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HEARINGS OFFICE



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

In the Matter of

WEST MAUI CONSTRUCTION, LLC.,

Petitioner,

vs.

DEPARTMENT OF FINANCE, COUNTY OF
MAUI,

Respondent,

PDH-2021-004

HEARINGS OFFICER'S
MODIFICATION OF APRIL 14, 2021
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER AFTER
JUDGE KELSEY T. KAWANO'S
REMAND ORDER

Hearing Date: March 23, 2021

Administrative Hearings Officer:
Richard A. Young

HEARINGS OFFICER'S MODIFICATION OF APRIL 14, 2021
FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER
AFTER JUDGE KELSEY T. KAWANO'S REMAND ORDER

On May 26, 2021, the Honorable Kelsey T. Kawano had issued a Decision and Order Reversing in Part, Hearings Officer's Findings of Fact, Conclusions of Law and Final Order Dated April 14, 2021 ("Remand Order").

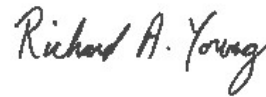
The Court "ORDERED, ADJUDGED AND DECREED,

1. The portion of the Hearing Officer's Findings of Fact, Conclusions of Law, and Final Order Dated April 14, 2021, limiting Appellant's relief to "costs reasonably incurred in connection with the solicitation, including the bid or proposed preparation costs of \$9,286.47" is reversed and vacated;
2. This matter is remanded to the Hearings Officer with instructions to modify the subject Decision and Final Order and to award the disputed underlying contract to West Maui; and
3. Order the release and return of the protest bond to West Maui."

Based upon the Court's Remand Order, the Hearings Officer modifies Paragraphs 2, 3, and 4 of his April 14, 2021 Decision as follows:

2. Petitioner's Protest to the cancellation of the solicitation for the Haiku Park Restroom Project is sustained;
3. The disputed underlying contract, West Maui Construction's bid on the first bid alternative in the amount of \$754,678.00, is awarded to West Maui; and
4. The protest bond shall be released and returned to West Maui.

Dated at Honolulu, Hawaii: June 9, 2021



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

In Re; West Maui Construction, LLC v. Department of Finance, County of Maui; PDH-2021-004; Hearings Officer's Modified Findings of Fact, Conclusions of Law, and Decision After Reversal and Remand.



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

In the Matter of)	PDH-2021-004
)	
WEST MAUI CONSTRUCTION, LLC.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW AND
)	FINAL ORDER
vs.)	
)	
DEPARTMENT OF FINANCE,)	Hearing Date: March 23, 2021
COUNTY OF MAUI,)	Hearings Officer: Richard A. Young
)	
Respondent.)	
)	
)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER

I. INTRODUCTION:

On March 2, 2021, West Maui Construction, LLC (“Petitioner”), filed a request for hearing to contest the Director of Finance, County of Maui’s (“Respondent”) denial of Petitioner’s protest in connection with Respondent’s cancellation of the solicitation for a project referred to as the Haiku Park Restroom Project, Job No. P19/105 Maui, Hawaii (“Project”).

The matter was thereafter set for a March 15, 2021 pre-hearing conference, and hearing on March 23, 2021. At the March 15, 2021 telephonic pre-hearing conference, Petitioner was represented by Charles W. Gall, Esq. and Aaron R. Mun, Esq. Respondent was represented by Caleb P. Rowe, Esq. The March 23, 2021 hearing date was confirmed.

On March 23, 2021, this matter came on for telephonic hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D. Petitioner was represented by Mr. Gall and Mr. Mun, along with

Ryan Grether and Joshua Dean from West Maui Construction; Respondent was represented by Mr. Rowe, along with April Shiotani and Jared Masuda from Maui County.

On April 7, 2021, the parties submitted their written closing briefs.

Having reviewed and considered the testimony of the witnesses, and the exhibits entered into evidence, as well as the written 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 September 28, 2020, Respondent had issued a solicitation for bids for the Haiku Park Restroom Project, Job No. P19/105 Maui, Hawaii (“Project”).

Bids were due and scheduled to be opened on October 29, 2020.

2. The terms of the solicitation called for a base bid for the construction of a new restroom facility with handicap access to the existing Haiku Community Center. The solicitation stated that \$792,000.00 was allocated to the project. Joint Exhibit 4 at page 16.

