



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

In the Matter of	)	PDH 2021-011
)	
ALPHA INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER
vs.	)	GRANTING RESPONDENT'S
	)	MOTION TO DISMISS
DEPARTMENT OF FINANCE,	)	UNTIMELY APPEAL AND
COUNTY OF MAUI,	)	DENYING PETITIONER'S
	)	MOTION FOR SUMMARY
Respondent	)	JUDGMENT
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS UNTIMELY
APPEAL AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION:

On October 29, 2021, the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, received Alpha Inc.'s ("Petitioner") request for administrative hearing to contest the Department of Finance, County of Maui's ("Respondent") denial of Petitioner's October 6, 2021 protest. The protest was over Respondent's September 27, 2021 letter rejecting Petitioner's bid on a project designated as the Waihee Well #577 Pump and Motor Replacement, IFB #DWSP 2021-37 ("Project").

The matter was thereafter set for a November 9, 2021 Pre-Hearing Conference. At the Pre-Hearing Conference, deadlines were set for the submittal of motions and responses to motions. Oral argument on motions and the hearing were also scheduled.

On November 8, 2021, Respondent had filed its Motion to Dismiss Untimely Appeal, Exhibits “1” – “9”, and Declaration of Jared Masuda.

On November 15, 2021, Petitioner filed its Motion for Summary Judgement, Memorandum in Support of Motion, Declaration of Gregory Sado, Exhibits “1” – “19”, and Appendices. Also, on November 17, 2021, both parties filed their memoranda in opposition to the motions for dismissal and summary judgement.

The motions for dismissal and summary judgment came on for hearing before the undersigned Hearings Officer on November 19, 2021, in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D. Both parties appeared by telephone conferencing call. Petitioner was represented by Jeffrey H. Osterkamp, Esq. Respondent was represented by Caleb Rowe, Esq.

On November 18, 2021, Beylik Drilling and Pump Service, Inc., the apparent second low bidder on the Project, though its attorneys Lyle Hosoda, Esq. and Spencer Lau, Esq., had filed its Motion to Intervene. On November 19, 2021, after due consideration, the Hearings Officer denied Beylik’s Motion to Intervene and proceeded to hear argument on Respondent’s motion to dismiss and Petitioner’s motion for summary judgment.

Having reviewed and considered the motions and memoranda, exhibits and declarations attached thereto, the arguments of counsel, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT:

1. On July 21, 2021, Respondent had posted a Solicitation for the Waihee Well #577 Pump and Motor Replacement, IFB #DWSP 2021-37 project (“Project”).

2. The solicitation called for the following work: “to furnish all labor, tools, materials and equipment as necessary to remove existing pump and motors and provide and install new pump and motor, and perform required startup procedures for acceptance, in place complete.” *See, Respondent’s Exhibit 1.*

3. On July 23, 2021, Respondent added Addendum 1 to the General

Requirements. Addendum 1 included Requirement 1000.5, which stated, “Pump and motor specs, performance curve shall be submitted with bid submittal. Failure to submit specs and curves with bid, would result in disqualification of bid.” *See, Respondent’s Exhibit 2.*

4. On August 19, 2021, Petitioner submitted its bid on the Project. Petitioner’s bid contained some information on the “Pump and motor specs, performance curve”. *See, Respondent’s Exhibit 3.*

5. Petitioner was the apparent low bidder on the Project, with a bid of \$555,000.00.

6. On September 27, 2021, Respondent issued a bid rejection letter to Petitioner, concluding that Petitioner’s bid was non-responsive, in material non-conformance with the terms of the Solicitation. In this letter, Respondent cited Hawaii Administrative Rule Section 3-122-97, entitled “Rejection of Offer”, which states, in relevant part:

- (a) A bid shall be rejected for reasons including but not limited to:
- (2) The bid is not responsive, that is, it does not conform in all material respects to the solicitation by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the solicitation, pursuant to section 3-122-33.

7. The September 27, 2021 bid rejection letter specified that 9 items “discussed in the specifications were not provided or identified with the bid proposal, and the motor components for the items do not meet specifications.” The letter states, in part:

- 1. No complete/detailed electronic motor specifications were submitted with bid.
- 2. Starting method quoted as “direct on-line” in the bid is incorrect - it should be designed for ‘soft starting/reduced voltage’ as discussed in the specifications.
- 3. Motor Efficiency type unknown.
- 4. Insulation class type and rating unknown.
- 5. Motor winding encapsulation type unknown.

