



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2022 MAY 26 A 11: 48

HEARINGS OFFICE

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

In the Matter of)	PDH-2022-001
)	
SODERHOLM SALES AND LEASING, INC.,)	
)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
Petitioner,)	
)	
vs.)	
)	
HAWAII STATE DEPARTMENT OF EDUCATION,)	
)	
Respondent.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On April 18, 2022, Soderholm Sales and Leasing, Inc. (hereinafter referred to as "Petitioner" or "SSL") filed a request for hearing to contest Respondent Hawaii State Department of Education's (hereinafter referred to as "Respondent" or "DOE") denial of Petitioner's protest in connection with a Request for Proposals, RFP D22-091, to furnish and deliver A-1 Type school buses to various schools and offices of the Hawaii State Department of Education statewide. A Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

Respondent filed its response to Petitioner's request for hearing on April 23, 2022.

On April 25, 2022, a pre-hearing conference was convened in the matter. Petitioner was represented by Jeffrey P. Miller, Esq. along with Petitioner's officer, Erik

Soderholm. Ann T. Horiuchi, Esq. and Ronald D. Rodriguez, Esq. appeared on behalf of Respondent. At the pre-hearing conference, hearing in the matter was confirmed for May 5, 2022; the parties were provided deadlines to file motions and responses; and hearing on motion(s) was set for May 2, 2022. The Hearings Officer also instructed the parties to submit written briefs on the issue of whether the Office of Administrative Hearings has jurisdiction to hear the matter under Hawaii Revised Statutes (“HRS”) §103D-709.

On April 27, 2022, Respondent filed Respondent Department of Education, State of Hawaii’s Motion to Dismiss and/or for Summary Judgment; Memorandum in Support of Motion; Declaration of Nicole Agena; Exhibits “A” – “I”; Declaration of Anne T. Horiuchi; Exhibits “1”-“2.”

On April 27, 2022, Petitioner filed Petitioner Soderholm Sales and Leasing, Inc.’s Jurisdictional Brief.

On April 29, 2022, Petitioner filed its opposition to Respondent’s motion and Respondent filed its response to Petitioner’s brief.

On May 2, 2022, Respondent’s motion came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Petitioner was represented by Jeffrey P. Miller, Esq. and Respondent was represented by Ann T. Horiuchi, Esq. and Ronald D. Rodriguez, Esq. At the conclusion of argument on Respondent’s motion, the parties were informed the Hearings Officer would take the matter under advisement.

Having reviewed and considered the arguments presented, along with the memorandum, declarations, and exhibits attached thereto, together with the records and files herein, the Hearings Officer notified the parties by letter on May 2, 2022, that Respondent’s motion to dismiss was granted and the May 5, 2022 evidentiary hearing was vacated.

The Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision granting Respondent’s motion to dismiss.

II. FINDINGS OF FACT

1. On January 11, 2022, DOE issued Request for Proposals, RFP D22-091, Sealed Proposals to Furnish and Deliver A-1 Type School Buses to Various Schools and Offices of the Hawaii State Department of Education Statewide (“RFP”).

2. The RFP states that DOE anticipates purchasing 14 passenger Type A-1 school buses of two models: Model 1 - single rear wheel, and Model 2 - dual rear wheel.

3. Pursuant to the RFP, the successful contractor(s) will furnish and deliver school buses statewide that fit the specific needs of the schools and offices purchasing vehicles.

4. Two contractors submitted proposals in response to the RFP: SSL and A-Z Bus Sales, Inc. ("A-Z Bus").

5. On March 17, 2022, DOE awarded the contract to both SSL and A-Z Bus.

6. A-Z Bus's proposal includes price sheets for two base model buses. A-Z Bus's lowest base model bus unit price is \$69,578.67.

7. By letter dated March 23, 2022, SSL protested the award of the solicitation to A-Z Bus alleging A-Z Bus's bid was nonresponsive, defective, and otherwise failed to materially comply with the requirements of the RFP.

8. By letter dated April 11, 2022, DOE denied SSL's protest.

9. On April 18, 2022, SSL filed a request for administrative hearing with the Office of Administrative Hearings ("OAH") to review the April 11, 2022 denial of its protest.

10. Along with its request for administrative hearing, SSL submitted a procurement protest bond in the amount of \$100.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702.