3. Further, the bid solicitation requested that bidders submit 2 deductive alternate bids, which would be considered if the base bid was greater than the allocated funds. Page 16 of the project manual stated, “The work is divided into a Base Bid with Deductive Alternates. The Deductive Alternates are listed in the order of preference as Deductive Alternates 1 through 2. The award will be made based on priority. If funds are not available for the Base Bid, the award will be made for the starting with Base Bid and removing Deductive Alternates in numerical order listed until funds available are utilized. The County will not shuffle the order of the Deductive Alternates”. Joint Exhibit 4 at page 16.

4. The Project Manual instructed bidders to submit a “Total Sum Base Bid” as well as to “provide alternative bids to be deducted from the amount of the Base Bid if the corresponding change in scope is accepted by the County”. Joint Exhibit 4 at page 63.

5. Under the terms of the solicitation, the first bid alternative removed the building structure, but kept the wastewater system, walkways, and water service. Joint Exhibit 4 at page 33.

6. Under the terms of the solicitation, the second bid alternative

removed both the building structure and the water lateral, water meter box and related piping improvements from the scope of the project. Joint Exhibit 4 at page 33.

7. The terms of the solicitation were amended by Addendum #2, dated October 22, 2020, which stipulated the method of award, noting that if all base bids were above the \$792,000.00 budgeted amount, the deductive alternate would be awarded to the bidder with the lowest base bid. Joint Exhibit 6.

8. The project manual also had a provision allowing the Director to reject any proposal or item bid that he considers unbalanced. Joint Exhibit 4 at page 15.

9. Bids were opened on October 29, 2020. West Maui Construction submitted its bid on October 29, 2020. Petitioner was the lowest bidder with a base bid of \$1,021,481.00.

10. Respondent first noticed that Petitioner's bid may be unbalanced after the bids were opened and Respondent had its consultants review the bids. However, Respondent's February 23, 2021 denial of protest and solicitation cancellation letters do not claim Petitioner's bid was unbalanced.

11. Ryan Grether, a co-owner of West Maui Construction, testified that the County did not reject Petitioner's bid for being unbalanced.

12. Mr. Grether testified that about 10 different subcontractors would be used by Petitioner on the project. Mr. Grether also testified that Petitioner would do the plumbing work on the project.

13. West Maui Construction's bid on the first bid alternative was \$754,678.00. Mr. Grether testified that he determined the amount for the alternate bids by using the numbers submitted by Petitioner's subcontractors, plus the GET tax and a small mark-up. Mr. Grether added that he did not lower the cost of the restroom building just to be awarded the project.

14. Although the bids were opened, Respondent did not award the project.

15. The bid results showed that Petitioner had the lowest base bid of all 10 bidders. However, for deductive alternates 1 and 2, Petitioner had the 2nd highest bids of all 10 bidders. Joint Exhibit 12.

16. The County was concerned that one of Petitioner's subcontractors was not properly licensed. However, this was due to the Department of Commerce and Consumer Affairs lag in updating its records. A November 6, 2020 e-mail from Ms. Shiotani

to Petitioner states that the issue had been resolved and that the County was preparing the contract work for Petitioner under Alternative 1 for \$754,678.00. Joint Exhibit 10.

17. The November 6, 2020 e-mail from Ms. Shiotani to Mr. Grether further states, “I’ll start processing the contract paperwork for West Maui Construction in the amount from Chart 2 (Deductive Alternate 1) \$754,678.00... This project is using lapsing funds so must finish the contract processing and encumber funds by 12/31/2020.”

Joint Exhibit 10.

18. Under the solicitation, the County had 60 days to withhold award of the contract from the date of bid opening. Joint Exhibit 4 at page 11.

19. At the hearing, both April Shiotani, Maui County’s Capital Improvements Project Coordinator, and Jared Masuda, Maui County’s Control Purchasing Agent, testified that based upon cost and time efficiencies, how the project was permitted, as well as warranty and responsibility considerations, the County’s intent was to have just one contractor complete the entire solicitation.

20. However, on cross-examination, both Ms. Shiotani and Mr. Masuda acknowledged that the solicitation did not state that it was an important factor that the entire scope of the project be done by a single contractor.

21. Further, Ms. Shiotani, admitted that when the solicitation was issued, the County anticipated it would not have funds to award the entire project. Because of this, the solicitation was designed with deductive alternatives which removed the bathroom building.

22. Jared Masuda is the Control Purchasing Agent for Maui County. Mr. Masuda drafted the February 23, 2021 letter cancelling the solicitation as the base bids exceeded available funds and funds for this project had lapsed at the end of the 2020 calendar year. No other reason for the cancellation was in the solicitation cancellation letter, including whether it was in the best interest of the County to cancel the solicitation.