6. Motor winding heaters unknown.
7. Failed to submit NSF 61 certification for pump.
8. Basket strainer submitted – Basket strainer not used in deep well pumps – spec calls for “tapered cylindrical type” (cone strainer).
9. Column Pipe listed as Steel A53 - column pipe needs to be Galvanized with combination couplings per specification (2001.6).

See, Respondent’s Exhibit 4.

8. On October 6, 2021, Petitioner submitted a protest letter to Respondent, asserting that the reasons given by Respondent for rejecting Petitioner’s bid were inadequate as all the items in the rejection letter are details that should be assessed at the submittal process rather than at the time of the bid. *See, Respondent’s Exhibit 5.*

9. In its protest, Petitioner argues that even if the listed items were missing from its bid or were not in conformance with the Solicitation, its bid could not on that basis be deemed nonresponsive. Along with its October 6, 2021 protest letter, Petitioner attached documents in response the Respondent’s concerns on the 9 items. These documents included Petitioner’s equipment supplier, APSCO’s, specifications regarding the pump equipment being supplied, and the materials for construction of the Project. *See, Respondent’s Exhibit 5.*

10. On October 12, 2021, Respondent responded to the protest letter, stating, in part, “Alpha did submit a performance curve and specifications for its pump... While this does provide some information regarding the motor, it clearly does not provide the full specifications as required. Additionally, what is provided does not meet the minimum specifications of the solicitation and the general requirements as provided in Addendum No. 1.” *See, Respondent’s Exhibit 6.*

11. The October 12, 2021 letter again lists the 9 components that do not meet the specifications and material requirements set forth in the Solicitation. and denied Alpha Inc.’s protest, stating that a bid is non-responsive if the bid contains a material non-conformity involving the price, quality, quantity, or delivery. *See, Respondent’s Exhibit 6.*

12. Petitioner asserts that its bid does not contain a material non-conformity and argues that Addendum 1, Requirement 1000.5, did not

provide that bids were required to include complete pump and motor submittal packages, nor did it indicate that the County was expecting this information to immediately comply with all of solicitation's specifications.

13. The Declaration of Jared Masuda, Respondent's central purchasing agent, states, in part, the following:

-that on October 12, 2021, Respondent's Protest Response letter was sent via certified mail to the address Petitioner provided in its October 6, 2021 Protest letter: 381 Ala Makani Street, Kahului, Hawaii 96732;

-that on October 18, 2021, the Protest Response letter was returned as undeliverable. USPS tracking records show that the address provided by Petitioner in its October 6, 2021 protest letter apparently did not accept mail service;

-that on October 18, 2021, Respondent resent the Protest Response letter via certified mail to a P.O. Box address which Respondent located in Petitioner's bid.

However, the County did not receive a return receipt for this mailing;

-that on October 22, 2021, Mr. Masuda e-mailed Mr. Gregory Sado of Petitioner to follow-up, and attached a copy of the Protest Response letter; and

-that on October 25, 2021, Respondent resent the Protest Response letter to Petitioner for a 3rd time. *See, Declaration of Jared Masuda, attached to Respondent's Responsive Statement.*

14. On October 29, 2021, Petitioner filed a Petition for Request for Administrative Hearing, 17 days after the October 12, 2021 Protest Response letter was first sent to the address that had been provided by Petitioner.

15. In its Request for Hearing, Petitioner asserts, "nothing in requirement 1000.5 or elsewhere in the Solicitation provides that a bid would be deemed nonresponsive if its pump and motor submittal information lacks detail or even conflicts

with the Solicitation’s specifications. Indeed, submission of a complete submittal package at the bid stage would have been highly impractical, because the pumps and motors necessary for the project must be custom-built, so necessarily are developed over time, and certainly are not finalized before an order is placed—which cannot occur before an award is made. As stated in the Protest, the pump and motor details “should be assessed at the submittal process rather than the time of bid.”

16. Petitioner submitted a \$5,500.00 Procurement Protest Bond, along with a \$200.00 filing fee.

17. On November 8, 2021, Respondent filed Respondent’s Response to Petitioner’s Request for Administrative Hearing. In this response, Maui County asserts that:

- (1) Petitioner’s Request to the Office of Administrative Hearings for a hearing was untimely. Under HRS Section 103D-712(a), the request for hearing is to be made within 7 days of the issuance of written determination. Further, as defined by prior case law, “issuance” means the date of mailing.
- (2) Petitioner’s bid was non-responsive as the IFB and Addendum 1 listed specific pump and motor specifications that were deemed necessary, and Petitioner’s bid did not conform with the pump and performance curve requirements. Further, responsiveness is determined at the time the bids are opened.

