



eFiled 2025 NOV 07 P 12:59

HEARINGS OFFICE

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

In the Matter of

CUSHNIE CONSTRUCTION COMPANY,  
INC.,

Petitioner,

vs.

COUNTY OF KAUAI, CHELSIE SAKAI,  
CHIEF PROCUREMENT OFFICER,

Respondent.

PDH-2025-007

HEARINGS OFFICER'S FINDINGS  
OF FACT, CONCLUSIONS OF LAW,  
AND DECISION

Administrative Hearings Officer:  
Ryan H. Ota

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On September 25, 2025, Cushnie Construction Company, Inc. ("Petitioner") filed a request for administrative review ("Request for Administrative Review") to contest Chelsie Sakai, Chief Procurement Officer's ("Respondent") September 19, 2025 denial of Petitioner's protest dated September 10, 2025 regarding Respondent's Invitation for Bids # 4049 ("IFB") for Services to Load and Haul Soil to the Kekaha Landfill for the County of Kauai ("Project"). Petitioner posted a no protest bond and did not file a nonrefundable filing fee with its Request for Administrative Review.

The Notice of Prehearing Conference and Hearing was served on the parties.

On October 1, 2025, Respondent filed Respondent's Response Pursuant to HAR § 3-126-62.

On October 2, 2025, a prehearing conference was held via Zoom.

On October 14, 2025, this matter came on for hearing pursuant to Hawaii Revised Statutes (“HRS”) chapters 91 and 103D and Hawaii Administrative Rules (“HAR”) title 3, chapter 126. Bronson Griep, appeared on behalf of Petitioner, with Anne McLeary present as Petitioner’s representative. Deputy County Attorney H. Ramsey Ross, Esq. appeared on behalf of Respondent.

Petitioner’s Exhibits 1 through 12 were admitted into evidence<sup>1</sup>. The Hearings Officer took administrative notice of the records and files in this matter.

The following individual testified on behalf of Petitioner: Bronson Griep<sup>2</sup>, Petitioner’s Estimator.

After Petitioner rested its case, Respondent orally moved for a dismissal under HAR § 3-126-70, on the basis that Petitioner did not file a protest bond or an administrative filing fee and that the protest was untimely in that Respondent had not made any award or indicated any intent to award at the time of the Protest. The Hearings Officer took the matter under advisement.

Respondent proceeded with its case-in-chief and Kristi Mahi, Procurement & Specifications Specialist, testified on behalf of Respondent.

The parties agreed to make oral closing arguments in lieu of written closing briefs and did so at the hearing.

Having considered the evidence and arguments of counsel, and the exhibits, records, and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision.

## II. FINDINGS OF FACT<sup>3</sup>

1. On August 4, 2025, Respondent published its IFB for the Project. The IFB required bidders to submit its offers and various other required documentation, including but not limited to, a certificate of insurance with endorsements and required coverages, proof of a subcontracting agreement with any subcontractors to be engaged by the offeror, and certificate of vendor compliance. *See* Petitioner’s Exhibit 1.

---

<sup>1</sup> Petitioner submitted proposed Exhibits 1-13. Respondents objected to Petitioner’s Exhibit 13 and it was not admitted into evidence by stipulation or at the evidentiary hearing. Respondents also objected to any annotations Petitioner made to exhibits 2 and 7, but not to the actual text of the exhibits. As such, both were admitted. Respondents did not submit any exhibits for evidentiary purposes.

<sup>2</sup> Petitioner did not file a witness list, but did indicate at the Prehearing Conference that it might have Mr. Griep, Ms. McLeary, and/or Ms. Laura Cushnie, President as witnesses.

<sup>3</sup> If any of the findings of fact are deemed conclusions of law, the Hearings Officer adopts those facts as conclusions of law.

2. IFB Solicitation Instructions Section 8 stated, “**BID OPENING AND AWARD.** Award information will also be posted on the County of Kaua’i Division of Purchasing web site under ‘Tabulations, Awards, and Other Information.’” *Id.* at page 5.
3. IFB Solicitation Instructions Section 10.A. Certificate of Insurance subsection stated, in relevant part, “Concurrent with the execution of the contract Contractor shall furnish the County with original certificates and endorsements effecting required coverage(s).” *Id.* at page 6.
4. IFB Scope of Work and Award Section II Subcontractors stated, in relevant part, “At the time of award, the successful Offeror will provide proof of a subcontracting agreement between itself and any subcontractor to be engaged in this contract.” *Id.* at page 14.
5. IFB Scope of Work and Award Section IV Method of Award stated, “Award shall be made to the responsible, responsive offer submitting the Lowest Total Sum Bid Price for items 1-2 whose offer complies in all respects with the solicitation requirements herein. . . .” *Id.*
6. IFB Minimum Specifications Section A.1. stated, in relevant part, “The submitted Offer should list vehicles with enough capacity to ensure minimum haul capability assuming each vehicle will be able to haul at least three loads per day [*sic*] Contractor must provide copies of applicable annual renewals, insurance policies, and proof of compliance with Hawai’i Compliance Express.’[*sic*]” *Id.* at page 17.
7. The IFB included the form for offers to be submitted by offerors. Item 5.c. of the Questionnaire states, “Submit subcontractor agreement (may be tentative or pending). *See* Petitioner’s Exhibit 2.
8. The bid opening was originally set for August 29, 2025 but was extended till September 5, 2025. Testimony of Ms. Mahi.
9. Petitioner timely submitted its bid which included a Certificate of Liability Insurance, Certificate of Vendor Compliance, and a Subcontractor Agreement<sup>4</sup>. *See* Petitioner’s Exhibit 3.