23. However, Mr. Masuda testified that the County denied Petitioner’s protest as it was not in the County’s best interest to award Petitioner alternate 1 and pay out \$754,678.00 for site work without a restroom. Further, the County was concerned that Petitioner’s bid was unbalanced and that funds had lapsed.

24. On cross-examination, Mr. Masuda testified that Petitioner’s bid was not rejected for being unbalanced.

25. Respondent was concerned that West Maui Construction, LLC's bid was unbalanced for the alternatives as compared to the total sum base bid. On November 10, 2020, Ms. Shiotani wrote to Petitioner asking that if awarded the contract, would Petitioner hold the cost of the restroom structure at the level reflected in its bid until additional funding could be secured and the contract amended. *See, Joint Exhibit 8 at page 3.*

26. Specifically, Ms. Shiotani testified that Petitioner's bid for the restroom portion of the project was \$266,803.00. The other contractors' bids for the restroom portion of the project were 2 to 4 times greater than this amount.

27. In a November 13, 2020 response, Petitioner stated it could not commit to holding the cost of the restroom structure. *See, Joint Exhibit 8 at pages 2 and 3.*

28. Mr. Grether testified that after receiving the November 10, 2020 e-mail from Ms. Shiotani, he contacted Petitioner's subcontractors to see if they were able to hold their prices. Mr. Grether was informed that because the cost of materials had escalated, especially those necessary to complete the restroom building, which included the costs of lumber, steel, pipe fittings, copper piping, and PVC materials; the subcontractors were not able to maintain their prices.

29. Mr. Grether added that under the procurement rules, once a subcontractor is named as a part of a bid, regulations prevent a substitution of the subcontractor except in limited situations.

30. Mr. Grether further testified that except for the term allowing the County 60 days from bid opening to award the contract, nothing else in the solicitation required the bidder to hold their prices for more than 60 days. Further, the solicitation did not require a bidder to hold its prices to build the restroom building if the deductive alternative was awarded.

31. A November 18, 2020 e-mail from April Shiotani to Petitioner stated, "The County of Maui will move forward with acquiring the necessary funds for completing the full project; therefore will not be awarding a construction contract for the project at this time, and will rebid the project once funding is available." *See, Joint Exhibit 8 at page 1.*

32. On November 25, 2020, Petitioner protested Respondent not awarding Petitioner the contract, stating in its protest letter, in part, that "This action by the County is inconsistent with the terms of the solicitation which contemplated that the County would not have sufficient funds necessary to complete the full project and stated that if full

funds were not available to do the entire project it would move forward with the portions of the project that it had funds for.” *See, Joint Exhibit 2 at page 2.*

33. On February 23, 2021, Respondent wrote a letter to Petitioner entitled “Subject: Protest Response Job No. P19/015” (“denial of protest letter”). The denial of protest letter states, in part, “Response: The County of Maui maintains that it has the right to cancel a solicitation based on lack of funding (copy of notice attached). While the solicitation did include deductive alternates, it is not in the County’s best interest to award a contract for \$754,678.00 and for it to not include the restroom building which was the basis of the project.” *See, Joint Exhibit 1 at page 1.*

34. The next paragraphs of Respondent’s February 23, 2021 denial of protest letter state, “The Department of Parks and Recreation is seeking to have funds re-appropriated by the County Council and did intend to award the base bid, without deductive alternates, to West Maui Construction once that is completed. However, due to the amount of time that will have passed by then, West Maui Construction would not be able to hold their original prices. It would not be legal, or fair to other contractors, if West Maui Construction was allowed to submit updated and revised prices. As such, the Department is planning to re-bid the project if they are able to obtain additional funding from the County Council to fund the project in its entirety.” “The County of Maui is denying your protest.” *See, Joint Exhibit 1 at page 1.*

35. On February 23, 2021, Respondent also issued a solicitation cancellation letter, entitled “Subject: Haiku Park Restroom, Job No. P19/015” (“solicitation cancellation letter”). In this letter, Respondent writes, “The County of Maui is canceling this solicitation in accordance with Hawaii Administrative Rules HAR 3-122-96, as prices exceeded available funds, and the funds have since lapsed at the end of the 2020 calendar year. The Department of Parks and Recreation is planning to seek additional funding through County Council and plans to re-bid the project sometime during this fiscal year. I apologize for the delay in getting this letter out...” *See, Joint Exhibit 13.*

36. In its February 23, 2021 solicitation cancellation letter, Respondent cites HAR Section 3-122-96 as its basis to cancel the solicitation. The applicable section of this rule is HAR §3-122-96(a)(2), which provides, in relevant part:

Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:

* * * *

(2) Cancellation after opening but prior to award:

- (A) The goods, services, or construction being procured are no longer required;
- (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
- (C) The solicitation did not provide for consideration of all factors of significance to the agency;
- (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) All otherwise acceptable offers received are at clearly unreasonable prices;
- (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or
- (G) *A determination by the chief procurement officer or a designee that a cancellation is in the public interest.*

* * * *

(Emphasis added).