The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the hearings officer sua sponte, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. *See Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii and Hawaiian Dredging Company, Inc., PCX 2011-2 and Goodfellow Bros., Inc. v. Department*

of Transportation, State of Hawaii and Hawaiian Dredging Construction Company, Inc., PCX 2011-3 (consolidated cases) (June 6, 2011); Ohana Flooring v. Department of Transportation, PCH-2011-12 (November 18, 2011); Air Rescue System v. Finance Department, PDH 2012-005 (December 12, 2012); and Nan, Inc. v. HART, PDH-2015-004 (May 28, 2015).

Respondent moves for dismissal of the matter for lack of jurisdiction and/or for summary judgement.

A. Respondent's Motion to Dismiss

In bringing its motion to dismiss, Respondent contends Petitioner failed to perfect its request for administrative hearing within the requirements of HRS §103D-709. Respondent raises two jurisdictional arguments: (1) SSL acknowledged that this protest does not concern a matter greater than \$10,000, the minimum threshold amount required by HRS §103D-709(d); and 2) the protest bond SSL submitted with its request for hearing did not meet the requirements of HRS §103D-709.

Minimum Amount in Controversy

In its motion to dismiss, Respondent argues SSL failed to perfect its request for administrative review when it “acknowledged that this protest does not concern a matter greater than \$10,000,” the minimum threshold amount required by HRS §103D-709(d). (*Respondent's Motion at page 6*).

HRS §103D-709 provides in relevant part:

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 *may initiate a proceeding* under this section; *provided that*:

- (1) For contracts with an estimated value of less than \$1,000,000, *the protest concerns a matter that is greater than \$10,000*; or
- (2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

(Emphasis added).

Pursuant to HRS §103D-709(d), for OAH to have jurisdiction over the matter, the protest must concern a matter greater than \$10,000. A request for administrative hearing

filed with OAH must concern a minimum amount in controversy and must be accompanied by a protest bond if the solicitation or award that is the subject of the protest involves a procurement under HRS §103D-302 or HRS §103D-303. *See HRS §103D-709; See also, On-Line Computer Products, Inc. v. Office of Enterprise Technology, State of Hawaii, PDH-2015-009 (November 25, 2015).*

Procurements under HRS §103D-302 relate to competitive sealed bids and procurements under HRS §103D-303 relate to competitive sealed proposals. The instant RFP is a competitive sealed proposal under HRS §103D-303. A bidder protesting an award of a contract under HRS §103D-303 may initiate a proceeding under HRS §103D-709 provided the protest concerns a matter that is greater than \$10,000. This minimum threshold requirement was designed to eliminate appeals involving relatively minor issues so that the procurement is not delayed. *See Air Rescue Systems Corp. v. Finance Dept., PDH-2012-006 (December 12, 2012); and 57 Engineering, Inc. v. Department of Education, State of Hawaii, PDH-2018-009 (October 23, 2018).*

In order to initiate a request for administrative review within the requirements of HRS §103D-709, the protest matter must meet the minimum amount in controversy required under HRS §103D-709(d) and the initiating party must submit a protest bond pursuant to HRS §103D-709(e).

HRS §103D-709 provides in relevant part:

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or

(2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

(e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of one per cent of the estimated value of the contract.

Respondent argues SSL acknowledged this protest does not concern a matter greater than \$10,000, the minimum amount in controversy required under HRS §103D-709(d), when it submitted a protest procurement bond in the amount of \$100. HRS §103D-709(e) requires a party initiating a proceeding HRS §103D-709(d) to pay a protest bond in the amount of one percent of the estimated value of the contract. SSL's \$100 protest procurement bond equates to one percent of \$10,000. Respondent contends SSL failed to perfect its request for administrative review when it "acknowledged that this protest does not concern a matter greater than \$10,000."

In its jurisdictional brief SSL argues: "[T]he bond requirements of H.R.S. §§103D-709(d) and (e) do not apply to the instant RFP. H.R.S. §§103D-709(d) requires a bond for (1) contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000, or (2) contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract).[sic] Here, there is no 'contract' because the DOE has not placed an order with any approved vendor." (*Petitioner's Brief at page 3-4*).

Petitioner does not address the jurisdictional threshold requirement in either its jurisdictional brief or in its opposition to Petitioner's motion. Petitioner makes no argument regarding the minimum amount in controversy required under HRS §103D-709(d). Rather, Petitioner argues there is no "contract" and therefore "the bond requirements" of HRS §§103D-709(d) and (e) do not apply to the instant request for hearing.

Respondent acknowledges this Office has held that the requirements of HRS §§103D-709(d) and (e) have been held inapplicable in cases where a protest is filed over the content of a solicitation because in that situation, the protest is filed prior to the date set for the submission of bids. *See Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010)*. However, that is not the case here. Here, Petitioner protests the award of the solicitation to A-Z Bus, not the contents of the solicitation. The Hearings Officer notes Petitioner's protest was filed after proposals were submitted, evaluated, and the contract awarded. The Hearings Officer further notes that Petitioner was aware of the contents of A-Z Bus's offer.

