



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

In the Matter of

ALPHA INC.,

Petitioner,

vs.

DEPARTMENT OF FINANCE,  
COUNTY OF MAUI,

Respondent,

and

BEYLICK DRILLING &  
PUMP SERVICE, INC.,

Intervenor.

PDH-2021-016

HEARINGS OFFICER'S  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND FINAL ORDER  
GRANTING RESPONDENT'S  
AND INTERVENOR'S  
MOTIONS TO DISMISS;  
DENYING PETITIONER'S  
MOTION FOR SUMMARY  
JUDGMENT and DISMISSING  
PETITIONER'S REQUEST FOR  
AN ADMINISTRATIVE  
HEARING

Motions Hearing Date:  
December 29, 2021

Administrative Hearings Officer:  
Richard A. Young

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND FINAL ORDER  
GRANTING RESPONDENT'S AND INTERVENOR'S MOTIONS TO DISMISS;  
DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT;  
and  
DISMISSING PETITIONER'S REQUEST FOR AN ADMINISTRATIVE HEARING

**I. INTRODUCTION:**

On December 10, 2021, the Office of Administrative Hearings received Alpha Inc.'s ("Petitioner") request for administrative hearing to contest the Department of Finance, County of

Maui's ("Respondent" or "Maui County") denial of Petitioner's November 2, 2021 protest. The protest was to Maui County's October 26, 2021 letter which found that Beylik Drilling & Pump Service, Inc.'s ("Beylik") bid bond submitted with its bid on the Waihee Well #577 Pump and Motor Replacement, IFB #DWSP 2021-37 ("Project"), satisfied the IFB's bid bond requirement.

The matter was thereafter set for a December 21, 2021 Pre-Hearing Conference. At the December 21, 2021 Pre-Hearing Conference, a motions deadline, a response to motions deadline, and hearing on motions and hearing dates were scheduled.

On December 15, 2021, Beylik Drilling and Pump Service, Inc., the second lowest bidder on the Project, though its attorneys Lyle Hosoda, Esq. and Spencer Lau, Esq., had filed its Motion to Intervene. On December 20, 2021, Petitioner filed a Memorandum in Opposition to Beylik's Motion to Intervene. At the December 21, 2021 prehearing conference, Beylik's Motion to Intervene was discussed. The December 21, 2021 Prehearing Order allowed Beylik to file pre-hearing motions and responses.

On December 29, 2021, prior to commencing the hearing on other pre-hearing motions, the Hearings Officer granted Beylik's Motion to Intervene after oral argument.

Also, on December 29, 2021, the motions for dismissal and summary judgment came on for hearing before the undersigned Hearings Officer, in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Both parties and intervenor appeared by telephone conferencing call. Petitioner was represented by Jeffrey H. Osterkamp, Esq. Respondent was represented by Caleb Rowe, Esq. Intervenor was represented by Lyle Hosoda, Esq.

The following motions were heard and taken under advisement:

- Respondent's December 20, 2021 Responsive Statement and Motion to Dismiss, Declaration of Jared Masuda, Exhibits "1" – "10";
- Beylik's December 22, 2021 Motion to Dismiss Alpha Inc.'s Request for Administrative Review, Declaration of Toni Gonsalves, Declaration of Lyle S. Hosoda, Exhibit "1"; and
- Petitioner's December 27, 2021 Motion for Summary Judgment, Declaration of Jeffrey M. Osterkamp, Appendices "1" – "4".

On December 28, 2021, both parties and Intervenor filed their memorandums in opposition to the motions for dismissal and summary judgement.

On January 7, 2022, Second Circuit Court Judge Peter Cahill issued a dismissal of Petitioner's appeal under PDH 2021-011, regarding the same solicitation at issue in the current

case. The Court ruled that because Maui County had withdrawn the solicitation as funding for the Project had lapsed on December 31, 2021, the appeal was moot. The Court dismissed the appeal under PDH 2021-011 regarding the Project.

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, and considering Judge Cahill's order, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

## **II. FINDINGS OF FACT:**

### **Background and Case #PDH 2021-011(First Appeal)**

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"). 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."

2. The July 23, 2021 Addendum 1 to the General Requirements included the following: "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."

3. The bids were opened on August 19, 2021. Alpha Inc. was the low bidder on the Project, with a bid of \$555,000.00.

4. Beylik was the second lowest bidder on the Project.

5. On September 27, 2021, Maui County issued a bid rejection letter to Petitioner, concluding that Alpha Inc.'s bid was non-responsive, in material non-conformance with the terms of the Solicitation.

6. On October 6, 2021, Alpha Inc. filed its Protest letter, protesting that the Solicitation did not require full specifications.

7. On October 12, 2021, 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.” The October 12, 2021 letter again lists the 9 components that do not meet the specifications and material requirements set forth in the Solicitation.

8. Further, in the October 12, 2021 letter, Maui County specifically 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.

9. On October 29, 2021, Petitioner filed a Request for Administrative Hearing in case no. PDH 2021-011 (First Appeal). The Office of Administrative Hearings received the hearing request on October 29, 2021 - 17 days after the October 12, 2021 Protest Response letter was first sent.