37. At the hearing, Petitioner submitted a Tabulation of Bidding Expenses dated March 19, 2021. Mr. Grether prepared this document which shows the costs to prepare Petitioner's bid, using the number of hours taken to prepare the bid, the wage rate of the individuals working on the bid, and accounting and payroll staff costs. The document shows the number of hours and costs up to the October 29, 2020 bid opening: \$4,855.57; and after the bid opening: \$4,430.90; with a total of \$9,286.47. *See, Joint Exhibit 14.*

38. Subsequent to the October 29, 2020 bid opening and Petitioner's November 25, 2020 protest, Maui County's April Shiotani continued e-mailing Petitioner to inquire whether Petitioner would be able to hold its prices for the project. There were e-mails and telephone calls between the parties in January and February 2021. This correspondence shows that Petitioner had to check its numerous subcontractors and their suppliers to see if costs could be held. Petitioner also informed its attorney of the status of the situation. *See, Joint Exhibit 7.*

39. At the hearing, Ms. Shiotani testified that as of March 19, 2021, the County Council had approved Maui County's budget amendment, so that currently, there should be funds for the low bid amount, \$1,021,481.00.

40. On March 2, 2021, Petitioner filed a request for hearing with the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs.

41. The matter was thereafter set for a March 15, 2021 Pre-Hearing Conference, and Hearing on March 23, 2021.

III. ANALYSIS:

The issue is whether Respondent’s decision to cancel the solicitation after the opening of bids for the Project was proper.

Under HRS Section 103D-308, an invitation for bids or other solicitation may be cancelled when it is in the best interests of the governmental body who issued the solicitation to do so. HRS §103D-308 provides:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the governmental body* which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefore shall be made part of the contract file.

(Emphasis added).

In *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004)*, the Hearings Officer noted that HRS §103D-308 “reflects a policy of giving precedence to the government’s ability to cancel a solicitation over a bidder’s interest in having the solicitation go forward where the government’s ‘best interests’ would be served.”

In determining whether the cancellation of a solicitation after bid opening is in the government’s best interest, Hawaii Administrative Rule (“HAR”) §3-122-96(a)(2) provides, in relevant part:

Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:

* * * *

(2) Cancellation after opening but prior to award:

(A) The goods, services, or construction being procured are no longer required;

- (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
- (C) The solicitation did not provide for consideration of all factors of significance to the agency;
- (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) All otherwise acceptable offers received are at clearly unreasonable prices;
- (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or
- (G) *A determination by the chief procurement officer or a designee that a cancellation is in the public interest.*

* * * *

(Emphasis added).

In promulgating HAR §3-122-96(a)(2), the Procurement Policy Board (“Board”):

presumably was cognizant of the potentially serious adverse impact a cancellation might have on the integrity of the competitive sealed bidding system once bids are revealed. Among other things, the cancellation of a solicitation after bid opening tends to discourage competition because it results in making all bidders’ prices and competitive positions public without an award. With that in mind, the Board identified certain specific circumstances in HAR §3-122-96 (a)(2) where the cancellation of a solicitation *may* be in the best interests of the agency and therefore justified, even after bid opening. Such a determination, however, must be consistent with the underlying purposes of the Procurement Code, including, but not limited to, the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public’s confidence in the integrity of the system (footnote omitted).

Phillip G. Kuchler, Inc., supra.

Thus, although the procuring agency generally has broad discretion to cancel a solicitation, its determination that cancellation is in the best interests of the government must have a reasonable basis because of the potential adverse impact of cancellation on the

competitive bidding system after the bids have been opened and the prices have been exposed¹.

The facts showed that Respondent had issued a solicitation for bids for the Haiku Park Restroom Project. The terms of the solicitation called for a base bid for the construction of a new restroom facility with handicap access to the existing Haiku Community Center. The solicitation stated that \$792,000.00 was allocated to the project. Under the terms of the solicitation, bidders were also requested to submit 2 deductive alternate bids, which would be considered if the base bid was greater than the allocated funds. The first bid alternative removed the building structure, but kept the wastewater system, walkways, and water service. The second bid alternative removed both the building structure and the water lateral, water meter box and related piping improvements from the scope of the project.