Based on these considerations, the Hearings Officer rejects Petitioner's argument that HRS §§103D-709(d) and (e) are inapplicable to the instant request for

administrative hearing. The Hearings Officer concludes that the minimum threshold requirement under HRS §103D-709(d) and bond requirement under HRS §103D-709(e) are applicable to this case.

This Office has held that HRS §103D-709(d) requires that the matter in controversy must be of a certain monetary value or a party may not initiate a proceeding with the Office of Administrative Hearings. *See Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii and Hawaiian Dredging Company, Inc., PCX 2011-2 and Goodfellow Bros., Inc. v. Department of Transportation, State of Hawaii and Hawaiian Dredging Construction Company, Inc., PCX 2011-3 (consolidated cases) (June 6, 2011)*. For OAH to have jurisdiction over this matter in accordance with the provisions of HRS §103D-709, the matter in controversy must be greater than \$10,000, and Petitioner was required to submit a bond in the amount of one per cent of the estimated value of the contract. *See HRS §§103D-709(d) and (e)*.

The Hearings Officer notes that although Petitioner argues no bond is required, Petitioner submitted a \$100 procurement protest bond along with its request for administrative hearing. The \$100 procurement protest bond Petitioner submitted equates to one percent of \$10,000. Petitioner does not explain in its jurisdictional brief or opposition to Respondent's motion why Petitioner submitted a procurement protest bond in the amount of \$100 with its request for hearing. Pursuant to HRS §103D-709(e), Petitioner's \$100 bond represents the estimated value of the contract is \$10,000. OAH does not have jurisdiction over a protest concerning a contract valued at \$10,000.

Bond Requirement

Respondent also asserts OAH lacks jurisdiction over the matter because Petitioner submitted an insufficient protest bond. Respondent contends the \$100 procurement protest bond Petitioner's submitted with its request for administrative hearing does not meet the requirements set forth under HRS §103D-709(e).

HRS §103D-709(e) provides:

The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of one per cent of the estimated value of the contract.

Under HRS §103D-709(e), a party initiating a request for administrative hearing must pay a cash or protest bond in the amount of “one percent of the estimated value of the contract” to perfect its request for administrative review.

HRS §103D-709(k) defines “estimated value of the contract” as the “lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable.”

The instant RFP was solicited pursuant to competitive sealed proposals under HRS §103D-303. Under HRS §103D-709(k), the “estimated value of the contract” for competitive sealed proposals is the “bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous.”

Petitioner contends the bond requirement under HRS §103D-709(e) does not apply to the instant RFP. In support of its position, Petitioner states that according to the RFP, DOE will only place orders with approved the approved contractors on an as needed basis and only during the “open order period” or “order window.” Petitioner posits that because no bus orders have been placed yet, there is no “contract.” Petitioner argues the bonding requirements of HRS §103D-709(e) do not apply in this case because the value of the contract is zero.

In response, Respondent asserts, “Petitioner’s assumption that contract value must necessarily coincide with the amount of an executed contract fails to account for the definition of an ‘estimated value of the contract’ which, for a competitive sealed proposal under HRS §103D-303, is ‘the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous.’” (*Respondent’s Response at pages 3-4*).

Respondent argues “SSL could have and should have applied HRS §103D-709(k) in order to make a good faith determination of the appropriate bond amount to post.”

HRS §103D-709(k) provides the following:

As used in this section, “estimated value of the contract” or “estimated value”, with respect to a contract, means the lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable.

Respondent contends the “bid amount of the responsible offeror” in the instant case is the unit price of contested awardee A-Z Bus’s least expensive base model bus. Respondent posits the “estimated value of the contract” in this case is \$69,578.67, the least expensive unit price of A-Z Bus’s base model bus.

The Hearings Officer has determined that HRS §§103D-709(d) and (e) apply to the instant request for administrative hearing. The protest in this case was filed after SSL and A-Z Bus responded to the RFP, after proposals were evaluated, and after the contract was awarded. Petitioner was aware of the contents of A-Z Bus’s offer and of the base model bus prices submitted by A-Z Bus. The Hearings Officer concludes Petitioner was required to submit a bond in the amount of one percent of the estimated value of the contract. *See HRS §103D-709(e)*.

