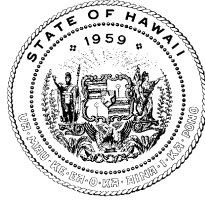


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HEARINGS OFFICE



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

In the Matter of

SCHNITZER STEEL HAWAII CORP.,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU
DEPARTMENT OF BUDGET AND
FISCAL SERVICES,

Respondent.

PDH-2021-010

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
FINAL ORDER (1) GRANTING
RESPONDENT'S MOTION TO
DISMISS, OR IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT
FILED ON SEPTEMBER 7, 2021; AND
(2) DENYING PETITIONER'S CROSS-
MOTION FOR SUMMARY JUDGMENT
FILED ON SEPTEMBER 9, 2021

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL (1) GRANTING RESPONDENT'S MOTION TO DISMISS,
OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT FILED ON
SEPTEMBER 7, 2021; AND (2) DENYING PETITIONER'S CROSS-MOTION
FOR SUMMARY JUDGMENT FILED ON SEPTEMBER 9, 2021

I. INTRODUCTION

On August 26, 2021, Petitioner SCHNITZER STEEL HAWAII CORP. ("Petitioner") filed a request for administrative review to contest the CITY AND COUNTY OF HONOLULU DEPARTMENT OF BUDGET AND FISCAL SERVICES's, ("Respondent") August 19, 2021 denial of its protest in connection with a Request for Sealed Bids for the sale and removal of scrap metal from various sites, Solicitation Document No. RFB-ENV-1501429 ("Solicitation"). Petitioner's request was made pursuant to Hawaii Revised Statutes ("HRS") §§ 103D-701D(e), 103D-709, and 103D-712(a), and Hawaii Administrative Rules ("HAR") §§ 3-126-42 and 3-126-59.

On August 30, 2021, 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 September 3, 2021 and the hearing was scheduled for September 10, 2021. Respondent filed Respondent's Response to Petitioner's Request for Hearing on September 2, 2021.

A prehearing conference was conducted by telephone on September 3, 2021 before the undersigned Hearings Officer. Joyce W.Y. Tam-Sugiyama, Esquire, and Ian L. Sandison, Esquire, appeared on behalf of Petitioner. Ryan H. Ota, Esquire, appeared on behalf of Respondent.

At the prehearing conference Respondent indicated that Respondent intended to file a dispositive motion. The parties were ordered to file dispositive motions by September 7, 2021. The parties were further order to file memoranda in opposition, if any, by September 9, 2021 and reply memoranda by 9:00 a.m. on September 10, 2021. The hearing on all motions was scheduled for September 10, 2021. The contested case hearing was rescheduled to September 15 and 17, 2021.

Respondent filed Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on September 7, 2021. On September 9, 2021, Petitioner filed Petitioner Schnitzer Steel Hawaii Corp.'s (I) Memorandum in Opposition to Respondent City and County of Honolulu Department of Budget and Fiscal Services' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment; and (II) Cross-Motion for Summary Judgment.

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 Granting Respondent's Motion to Dismiss and Denying Petitioner's Cross-Motion for Summary Judgment.

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 Solicitation was for the sale and removal of scrap metal from various City sites, for various agencies of the City and County of Honolulu.

2. On May 21, 2021, Addendum No. 4 to the Solicitation was issued. Addendum No. 4 replaced the Method of Award with the following:

“The City shall award a contract to the responsive, responsible Offeror who offers the lowest Total Sum Bid. The City will only consider an offer with pricing on all items listed.”

3. Addendum No. 4 also replaced Pricing/Certifications, in pertinent part, with the following:
Revised Appendix C: Pricing/Certifications:

SOLICITATION NO. RFB-ENV-1501429

The undersigned hereby agrees to complete the specified work herein, at the bid prices quoted below, in strict compliance with this Appendix C, Appendix A: Scope of Work, Appendix B: Term/Schedule of Work, Appendix D: Special Provisions and Appendix E: General Terms and Conditions attached hereto and by reference made a part thereof.