Bids were opened on October 29, 2020. West Maui Construction was the lowest bidder with a base bid of \$1,021,481.00. West Maui Construction's bid on the first bid alternative was \$754,678.00.

However, after the bids were opened, Respondent sent a November 10, 2020 letter to Petitioner asking that if awarded the contract, would Petitioner hold the cost of the restroom structure at the level reflected in its bid until additional funding could be secured and the contract amended. In a November 13, 2020 response, Petitioner stated it could not commit to holding the cost of the restroom structure.

On November 18, 2020 Maui County sent an e-mail to Petitioner stating "The County of Maui will move forward with acquiring the necessary funds for completing the full project; therefore will not be awarding a construction contract for the project at this time, and will rebid the project once funding is available."

On November 25, 2020, Petitioner protested Respondent not awarding Petitioner the contract, stating in its protest letter, in part, that "This action by the County is inconsistent with the terms of the solicitation which contemplated that the County would not have sufficient funds necessary to complete the full project and stated that if full funds were not available to do the entire project it would move forward with the portions of the project that it had funds for."

Petitioner asserts that Respondent's cancellation of the solicitation was

¹ Cancellation of a solicitation also means that bidders have expended labor and incurred costs in the preparation of

improper. Petitioner points out that Respondent's February 23, 2021 solicitation cancellation letter, states, "The County of Maui is canceling this solicitation in accordance with Hawaii Administrative Rules HAR 3-122-96, as prices exceeded available funds, and the funds have since lapsed at the end of the 2020 calendar year. The Department of Parks and Recreation is planning to seek additional funding through County Council and plans to re-bid the project sometime during this fiscal year." Respondent cites HAR Section 3-122-96 as its basis to cancel the solicitation. The applicable section of this rule is HAR §3-122-96(a)(2)(G), which provides that a solicitation may be cancelled after opening, but prior to award, if a determination by the chief procurement officer or a designee that a cancellation is in the public interest.

Respondent's other February 23, 2021 letter, its denial of protest letter, states, in part, "Response: The County of Maui maintains that it has the right to cancel a solicitation based on lack of funding (copy of notice attached). While the solicitation did include deductive alternates, it is not in the County's best interest to award a contract for \$754,678.00 and for it to not include the restroom building which was the basis of the project." The denial of protest letter further states, "The Department of Parks and Recreation is seeking to have funds re-appropriated by the County Council and did intend to award the base bid, without deductive alternates, to West Maui Construction once that is completed.... the Department is planning to re-bid the project if they are able to obtain additional funding from the County Council to fund the project in its entirety."

Petitioner argues against that the reasons for cancellation in Respondent's February 23, 2021 letters. Specifically, Petitioner argues that Respondent's February 23, 2021 solicitation cancellation letter stating that prices exceeded available funds, and the funds have since lapse at the end of the 2020 calendar year are false and self-imposed. Further, Petitioner argues that although Respondent asserts that HAR §3-122-96(a)(2)(G) states that a solicitation may be cancelled after opening but prior to award if a determination by the chief procurement officer or a designee that a cancellation is in the public interest; still, the agency is required to act with fairness to all those involved in the procurement process.

their bids without the possibility of acceptance.

A. Whether Prices Exceeded Available Funds

Although Respondent asserts that the price of the Haiku Park Restroom project exceeds the available funds; this statement is only true as to the total sum base bid. As Petitioner argues, the solicitation was drafted calling for not only a base bid for the entire project, but also alternate bids for less than the complete project. Alternative 1 removed the building structure, but kept the wastewater system, walkways, and water service. Alternative 2 removed both the building structure and the water lateral, water meter box and related piping improvements from the scope of the project.

The terms of the solicitation called for a base bid for the construction of a new restroom facility with handicap access to the existing Haiku Community Center. The solicitation stated that \$792,000.00 was allocated to the project. Further, page 16 of the project manual stated, “If funds not available for the base bid, the award will be made starting with the lowest base bid”.

West Maui Construction was the lowest bidder with a base bid of \$1,021,481.00. West Maui Construction’s bid on the first bid alternative was \$754,678.00.

After the bids were opened, Respondent wrote a November 10, 2020 letter to Petitioner, asking that if awarded the contract, would Petitioner hold the cost of the restroom structure at the level reflected in its bid until additional funding could be secured and the contract amended. In a November 13, 2020 response, Petitioner stated it could not commit to holding the cost of the restroom structure.

Respondent did not issue an award of the project. Instead, on November 18, 2020, an e-mail was sent to Petitioner stating, “The County of Maui will move forward with acquiring the necessary funds for completing the full project; therefore will not be awarding a construction contract for the project at this time, and will rebid the project once funding is available.”