18. On November 8, 2021, Respondent also filed its Motion to Dismiss Untimely Appeal, Exhibits “1” – “9”, and Declaration of Jared Masuda. Respondent asserts that under HRS Section 103D-712(a), the Request to the Office of Administrative Hearings for hearing is to be made within 7 days of the issuance of written determination.

19. On November 15, 2021, Petitioner filed its Motion for Summary Judgment, Memorandum in Support of Motion, Declaration of Gregory Sado, Exhibits “1” – “19”. Petitioner asserts that no circumstances exist to support both Respondent’s denial of its October 6, 2021 Bid Protest, and Respondent’s September 27, 2021 rejection of Petitioner’s August 19, 2021 bid as unresponsive.

20. The Declaration of Gregory Sado states that he is the Operations Manager with Petitioner. Among other things, Mr. Sado states that Petitioner did not receive Respondent's October 12, 2021 denial of Protest until the County e-mailed it on October 22, 2021. *Declaration of Gregory Sado, #s 2 and 3.*

21. The Declaration of Mr. Sado further states that Petitioner provided pump and motor "specs" and a performance curve in response to Addendum 1, requirement 1000.5. According to Mr. Sado, Petitioner justifiably believed that Respondent was thereby asking bidders to provide general information so that Respondent could verify that the bidders had performed their due diligence and had arranged for appropriate subcontractors/suppliers." *Declaration of Gregory Sado, # 11.*

22. Additionally, the Declaration of Mr. Sado states that in its October 6, 2021 protest letter, Petitioner provided specific information on the other items listed in Respondent's September 27, 2021 rejection letter, even though the Solicitation did not ask for this information. Further, the declaration states that the "direct line" motor starting method listed in Alpha's bid was still designed for a soft start. However, Mr. Sado admitted that Petitioner made a mistake in listing a basket strainer, instead of a cone strainer – even though Petitioner had intended to use a cone strainer. *Declaration of Gregory Sado, #s 13, 14, and 15.*

23. On November 17, 2021, Respondent filed its Memorandum in Opposition to the filed Motion for Summary Judgment, and Petitioner filed its opposition to Respondent's Motion to Dismiss.

24. In its Memorandum in Opposition to Respondent's Motion to Dismiss, Petitioner argues that Respondent sent its October 12, 2021 protest response letter to an address that was not on the bid; that Respondent did not promptly e-mail its protest response letter to Petitioner after it knew the letter had not been received; and that Respondent unfairly moved to dismiss Petitioner's request for a hearing, even before Petitioner received the protest response letter. *Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss Untimely Appeal.*

25. In its Memorandum in Opposition to Petitioner's Motion for Summary Judgment, Respondent argues that it rejected Petitioner's bid as nonresponsive as the Solicitation and Addendum 1 required bidders to provide complete specifications

regarding the pump and motor for the County to determine compatibility with the County's well; and that responsiveness is determined at the time of bid opening. *Respondent's Memorandum in Opposition to Petitioner's Motion for Summary Judgment.*

26. Petitioner asserts that as the lowest responsive and responsible bidder, it is entitled to the award of the Project's contract.

III. CONCLUSIONS OF LAW:

A. Respondent's Motion to Dismiss Untimely Appeal

The issue is whether Petitioner's request for an administrative hearing over Respondent's determination that Petitioner's bid was unresponsive to the Solicitation and the Addendum, was timely.

In its Motion to Dismiss, Respondent asserts that under HRS Section 103D-712(a), the Request to the Office of Administrative Hearings for hearing is to be made within 7 days of the issuance of written determination.

The material facts in this case are undisputed and establish the following timeline:

-On August 19, 2021 Alpha Inc. submitted its bid on the Project. Alpha Inc.'s bid had some information on the "Pump and motor specs, performance curve". Alpha Inc. was the low bidder on the Project, with a bid of \$555,000.00.

-On September 27, 2021, Maui County issued a bid rejection letter concluding that Alpha Inc.'s bid was non-responsive. The September 27, 2021 bid rejection letter specified that 9 items "discussed in the specifications were not provided or identified with the bid proposal, and the motor components for the items did not meet specifications."

-On October 6, 2021, Petitioner submitted a protest letter to Respondent, asserting that the reasons given by the Maui County for rejecting Alpha Inc.'s bid were inadequate as all of the items in the rejection letter are details that should be assessed at the submittal process rather than at the time of the bid. Petitioner argues that even if the listed items were missing from Alpha's Bid or were not in conformance with the Solicitation, Alpha's bid could not on that basis be deemed nonresponsive.