10. 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.”

11. On November 29, 2021, after earlier oral argument, the Hearings Officer granted Respondent’s Motion to Dismiss for Failing to Timely Request an Administrative Hearing. Alpha Inc. appealed this decision.

12. On January 7, 2022, Circuit Court Judge Peter Cahill dismissed the Appeal in PDH 2021-011 (First Appeal) as moot, as funding for the Project had lapsed at the end of 2021; Maui County had cancelled the solicitation; and therefore, the Project could not be awarded.

Case #PDH 2021-016 (Second Appeal)

13. In the instant case, PDH 2021-016, Alpha Inc. filed a November 2,

2021 protest to Maui County's October 26, 2021 letter which found that Beylik's bid bond submitted with its bid on the Waihee Well #577 Pump and Motor Replacement, IFB #DWSP 2021-37 ("Project"), satisfied the IFB's bid bond requirement.

14. In the November 2, 2021 protest, Alpha Inc. asserts that it is an aggrieved bidder under HRS Section 103D-701. Alpha Inc. argues that Beylik's bid bond was not unconditional as after 60 days of bid opening, the bid bond precluded an award without specific consent from the surety. Bid opening was on August 19, 2021. Sixty days later is October 18, 2021.

15. An October 26, 2021 e-mail from Maui County's Jared Masuda to Alpha Inc.'s Gregory Sado states that the County has 120 days to award the contract before the surety has to give consent to allow the award. Alpha Inc. disagreed with this, stating that the bid bond language states that the County has 60 days after the acceptance of bids (bid opening) to award the contract.

16. Alpha Inc. argues that after 60 days from bid opening, the surety is required to give consent to the award. Alpha Inc. argues that this creates a situation where the bid bond is not unconditional; and that this is post-bid negotiations, in violation of procurement rules.

17. In its November 2, 2021 protest, Alpha Inc. argues that Beylik's bid bond is conditional, and therefore in violation of the Procurement Code, and must be rejected.

18. On December 3, 2021, Maui County denied Alpha Inc.'s protest on the basis that Alpha Inc. no longer had standing regarding this Solicitation as a result of the Hearings Officer's Order of Dismissal in PDH 2021-011.

19. Maui County argues that under HRS Section 103D-701(a) "Any actual or prospective bidder who is aggrieved in connection with a solicitation or award of a contract may protest." Maui County argues that after the Hearings Officer's Dismissal of Alpha Inc.'s Request for an Administrative Hearing concerning the same solicitation in case PDH 2021-011, Alpha Inc. is no longer an actual bidder and no longer has standing to protest under HRS Section 103D-701(a). The dismissal upheld the rejection of Petitioner's bid and Petitioner's involvement in the solicitation was effectively terminated.

20. Maui County's December 3, 2021 denial of Alpha Inc.'s protest

also stated that Alpha Inc. no longer has a realistic expectation of being awarded the contract, and therefore, is not an aggrieved party.

21. It is noted that the December 3, 2021 denial of Alpha Inc.'s protest does not respond to Alpha Inc.'s assertion in the November 2, 2021 protest that Beylik's bid bond was in violation of the procurement rules.

22. On December 10, 2021, the Office of Administrative Hearings received Alpha Inc.'s request for an administrative hearing to contest the Maui County's denial of Petitioner's November 2, 2021 protest (Second Appeal). This protest was to Maui County's December 3, 2021 Protest Response which asserted that:

- A. Alpha Inc. no longer has a realistic expectation to win the contract as Alpha Inc. is no longer considered an actual bidder, and that therefore, Alpha Inc. lacks standing to pursue the November 2, 2021 Protest;
- B. Maui County's failed to address some of the claims in the Protest, and therefore, waived its right to challenge these unaddressed claims; and
- C. Beylik's bid should have been rejected as Beylik's bid bond was conditional after 60 days from the time of bid acceptance (bid opening) lapsed. Beylik's bid bond was conditional upon approval of the Surety for the bid bond to be valid.

23. Beylik's bid bond stated, in part, that if more than 60 days lapsed beyond the time of acceptance of bids, then the surety is obligated to provide coverage only if it provides consent. The language in Beylik's bid bond states, in part, "The Surety hereby waives any notice of an agreement between the Owner (Maui County) and the Contractor (Beylik) to extend the time in which the Owner may accept the bid. Waiver of notice by the Surety shall not apply to any extension exceeding sixty (60) days in the aggregate beyond the time for acceptance of bids specified in the bid documents, and the Owner and Contractor shall obtain the Surety's consent for an extension beyond sixty (60) days." *See, Petitioner's Exhibit 5B.*

24. Alpha Inc. argues that HRS Section 103D-302 prohibits negotiations after bid opening and before awarding the contract. Because a bond submitted at the time of the bid cannot be corrected, supplemented, or replaced; after 60 days of bid opening, Maui County could not have obtained Beylik's consent to the award without the approval of its surety, and therefore, Maui County could not award the contract to Beylik unconditionally.