At the hearing, both April Shiotani and Jared Masuda testified that the intent of the County was to have just one contractor complete the entire solicitation. The reasons to have a single contractor were based upon cost and time efficiencies, how the project was permitted, as well as warranty and responsibility considerations. Mr. Masuda added that the County was concerned that Petitioner’s bid was unbalanced; but admitted on cross-examination that Petitioner’s bid was not rejected for being unbalanced.

On November 25, 2020, Petitioner protested Respondent not awarding

Petitioner the contract, stating in its protest letter, in part, that “This action by the County is inconsistent with the terms of the solicitation which contemplated that the County would not have sufficient funds necessary to complete the full project and stated that if full funds were not available to do the entire project it would move forward with the portions of the project that it had funds for.”

On February 23, 2021, Respondent wrote 2 letters to Petitioner entitled “Subject: Protest Response Job No. P19/015”; and a solicitation cancellation letter, entitled “Subject: Haiku Park Restroom, Job No. P19/015”.

The denial of protest letter states, in part, “Response: The County of Maui maintains that it has the right to cancel a solicitation based on lack of funding (copy of notice attached). While the solicitation did include deductive alternates, it is not in the County’s best interest to award a contract for \$754,678.00 and for it to not include the restroom building which was the basis of the project.”

Respondent’s other February 23, 2021 letter to Petitioner, the solicitation cancellation letter, entitled “Subject: Haiku Park Restroom, Job No. P19/015”, states “The County of Maui is canceling this solicitation in accordance with Hawaii Administrative Rules HAR 3-122-96, as prices exceeded available funds, and the funds have since lapsed at the end of the 2020 calendar year. The Department of Parks and Recreation is planning to seek additional funding through County Council and plans to re-bid the project sometime during this fiscal year.”

Respondent argues that the Project Manual instructed bidders to submit a “Total Sum Base Bid” as well as to “provide alternative bids to be deducted from the amount of the Base Bid if the corresponding change in scope is accepted by the County”. According to Respondent, the corresponding change in scope (bid alternative) was not accepted by the County.

However, as Petitioner argued in its Reply Brief, it makes little sense that the County did not accept the bid alternates when the County specifically requested bidders submit bid alternatives. The bid solicitation requested that bidders submit 2 deductive alternate bids, which would be considered if the base bid was greater than the allocated funds. Page 16 of the project manual stated, “The work is divided into a Base Bid with Deductive Alternates. The Deductive Alternates are listed in the order of preference as Deductive Alternates 1 through 2. The award will be made based on priority. If funds are not available for the Base Bid, the award will be made for the starting with Base Bid and

removing Deductive Alternates in numerical order listed until funds available are utilized. The County will not shuffle the order of the Deductive Alternates”.

Further, by the way the County structured the solicitation, it is apparent that the County did not expect any Base Bid to fall below the \$792,000.00 allocated to the project. Knowing that funds would lapse by the end of the 2020 calendar year, the solicitation called for alternate bids so at least the infrastructure for the restroom project could be built before the funds lapsed.

As Petitioner argues, the price did not exceed available funds. In the solicitation, Respondent stated that there was \$792,000.00 allocated to the project. Further, page 16 of the project manual stated, “If funds not available for the base bid, the award will be made starting with the lowest base bid”. Petitioner’s bid for Alternative 1 was \$754,678.00. This is less than the \$792,000.00 allocated. Therefore, the Hearings Officer agrees with Petitioner that Respondent’s claim that prices exceeded available funds is false.

B. Whether Respondent Acted With Reasonable Promptness to Use Funds that Were Scheduled to Lapse at the End of the 2020 Calendar Year

As Petitioner argues, the agency has the duty to act with reasonable promptness. HRS Section 103D-302(h) provides that “The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.”

Petitioner argues that it provided Maui County with its protest to the County’s not awarding the project in its November 25, 2020 letter. By Respondent’s own admission, the funds for the project expired at the end of calendar year 2020. As Petitioner argues, Respondent had over a month from the date it knew Petitioner was protesting the not awarding of the project to address Petitioner’s protest. It was not until February 23, 2021 that Respondent issued its denial of the protest. This is long after the majority of the funds lapsed at the end of 2020. In this situation, this is contrary to HRS Section 103D-302(b), which provides that “The contract shall be awarded with reasonable promptness.”