-On October 12, 2021, Maui County issued its denial of Alpha Inc.'s protest, stating, in part, "The County of Maui is denying your protest." In this letter, Maui County responded to the protest letter, stating, in part, "Alpha did submit a performance curve and specifications for its pump...While this does provide some information regarding the motor, it clearly does not provide the full specifications as required. Additionally, what is provided does not meet the minimum specifications of the solicitation and the general requirements as provided in Addendum No. 1."

- On October 29, 2021, Petitioner filed a request for administrative hearing.

Respondent's Motion to Dismiss asserts that under HRS Section 103D-712(a), the Request to the Office of Administrative Hearings for hearing is to be made within 7 days of the issuance of written determination.

Through its October 12, 2021 Protest Response letter, Maui County denied Petitioner's October 6, 2021 protest. The timing of Petitioner's response to the denial is summarized in the Declaration Jared Masuda, Maui County's central purchasing agent, and supported by the USPS tracking records and the October 22, 2021 e-mail from Mr. Masuda to Mr. Sado. *See, Respondent's Responsive Statement and the attached Exhibits 7 and 8.*

The Declaration of Jared Masuda, states, in part, the following:

-that on October 12, 2021, Respondent's Protest Response letter was sent via certified mail to the address Petitioner provided in its October 6, 2021 Protest letter: 381 Ala Makani Street, Kahului, Hawaii 96732;

-that on October 18, 2021, the Protest Response letter was returned as undeliverable. USPS tracking records show that the address provided by Petitioner in its October 6, 2021 protest letter apparently did not accept mail service;

-that on October 18, 2021, Respondent resent the Protest Response letter via certified mail to Petitioner's P.O. Box address which it had located in Petitioner's bid.

However, Respondent did not receive a return receipt for this mailing;

-that on October 22, 2021, Mr. Masuda e-mailed Mr. Gregory Sado of Petitioner to follow-up, and attached a copy of the Protest Response letter; and

-that on October 25, 2021, Respondent resent to Protest Response letter to Petitioner for a 3rd time.

In its Motion to Dismiss for untimely filing a request for hearing, Respondent argues that Petitioner's request for an administrative hearing regarding Respondent's determination that Petitioner's bid was unresponsive to the Solicitation and the Addendum was not timely made. As Respondent argues, its October 12, 2021 Protest Response letter was sent via certified mail to the address Petitioner provided in its October 6, 2021 Protest letter: 381 Ala Makani Street, Kahului, Hawaii 96732.

Respondent also points out that under HAR Section 3-126-3(d)(1), "The written protest shall include, at a minimum...the name and address of the protestor." The address provided by Alpha, Inc. in the October 6, 2021 Protest letter was the 381 Ala Makani Street address. Clearly, Petitioner was obligated to provide an address in its bid upon which Respondent could rely on.

The Protest Response letter was returned as undeliverable on October 18, 2021. USPS tracking records show that the address provided by Petitioner in its October 6, 2021 protest letter did not accept mail service. The Declaration of Gregory Sado, Petitioner's Operations Manager, acknowledges this, stating that "Only the Alpha P.O. Box accepts certified mail." *Declaration of Gregory Sado, paragraph 9*. Nevertheless, Petitioner elected to use the 381 Ala Makani Street address in its October 6, 2021 Protest letter, knowing that certified mail would not be successfully delivered at this address. As Respondent argues, this is Petitioner's error, as any correspondence responding to the protest, would be sent to the address the protestor used in its protest letter.

The Hearings Officer concludes that it was reasonable for Respondent to rely on and send its October 12, 2021 Protest Response letter to the address Petitioner provided in its October 6, 2021 Protest letter. As stated in Respondent's motion, "while the

address used by the County was apparently a non-deliverable address, the fault for that error lies with the Petitioner...The only address included on the Petitioner's protest letter was the 381 Ala Makani St. address used by the County in issuing its decision on Petitioner's protest." *Respondent's Motion to Dismiss at pages 3 and 4.*

The record further evidences Respondent's good faith attempts to transmit its October 12, 2021 Protest Response letter to Petitioner by resending the Protest Response letter via certified mail to Petitioner's P.O. Box address on its bid on October 18, 2021. However, Respondent did not receive a return receipt for this mailing.

Further, on October 22, 2021, Mr. Masuda e-mailed Mr. Gregory Sado of Petitioner to follow-up, and attached a copy of the Protest Response letter; and on October 25, 2021, Respondent resent to Protest Response letter to Petitioner for a 3rd time.

It is uncontested that Petitioner received Respondent's October 12, 2021 Protest Response letter on October 22, 2021 and filed a request for administrative hearing on October 29, 2021. Although the request was made on the 7th day after receipt of the Protest Response letter; this is 17 days after the October 12, 2021 Protest Response letter was properly issued.