A	B	C	D	E	F
Item	Description	Unit of Measure	FOR EVALUATION PURPOSES ONLY: Industry Price per Pound	Unit Price to the City	Unit Price to the Contractor (D) – (E)
1	Ferrous Scrap Metal Sale and Collection Services	Per Pound	\$1.00	\$ _____	\$ _____
2	Non-Ferrous Scrap Metal Sale and Collection Services	Per Pound	\$1.00	\$ _____	\$ _____
TOTAL SUM BID (Item No. 1 + Item No. 2) =					\$ _____

4. Addendum No. 4 extended the deadline for submission of bids to June 28, 2021.
5. All bids were opened on June 28, 2021.
6. There were only two bidders for the Solicitation: Petitioner and Island Recycling, Inc. (“IRI”).
7. Petitioner became aware of the bid results on June 29, 2021.
8. The pricing offers of IRI and Petitioner are summarized below:

Solicitation No. RFB-ENV-1501429
Furnish and Deliver Aerial Lift Trucks for the Various City Agencies
Opened: 6/28/2021 by AD & LS

ITEM	DESCRIPTION	UNIT OF MEASURE	EVALUATION ONLY: INDUSTRY PRICE PER POUND	Island Recycling, Inc.		Schnitzer Steel Hawaii Corp.	
				UNIT PRICE TO THE CITY	UNIT PRICE TO THE CONTRACTOR	UNIT PRICE TO THE CITY	UNIT PRICE TO THE CONTRACTOR
1	Ferrous Scrap Metal Sale and Collection Services	Per Pound	\$1.00	\$0.073	\$0.927	\$0.045	\$0.955
2	Non-Ferrous Scrap Metal Sale and Collection Services	Per Pound	\$1.00	\$0.00	\$0.00	\$1.00	\$0.00
TOTAL SUM BID =				\$0.073			\$0.955

*Note: These figures are preliminary or apparent bid results of the date of bid opening. All bids are subject to evaluation.

9. Petitioner emailed Respondent on June 29, 2021, indicating that Petitioner had questions regarding the bid results. Respondent did not respond to the email.

10. By letter dated July 2, 2021, Petitioner submitted a protest (“Protest”) pursuant to HRS § 103D-701(a) and HAR § 3-126-4. The Protest stated,

“According to the bid results, IRI did not provide any pricing information for non-ferrous scrap and instead listed \$0.00 for both values. Under the Solicitation’s instructions, the total must equal \$1.00. Furthermore, IRI’s ‘TOTAL SUM BID’ amount does not equal the sum of the ‘Unit Price to the Contractor’. Instead it erroneously lists the Unit Price to the City for ferrous scrap. Accordingly, IRI’s bid was non responsive and improper, and should be disqualified.

Because the bid results showing IRI’s nonresponsive bid were published on June 28, 2021, SSHC submits this protest in writing out of an abundance of caution to reserve its rights and remedies.”

11. On July 6, 2021, Respondent contacted Petitioner and indicated that Respondent intended to cancel and reissue the Solicitation. Respondent also asked Petitioner to withdraw its Protest.

12. On July 6, 2021, Petitioner again submitted its July 2, 2021 Protest to Respondent.

13. On August 19, 2021, Respondent denied the Protest. The denial stated, in pertinent part,

“The Protest is denied for the reasons set forth below:

In accordance with the Hawaii Administrative Rules (HAR) §3-126-4(a) which states in relevant part, ‘A protest of a [sic] award shall be submitted in writing to the chief procurement officer or as otherwise specified in the solicitation, within five working days after the posting of the notice of award. . .’

However, no award for the subject solicitation has been made and the City intends to cancel the subject solicitation, in accordance with HAR §3-122-96, because ‘ambiguous or otherwise inadequate specifications were part of the solicitation’. In light of this, SSHC’s Protest is untimely and denied. . .”

14. Petitioner filed its request for administrative review to the Office of Administrative Hearings on August 26, 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.

The issue for determination is whether Petitioner had standing to protest the solicitation. Respondent's Motion to Dismiss argues that at the time Protest was submitted, Respondent had not awarded the contract or taken any other official action on the Solicitation. Respondent argues that Petitioner's Protest is premature because, at the time Petitioner submitted its protest, Petitioner was not aggrieved by any official action taken by Respondent.

Petitioner argues that IRI's bid was nonresponsive, making Petitioner the only responsive (and responsible) bidder. Petitioner argues that it should have been awarded the contract. Accordingly, Petitioner argues that it was aggrieved at the time it submitted the Protest because Respondent failed to reject IRI's bid. For the foregoing reasons, the Hearings Officer finds that Petitioner was not an aggrieved party at the time it submitted the Protest. Accordingly, the Hearings Officer does not have jurisdiction to hear Petitioner's request for administrative review.

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. ... 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.”