25. In its December 10, 2021 Request for Administrative Hearing,

Alpha Inc. requests that:

- A. Alpha Inc.'s Protest be sustained;
- B. That the County's rejection of Alpha Inc.'s Protest be overruled;
- C. That Beylik's bid should be rejected as its bid bond was conditional; and
- D. That any contract Beylik may have with Maui County for the Solicitation be terminated.

### **III. CONCLUSIONS OF LAW:**

The issue in the instant case, PDH 2021-016, is whether the denial of Alpha Inc.'s November 2, 2021 protest was proper. In this protest, Alpha Inc. challenges Maui County's October 26, 2021 letter which found that Beylik's bid bond submitted with its bid on the Waihee Well #577 Pump and Motor Replacement, IFB #DWSP 2021-37 ("Project"), satisfied the IFB's bid bond requirement.

Both Respondent and Intervenor filed pre-hearing motions to dismiss on the basis that Petitioner no longer has standing. Petitioner filed its motion for summary judgment asserting that it has standing to file the November 2, 2021 protest.

Petitioner's December 27, 2021 Motion for Summary Judgment asserts that its November 2, 2021 Protest should be upheld, and that Beylik's bid was non-responsive as its bid bond was not unconditional. Petitioner argues that Alpha Inc. has standing to Protest; that Maui County waived its right to contest the merits of the Protest as its Protest Response did not address the merits; and that the Hearings Officer does not have jurisdiction over any other issue that the County or Beylik may now challenge, as the County and Beylik did not respond to claims in the Protest, other than to deny standing.

In their Memorandums in Opposition to Alpha Inc.'s Motion for Summary Judgment, both Respondent and Intervenor argue that Alpha Inc. no longer has standing as there is no stay of the Hearings Officer's dismissal while the case is on appeal, and that Alpha Inc. does not have an active bid. Further, Respondent and Intervenor point out that funding for the project lapsed at the end of December 2021, and there is currently no funding in the 2022 budget for the project.

As noted above, on January 7, 2022, Judge Cahill issued an order denying Alpha Inc.'s appeal in PDH 2021-011 regarding the same project at issue in the current case. Judge Cahill's

decision notes that funding for the project has lapsed, that Maui County withdrew its solicitation as the funding had lapsed, and that the appeal was dismissed as moot.

Both Respondent's December 20, 2021 Motion to Dismiss, and Intervenor's December 22, 2021 Motion to Dismiss Alpha Inc.'s Request for Administrative Review, assert that under HRS Section 103D-701(a), Alpha Inc. lacks standing as it is not an actual or prospective bidder, offeror, or aggrieved person after the Hearings Officer's November 29, 2021 order dismissing the First Appeal as untimely.

In its Memorandum in Opposition to the Motions to Dismiss, Petitioner argues that although the Hearings Officer's Order of Dismissal is not stayed during the appeal; because the Circuit Court (or another court) may award the contract to Alpha, Inc., Alpha Inc. is still an actual bidder and has not lost standing.

However, on January 7, 2022, Judge Cahill issued an order dismissing Petitioner's first appeal as funding on the project lapsed on December 31, 2021. Judge Cahill determined that this matter was moot, as Maui County had withdrawn the Solicitation. Because Petitioner cannot be awarded the contract as the solicitation was withdrawn due to lack of funding, the Second Circuit Court has determined that the appeal is moot.

In their motions to dismiss, Maui County and Beylik argue that Alpha Inc. no longer has standing. The Hearings Officer agrees with Maui County and Beylik that Alpha Inc. no longer has standing. Under HRS Section 103D-701(a), Alpha lacks standing as it is no longer an actual or prospective bidder, offeror, or aggrieved person; and pursuant to HRS Section 103D-709, cannot file a protest. Based upon Petitioner's lack of standing, and the Court's order dismissing the solicitation as moot, the Hearings Officer grants both Respondent's and Beylik's Motions to Dismiss. As a result, Petitioner's Motion for Summary Judgment is moot and therefore, denied.

#### **IV. ORDER:**

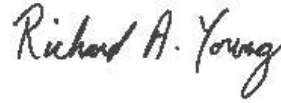
Accordingly, the Hearings Officer orders as follows:

- Respondent's December 20, 2021 Motion to Dismiss is granted;
- Intervenor's December 22, 2021 Motion to Dismiss is granted;
- Petitioner's December 27, 2021 Motion for Summary Judgment is denied; and
- Petitioner's December 10, 2021 Request for an Administrative Hearing is dismissed.



The parties will bear their own attorney's fees and costs incurred in pursuing this matter. Pursuant to HRS § 103D-709(e), the \$5,500.00 Procurement Protest Bond shall be forfeited to the State of Hawaii.

DATED: Honolulu, Hawaii, January 21, 2022.



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

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*In Re Alpha, Inc. v. Department of Finance, County of Maui, and Beylik Drilling & Pump Service, Inc., Intervenor; PDH-2021-016; Hearings Officer's Findings of Fact, Conclusions of Law, and Final Order Granting Respondent's Motion to Dismiss; Granting Intervenor's Motion to Dismiss; Denying Petitioner's Motion for Summary Judgment, and Dismissing Petitioner's December 10, 2021 Request for an Administrative Hearing.*