Petitioner argues, without authority, that Respondent could have e-mailed Petitioner its October 12, 2021 Protest Response letter, or sent it via facsimile. In its memorandum in opposition to the Motion to Dismiss, Petitioner contends that "an "issuance" cannot occur absent delivery to the bidder" and that under the terms of the Solicitation, the County was required to send the protest response to the P.O. Box address on the bid. However, as Respondent points out, the general terms in the Solicitation apply only after the contract is awarded and executed.

Further, Petitioner argues that, "Absent the County producing evidence that an "issued" document was received, the County has no basis to contend that it triggered Alpha's period for filing a request for hearing". *Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss Untimely Appeal.* Petitioner's argument, however, flies directly in the face of the holding in *Nihi Lewa, Inc.* As Respondent argues, "[t]he Hawaii Supreme Court has ruled that the term "issuance" as used in HRS Section 103D-712(a) does not mean when the decision has been received by the protestor, but rather,

“means the date of mailing, as evidenced by the postmark date” because legislative history indicates that the “Legislature intended the time for filing to start at the beginning, rather than the end, of the delivery process” and “the overall framework of the Hawaii Public Procurement Code indicated that the legislature intended to create an expeditious process for resolving disputes over the awarding of contracts.” Nihi Lewa, Inc. V. Dept. of Budget and Fiscal Servs., 103 Hawaii 163, 167; 80P.3d 984, 988 (2003), *citing* CARL Corp. v. State, 85 Hawaii 431, 453; 946 P2d 1, 24 (1997). *Respondent’s Motion to Dismiss at page 3.*

On this record, the Hearings Officer concludes that it was reasonable for Respondent to rely upon and send its protest denial letter to the address provided by Petitioner in its protest. Moreover, there is no dispute that Respondent made other attempts to transmit the October 12, 2021 Protest Response letter to Petitioner by sending it to the address on Petitioner’s bid and by e-mailing Petitioner’s representative.

Prior case law has established that the “issuance “of a written decision, is the date the letter is mailed, not the date of receipt. As noted in Respondent’s motion and as argued at the hearing on the motion, besides fairness to all bidders, the legislature also intended that the Hawaii Public Procurement Code create an expeditious process for resolving disputes over the awarding of contracts. Although Petitioner complains that it is not fair for Respondent to move for dismissal before Petitioner has received the protest response, it is Petitioner’s use of an address that does not accept certified mail in its protest letter which led to the problem. As noted above:

“The Hawaii Supreme Court has ruled that the term “issuance” as used in HRS Section 103D-712(a) does not mean when the decision has been received by the protestor, but rather, “means the date of mailing, as evidenced by the postmark date” because legislative history indicates that the “Legislature intended the time for filing to start at the beginning, rather than the end, of the delivery process” and “the overall framework of the Hawaii Public Procurement Code indicated that the legislature intended to create an expeditious process for resolving disputes over the awarding of contracts.” Nihi Lewa, Inc. V. Dept. of Budget and Fiscal Servs., 103 Hawaii 163, 167; 80P.3d 984, 988 (2003), *citing* CARL Corp. v. State, 85 Hawaii 431, 453; 946 P2d 1, 24 (1997). *Respondent’s Motion to Dismiss at page 3.*

Seven days after the October 12, 2021 Protest Response letter was mailed is October 19, 2021. Clearly, in this case, the October 29, 2021 request for administrative hearing was made after this 7-day period had expired.

The Hearings Officer concludes that under HRS Section 103D-712(a), Petitioner did not timely file a request for hearing, and Respondent's November 8, 2021 Motion to Dismiss Untimely Appeal is granted. Petitioner's Request for Administrative Hearing is dismissed.

Having arrived at this decision, Petitioner's motion for summary judgment is rendered moot and for that reason, is denied.

IV. ORDER:

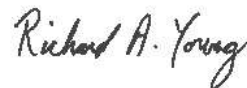
Accordingly, the Hearings Officer orders as follows:

-Respondent's November 8, 2021 Motion to Dismiss Untimely Appeal is granted. Petitioner's Request for Administrative Hearing is dismissed.

-The December 1, 2021 hearing date is vacated.

The parties will bear their own attorney's fees and costs incurred in pursuing this matter. Pursuant to HRS § 103D-709(e), the protest bond shall be deposited into the General Fund.

DATED: Honolulu, Hawaii, November 29, 2021.



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

In Re Alpha, Inc. v. Department of Finance, County of Maui; PDH-2021-011; Hearings Officer's Findings of Fact, Conclusions of Law, and Final Order Granting Respondent's Motion to Dismiss Untimely Appeal.