This office, in *Eckard Brandes, Inc. v. Department of Finance, County of Hawaii, et al.*, PCH-2003-14 and PCH-2003-20, stated,

“The foregoing section [HRS §103D-701(a)] dictates that only ‘aggrieved’ persons have standing to protest. In order to have standing, an actual or prospective bidder, offeror or contractor must show that it has

suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. Citing, B&B Security Consultants, Inc.; DCCAB No. P-630; District of Columbia v. Group Insurance Administration, 633 A.2d 2 (D.C. 1993). **Consequently, a party is not aggrieved until official action, adverse to it, has been taken.**” (Emphasis added).

In *Eckard*, the Hearings Officer found that the agency’s determination that a competing bidder did not have a conflict of interest with the subject contract constituted an “official action” that adversely affected the petitioner, thereby making the petitioner an aggrieved party.

The Protest in this matter is based on Petitioner’s position that IRI’s bid was nonresponsive for allegedly failing to include a rate for non-ferrous scrap material collection.¹ Petitioner argues that, as the only responsive bidder, it should be awarded the contract for scrap metal sale and collection and brings the instant action to compel Respondent to award it the contract. Petitioner argues that because Respondent did not reject IRI’s bid, Petitioner was aggrieved.

Respondent argues that Petitioner’s Protest was untimely (or premature). It is undisputed that the contract had not been awarded at the time the Protest was submitted. Respondent asserts that Respondent had not made any determination regarding either bid, nor the viability of the Solicitation, when the Protest was submitted. Respondent was in the process of evaluating the bids submitted and had not determined whether either bid was responsive. Petitioner argues that Respondent’s *failure* to reject IRI’s bid aggrieved Petitioner. However, the parties agree that the Solicitation did not include a deadline for the award of the contract or rejection of offers. Petitioner argues that the five-day time period to submit a protest in HRS § 103D-701(a) also served as a deadline for Respondent to make an agency determination. However, this argument is inconsistent with the plain language of HRS § 103D-701(a). The five-day requirement clearly applies to the submittal of protests and not the award of a contract or any other agency determination in a procurement matter.

The Hearings Officer finds that no official action had been taken by Respondent at the time the Protest was submitted. Applying the standard set forth in *Eckard*, until official action is taken by Respondent, Petitioner cannot be said to be aggrieved. Accordingly, Petitioner was not *yet* aggrieved at the time it submitted the Protest.

¹ Respondent argues that IRI’s bid included a rate of “\$0” for non-ferrous metals to be paid to the City, as well as a rate of “\$0” to be paid to IRI. The parties acknowledge that these two figures may be inconsistent with the formula for determining pricing. Respondent’s denial letter indicated that Respondent “may waive or accept minor informalities, mistakes, or other defects in accordance with HAR 3-122-31.”

Petitioner alternatively argues that it was aggrieved by Respondent's decision to cancel the Solicitation. Petitioner was notified by Respondent on July 6, 2021 that it intended to cancel the Solicitation. The denial of the Protest was also issued on July 6, 2021 reiterating Respondent's intent to cancel the solicitation based on Respondent's finding that the solicitation contained ambiguous or otherwise inadequate specifications. Petitioner argues that its "resubmission" of its Protest on July 6, 2021 constitutes a timely protest as it was then aggrieved by Respondent's decision to cancel the solicitation. Respondent argues that the July 6, 2021 resubmission of the Protest does nothing more than attach a copy of the July 2, 2021 Protest. Respondent is correct. HAR § 3-126-3(d)(3) requires a protest to include a "statement of reasons for the protest".

This office has previously stated that,

"At a minimum, a protest must place the procuring agency on notice of the filing of a protest. Such notice is obviously necessary before the agency can take steps to resolve the protest or issue a decision upholding or denying the protest. Additionally, adequate notice of a protest is a prerequisite to the application of the stay provided by HRS § 103D-701(f)."

Frank Coluccio Constr. Co. v. Dept. of Budget and Fiscal Services, City and County of Honolulu, et al., (October 18, 2002, PCH-2002-12).

Here, neither the July 2nd nor July 6th submissions raised the issue of cancellation as a basis for the Protest. These considerations lead the Hearings Officer to conclude that the July 2, 2021 Protest, as well as Petitioner's July 6, 2021 letter resubmitting the July 2, 2021 Protest, are insufficient notice to protest Respondent's intended cancellation of the Solicitation and therefore not a basis to give Petitioner standing.

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

IV. DECISION AND ORDER

Based on the foregoing considerations, Respondent's Motion to Dismiss Petitioner's Request for Hearing is granted. Respondent's alternative motion for summary judgment need

not be addressed and is therefore denied. 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, September 29, 2021.



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