Respondent argues that under the solicitation, it had 60 days to withhold award of the contract from the date of bid opening. However, as Petitioner argues, even if Respondent had asserted its right to delay the award of the contract, the facts show that the bids were opened on October 29, 2020. Even if Respondent used the entire 60 days, this period would lapse before the end of the 2020 calendar year, when the majority of the

funding expired. Respondent would have had 3 days to then award the project, which would be done before funds lapsed.

As Petitioner argues, given the facts in this case, to cite as a reason that funds have lapsed, is a self-imposed reason for not having funds. The Hearings Officer agrees with Petitioner that Respondent's claim that the funds have since lapsed at the end of the 2020 calendar year is self-imposed. Therefore, the Hearings Officer concludes that Respondent did not act with reasonable promptness and caused the majority of funds available for the project to lapse.

C. **Whether It Is In the Best Interests of Maui County to Cancel the Solicitation**

Under the statute, the cancellation of solicitations is governed by HRS §103D-308, which provides:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the governmental body* which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefore shall be made part of the contract file.

In its February 23, 2021 solicitation cancellation letter, Respondent cites HAR Section 3-122-96 as its basis to cancel the solicitation. The applicable section of this rule is HAR §3-122-96(a)(2) provides, in relevant part:

Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:

* * * *

(2) Cancellation after opening but prior to award:

- (A) The goods, services, or construction being procured are no longer required;
- (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
- (C) The solicitation did not provide for consideration of all factors of significance to the agency;

- (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) All otherwise acceptable offers received are at clearly unreasonable prices;
- (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or
- (G) *A determination by the chief procurement officer or a designee that a cancellation is in the public interest.*

* * * *

(Emphasis added).

Respondent's other February 23, 2021 letter to Petitioner, the denial of protest letter, states, in part, "Response: The County of Maui maintains that it has the right to cancel a solicitation based on lack of funding (copy of notice attached). While the solicitation did include deductive alternatives, it is not in the County's best interest to award a contract for \$754,678.00 and for it to not include the restroom building which was the basis of the project."

However, it is inconsistent for Respondent to argue that the restroom building was the basis of the project, when it structured the bidding for the project such that if funds were not available for the entire project, the alternative bids called for the project to be done without the restroom building.

As Petitioner argues in its November 25, 2020 Protest letter, "This action by the County is inconsistent with the terms of the solicitation which contemplated that the County would not have sufficient funds necessary to complete the full project and stated that if full funds were not available to do the entire project it would move forward with the portions of the project that it had funds for."

The Hearings Officer agrees with Petitioner that it is inconsistent for Respondent to claim that "it is not in the County's best interest to award a contract for \$754,678.00 and for it to not include the restroom building which was the basis of the project"; while the County had originally structured the bidding for the project such that if funds were not available for the entire project, the first bid alternative called for the project to be done without the restroom building.

At the hearing and in its written closing argument Respondent argues that it is in the best interest of the County to cancel the solicitation as cancellation falls within

HAR §3-122-96(a)(2)(C) which provides that a solicitation may be cancelled if the solicitation did not provide for consideration of all factors of significance to the agency.

Respondent argues that, “Ms. Shiotani testified that because the contract didn’t set forth the County’s intent to operate under a single contract, did not mention holding the price for the bathroom portion of the project until additional funding could be secured for a contract amendment, did not provide that any contract based solely on the deductives to go to the lowest bidder for that deductive, and didn’t say the project would only move forward if funding for the full scope of the project was secured, the solicitation “failed to provide for consideration of all factors that were significant to the County.” “ *Respondent’s Closing Brief at page 10.*

Respondent argues that awarding the contract piecemeal, by just awarding Petitioner Deductive Alternate 1 which removed the building structure, would not meet the County’s need to provide a usable restroom facility; a consideration that is significant to the agency, but something that the agency failed to take into consideration when drafting the solicitation.

However, as noted above, the argument that the County had not taken into consideration the need for a usable restroom facility was not made in its February 23, 2021 denial of protest and solicitation cancellation letters. As noted above, HRS §103D-308 states, in part, that when asserting that it is in the best interests of the governmental body which issued the invitation to cancel the solicitation, the reasons for the cancellation shall be made part of the contract file. Contrary to Respondent’s written closing arguments that awarding the contract piecemeal by just awarding Petitioner Deductive Alternate 1, would not meet the County’s need to provide a usable restroom facility; the solicitation was drafted by the County for a possible construction of a portion of the project without the restroom.

