or should have known, of Respondent's determination of nonresponsibility. On June 25, 2021, Petitioner filed the instant request for administrative review of Respondent's June 18, 2021 determination of Petitioner's nonresponsibility related to the IFB for the Project. Accordingly, Petitioner's June 25, 2021 filing of its request for administrative review was in compliance with the time limitations of HRS §103D-701(a).²

The issue for determination remains whether Respondent's determination of nonresponsibility based on Petitioner's failure to provide HDD experience was proper.

Petitioner argues that Respondent improperly rejected its bid based on criteria not set forth in the Solicitation. Pursuant to HRS §103D-302(f), Respondent is required to evaluate bids solely based on the requirements set forth in the IFB. HRS §103D-302(f) provides as follows:

Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids shall set forth the evaluation criteria to be used.

² Respondent also argues that this Office does not have jurisdiction over Petitioner's allegation that Respondent wrongly awarded the contract for the Project to Intervenor. To the extent that Petitioner seeks review of its protest of the contract award to Intervenor, that issue is not before this Office.

No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(Emphasis added). See also, Hawaii Administrative Rules (“HAR”) §3-122-33.³

The Hearings Officer agrees with Petitioner that HRS §103D-310(b) does not allow the procurement officer to establish additional experience requirements that are not set forth the terms of the IFB. Contrary to Respondent’s assertion, HRS §103D-310(b) does not provide Respondent discretion to request bidder specific experience requirements not set forth in the Solicitation to establish bidder responsibility. In this case, Respondent deemed Petitioner nonresponsible for failing to provide HDD-related work experience in response to the Contractor Questionnaire. The Solicitation does not require bidder HDD experience. Based on the foregoing considerations, the Hearings Officer determines that Respondent erred in deeming Petitioner nonresponsible on the basis that Petitioner failed to provide HDD-related work experience. The Hearings Officer further concludes that Respondent’s use of HDD experience criteria is improper and in violation of HRS §103D-302. Having arrived at this conclusion, the Hearings Officer need not address the other arguments raised by Petitioner. It is, however, necessary to determine an appropriate remedy.

Petitioner argues that the contract should be terminated. Intervenor argues that the only remedy available, should Petitioner’s request for relief be granted, is to remand the matter to Respondent for the agency to ask bidders to refile their responsibility submissions on a standard form of questionnaire prepared by the policy board.

Respondent issued its determination of Petitioner’s nonresponsibility on June 18, 2021. On the same date, June 18, 2021, Respondent awarded the contract for the Project to Intervenor. There is no authority for the Hearings Officer to remand the matter to Respondent for further evaluation after an award as been made. The available remedies after an award of a contract has been made are found under HRS §103D-707.

HRS §103D-707 provides as follows:

³ HAR §3-122-33 provides:
The award shall be made to the lowest responsive, responsible bidder and shall be based on the criteria set forth in the invitation for bids

§103D-707 Remedies after an award. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination;

(2) If the person awarded the contract has acted fraudulently or in bad faith:

(A) The contract may be declared null and void; or

(B) The contract may be ratified and affirmed, or modified, if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be appropriate.

In this case there is no allegation or evidence that Intervenor acted fraudulently or in bad faith. Therefore, the remedies under §103D-707(2) do not apply. Accordingly, the available remedies provided in HRS §103D-707(1) allow the Hearings Officer to either ratify and affirm, modify or terminate the contract.

Pursuant to HRS §103D-707(1)(A), the contract may be ratified and affirmed, or modified only if it is in the best interest of the State. In this case, Petitioner was the lowest bidder with its bid of \$18,570,704.70, and Intervenor's bid of \$21,107,000.00 was the fourth lowest bid. The difference in cost for the two bids is over \$2.5 million. Without a determination that affirming the contract is in the State's best interest, the contract should be terminated. Ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998)*; *Kiewit Pacific C. v. Dept. of Land and Natural Resources et al, PCH-2008-20 (February 20, 2009)*. There is no evidence that affirming the award of the contract to Intervenor is in the best interest of the State. In light of the foregoing considerations, the Hearings Officer concludes that the contract awarded to Intervenor should be terminated.

IV. FINAL ORDER

On the basis of the foregoing considerations, the Hearings Officer concludes that there are no genuine issues of material fact and that Petitioner is entitled to judgment in its favor as a matter of law. Accordingly, the Hearings Officer orders as follows:

- 1) Petitioner’s motion for summary judgment is granted and Respondent’s June 18, 2021 determination of Petitioner’s nonresponsibility is vacated;
- 2) Respondent’s motion to dismiss or for summary judgment is denied;
- 3) Intervenor’s motion to dismiss or for summary judgment is denied;
- 4) The award of the contract to Intervenor is terminated;
- 5) Each party shall bear its own attorney’s fees, costs, and expenses; and
- 6) Petitioner’s cash bond shall be returned to Petitioner upon the filing and service of a declaration by Petitioner attesting that the time to appeal to Circuit Court has lapsed and that no appeal has been timely filed. In the event of a timely application for judicial review of the decision herein, the disposition of the bond shall be subject to the Circuit Court.

DATED: Honolulu, Hawaii, August 9, 2021.



DESIRÉE L. HIKIDA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Hearings Officer’s Findings of Fact, Conclusions of Law, and Final Order: 1) Granting Petitioner’s Motion for Summary Judgment; 2) Denying Respondent’s Motion for Dismissal or in the Alternative for Summary Judgment; and 3) Denying Intervenor’s Motion for Dismissal or, Alternatively, Summary Judgment; In Re Nan, Inc., PDH-2021-008.