The Hearings Officer agrees with Respondent and determines the “estimated value of the contract” is \$69,578.67. The Hearings Officer notes DOE anticipates purchasing 14 passenger Type A-1 school buses from the contractor(s) awarded the contract. DOE awarded the contract to both SSL and A-Z Bus. A-Z Bus’s lowest unit price base model bus is \$69,578.67. The Hearings Officer cannot accept SSL’s position that the estimated value of the contract is zero. Estimating the value of the contract at zero would render the request for hearing moot. The Hearings Officer concludes that based on an estimated value of the contract at \$69,578.67, Petitioner was required to submit a bond in the amount of \$695.79. The Hearings Officer further concludes that Petitioner failed to perfect its appeal when it submitted a procurement protest bond in the amount of \$100. The Hearings Officer notes that in determining the estimated value of the contract at \$69,578.67, the matter in controversy meets the minimum jurisdictional threshold under HRS §103D-709(d). Nonetheless, estimating the value of the contract at \$69,578.67 renders Petitioner’s \$100 protest bond insufficient under HRS §103D-709(e). Based on the foregoing considerations, the Hearings Officer concludes Petitioner failed to perfect its request for administrative hearing and OAH does not have jurisdiction over this matter.

Filing Fee

Finally, in its jurisdictional brief, Petitioner argues no filing fee was required for the instant request for hearing. Petitioner argues that “the estimated value of the contract

is zero, well below the threshold of \$500,000 to trigger the filing fee requirement.”
(*Petitioner’s Brief at page 4*).

Under HRS §103D-709(f), a party initiating a proceeding under HRS §103D-709 is required to pay a filing fee for contracts with an estimated value of \$500,000 or more.

HRS §103D-709(f) provides in relevant part:

In addition to the bond required in subsection (e), the initiating party shall pay to the department of commerce and consumer affairs a non-refundable filing fee of:

(1) \$200 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or

(2) \$1,000 for a contract with an estimated value of \$1,000,000 or more.

Respondent contends a filing fee was required and asserts the matter should be dismissed for Petitioner’s failure to submit a filing fee. Respondent argues Petitioner should have applied HRS §103D-709(k) to make a good faith effort in determining the “estimated value” of the contract at issue. The estimated value of the contract in this case means the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous. *See HRS §103D-709(k)*. Respondent posits if DOE purchased all 14 buses from A-Z Bus at A-Z Bus’s lowest base model bus unit price of \$69,578.67, the DOE would be spending a minimum of \$974,101.38 on this contract. Respondent argues the estimated value of the contract meets the \$500,000 threshold and “SSL should have at least paid \$200 as a filing fee for this Appeal.” (*Response to Brief at page 5*).

The Hearings Officer has rejected Petitioner’s position that the value of the contract is zero. Nonetheless, the Hearings Officer cannot accept Respondent’s position that, for the purpose of determining whether a filing fee is required, the estimated value of the contract is \$974,101.38. In its motion, Respondent contends the “estimated value of the contract” is the unit price of A-Z Bus’s lowest priced base model in the amount of \$69,578.67. Respondent does not explain why the “estimated value of the contract” should be calculated one way to determine the bond requirement and calculated another way to determine whether a filing fee is required. The Hearings Officer notes DOE awarded the contract to both SSL and A-Z Bus. The Hearings Officer cannot reasonably conclude DOE intends to purchase all 14 buses from A-Z Bus. Neither can the Hearings Officer accept both

of Respondent's conflicting positions. The Hearings Officer has determined the "estimated value of the contract" in this instant case is \$69,578.67. The Hearings Officer determines the \$69,578.67 estimated value of the contract does not meet the jurisdictional threshold of \$500,000 to require a filing fee. Based on these considerations, the Hearings Officer concludes no filing fee was required in the instant request for administrative hearing.

Notwithstanding the Hearings Officer's determination that no filing fee was required in this instant case, SSL failed to perfect its request for administrative hearing when it submitted an insufficient bond and, accordingly, OAH lacks jurisdiction over this matter. Respondent's motion to dismiss for lack of jurisdiction is granted.


B. Respondent's Motion for Summary Judgment is Moot

Because the Hearings Officer has no jurisdiction to consider SSL's procurement protest, it would not be appropriate to issue a formal opinion on Respondent's motion for summary judgment. Since there is no jurisdiction to consider SSL's protest, there is no jurisdiction to consider a motion concerning the merits of the protest. In view of the jurisdictional rulings herein, Respondent's motion for summary judgment is moot.

IV. DECISION

Based upon the foregoing considerations, Respondent's motion to dismiss is granted and the matter is hereby dismissed. The parties shall bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, May 26, 2022.



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