For Respondent to make the argument that its own solicitation did not take into consideration all of the factors significant to it, would put adverse consequences upon another party for its own inadequacies. It raises the question as to why the County would design a solicitation which would likely not have sufficient funds for the entire project, and include deductive alternates which the County was bound to accept since the alternate bids would almost certainly fall under the allocated amount of \$792,000.00. Why would the County design a solicitation that would allow a portion of the work to go forward if this did not meet its needs? As Petitioner argues in its closing brief, “the County must honor the terms of its own solicitation.” *Petitioner’s Closing Brief at page 8.*

Therefore, the Hearings Officer concludes that Respondent cannot now claim that it is in the best interests of Maui County to cancel the solicitation as the agency failed to take into consideration when drafting the solicitation considerations that are significant to the agency.

Based on all of these considerations, the Hearings Officer concludes that the cancellation of the solicitation was inconsistent with HRS Chapter 103D and its implementing rules.

Relief Available to Petitioner

In its Petition for Hearing Relief and its Closing Argument, Petitioner requests that it be awarded the contract under the first deductive alternative bid for \$754,678.00. Alternatively, Petitioner requests that it be awarded “actual costs reasonably incurred in connection with the solicitation, including bid or proposed preparation costs, but not attorney’s fees.”

Under HRS Section 103D-701(g):

“In addition to any other relief, when a protest is sustained and the protestor should have been awarded the contract under the solicitation but is not, then the protestor shall be entitled to the actual costs reasonably incurred in connection with the solicitation, including bid or proposal preparation costs but not attorney’s fees.”

As Petitioner argues, Maui County failed to award the contract to the lowest responsive and responsible bidder; issued a false statement regarding the bid exceeding the available funds as Petitioner’s bid for deductive alternate 1 was less than the available funds; and failed to act with reasonable promptness in not awarding the contract and letting the majority of the funding lapse.

The evidence presented showed even after the bid opening, Ms. Shiotani continued e-mailing Petitioner to inquire whether Petitioner would be able to hold its prices for the project. There were e-mails and telephone calls between the parties in January and February 2021. This correspondence shows that Petitioner had to check its numerous subcontractors and their suppliers to see if costs could be held. Petitioner also informed its attorney of the status of the situation. This work is in connection with the solicitation and is associated with the costs to prepare the bid.

Petitioner’s Tabulation of Bidding Expenses shows the costs to prepare Petitioner’s bid, using the number of hours taken to prepare the bid, the wage rate of the individuals

working on the bid, and accounting and payroll staff costs. The document shows the number of hours and costs up to the bid opening on October 29, 2020, \$4,855.57; and after the bid opening, \$4,430.90; with a total of \$9,286.47 for bid preparation costs.

The evidence also showed that the majority of the funding for the project had lapsed at the end of the 2020 calendar year. Because the majority of the funding for this project has lapsed, at the time of the solicitation cancellation it was not possible to award Petitioner the contract under the first alternative bid for \$754,678.00. The testimony of Ms. Shiotani is that as of March 19, 2021, the County Council had approved Maui County's budget amendment, so that currently, there should be funds for the low bid amount, \$1,021,481.00. Although Petitioner requests that it be awarded the contract under the first deductive alternative bid for \$754,678.00, under HRS Section 103D-706 and HAR Section 3-126-37, "If prior to the award it is determined that a solicitation or proposed award of a contract is in violation of the law, then the solicitation or proposed award shall be: (1) Cancelled; or (2) Revised to comply with the law." In this case, as no award has been made, an award of the contract cannot be ordered.

However, under HRS Section 103D-701(g), Petitioner is entitled to its alternatively requested relief of actual costs reasonably incurred in connection with the solicitation, including the bid or proposed preparation costs, of \$9,286.47.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. Respondent's decision to cancel the solicitation for the Haiku Park Restroom Project after the opening of bids for the Project was improper as:
 - a. the price of the first bid alternative did not exceed available funds; and under the terms of the solicitation, the contract should have been awarded to West Maui Construction, LLC;
 - b. Respondent did not act with reasonable promptness and caused the majority of the funds available for the project to lapse; and
 - c. Respondent has not shown that it is in the best interests of Maui County to cancel the solicitation.

Petitioner is the prevailing party in this matter;

2. Petitioner's Protest to the cancellation of the solicitation for the Haiku Park Restroom Project is sustained; and Petitioner is entitled to an award of "actual costs reasonably incurred in connection with the solicitation, including the bid or proposed preparation costs" in the amount of \$9,286.47;
3. Each party shall bear its own attorney's fees incurred in this matter; and
4. Petitioner's protest bond in the amount of \$5,107.41 shall be returned upon the filing of an affidavit by Petitioner that no appeal of this decision has been made, and that all time deadlines to appeal have lapsed.

Dated at Honolulu, Hawaii: April 14, 2021



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