---

<sup>4</sup> The Subcontractor Agreement does not appear to be an enforceable agreement in that it does not provide sufficient details to establish the basic elements of a contract including, but not limited to, appropriate legal consideration. The entire text of the agreement consists of one sentence stating, “Wally Rita Trucking, Inc. agrees to haul soil for the General Contractor, Cushnie Construction Company, Inc. for the project ‘Load and Haul Soil to Kekaha

10. Offeror Earthworks Pacific Inc. (“Earthworks”) timely submitted its bid which did not include proof of insurance, proof of compliance with Hawai’i Compliance Express, or proof of a subcontractor agreement. *See* Petitioner’s Exhibit 4.
11. On or about September 5, 2025, Respondent published the bid submittals on its website which included submittals from seven offerors including Petitioner and Earthworks. The title of the web page was “Final tabulation Bid IFB-G/S #4049 – Services to Load and Haul Soil to Kekaha Landfill.” Earthworks total bid price was \$2,450,000. Petitioner’s total bid price was \$2,819,100. *See* Petitioner’s Exhibit 5 at page 2.
12. On or about September 10, 2025, Petitioner filed its protest (“Protest”) with Respondent alleging that Earthworks’ bid is non-responsible and non-responsive because it did not include a subcontractor agreement, proof of compliance with the Hawaii Compliance Express, and a certificate of insurance.<sup>5</sup> *See* Petitioner’s Exhibit 6.
13. At the time of the receipt of the Protest, Respondent had not made an award, nor had it indicated any intent to award to any offeror. Testimony of Ms. Mahi.
14. On or about September 19, 2025, Respondent denied Petitioner’s protest (“Protest Denial Letter”) by determining that Petitioner lacked standing to protest as it was not aggrieved at the time of the protest and the protest was therefore also untimely. Respondent also addressed the substantive claims raised by Petitioner and rejected them by asserting that none of the documents in question were required to be submitted with the bids. *Id.*
15. On September 25, 2025, Petitioner filed its Request for Administrative Review with the Office of Administrative Hearings (“OAH”) and attached a letter addressed to Respondent dated September 22, 2025. The Request for Administrative Review did not have either an administrative filing fee nor a protest bond.

---

Landfill’.”

<sup>5</sup> Neither party submitted the actual protest letter as evidence.

### III. CONCLUSIONS OF LAW<sup>6</sup>

#### **A. Petitioner did not perfect its request for administrative review.**

After Petitioner rested its case-in-chief, Respondent orally moved to dismiss Petitioner's Request for Administrative Review under HAR § 3-126-70, which provides for dismissal of requests for administrative reviews. Respondent argued that Petitioner's Request for Administrative Review failed to file a non-refundable filing fee and/or a protest bond as required under HRS §103D-709.

HRS § 103D-709(f) states,

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.

Failure to pay the filing fee shall result in the rejection or dismissal of the request for review. . . .

HRS § 103D-709(e) states, "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. . . ."

HRS § 103D-709(k) states,

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.

Petitioner argued that it believed that neither the administrative filing fee nor the protest bond were required as the current proceeding was being held pursuant to HRS § 103D-701 and allegedly still under review of the chief procurement officer. In its closing oral argument, Petitioner requested that it be allowed to submit any fees and/or bonds required. Petitioner is mistaken as to the controlling statutory provisions in this matter as it is an administrative review of the chief procurement officer's denial of its Protest being brought pursuant to HRS 103D-709.

---

<sup>6</sup> If any of the conclusions of law are deemed findings of fact, the Hearings Officer adopts those conclusions as findings of fact.

In this case, Petitioner alleges that the apparent low-bidder's bid is non-responsive and non-responsive and sought "recognition as the lowest responsive and responsible bidder". See Request for Administrative Hearing. Petitioner based its Protest and Request for Administrative Review on being an aggrieved bidder as the alleged lowest responsive and responsible bidder being denied the award, notwithstanding Respondent's denial that it had made such a determination. As such, Petitioner was required to file its Request for Administrative Review in full compliance with HRS §103D-709 which included filing an administrative filing fee and protest bond based upon the expected value of the contract to the alleged awardee. Furthermore, both the administrative filing fee and protest bond must be filed within the statutory time frame to file a request for administrative review. "Until such bond is posted, the request for administrative review is incomplete and the time limitation for filing a valid request for administrative review continues to run." *Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii*, PCX-2009-4 at page 5. In a similarly decided case, it was held that, "The essence of this decision is that a bond must be filed with the OAH along with the request for hearing within the seven calendar day limit of HRS § 103D-712(a)." *Derrick's Well Drilling and Pump Services, LLC v. County of Maui, Department of Finance*, PDH-2012-001 at page 10.

HRS § 103D-709(f) expressly provides, "Failure to pay the filing fee shall result in the rejection or dismissal of the request for review. . . ." In this case, as with the failure to file a protest bond, failure to file the required administrative filing fee makes the Request for Administrative Review defective and the Hearings Officer hereby orders this matter to be dismissed for lack of jurisdiction.

#### **B. Petitioner's Protest was untimely.**

Even *assuming arguendo* that Petitioner's Request for Administrative Review was perfected, Petitioner's standing to file a protest pursuant to HRS § 103D-701 would still be problematic. 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 . . . (Emphasis added).

A party becomes “aggrieved” and has standing to protest where, “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.** *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.” *Eckard Brandes, Inc. v. Department of Finance, County of Hawai‘i; et. al*, PCH-2003-14 and PCH-2003-20 (Consolidated) (June 24, 2004) at page 2. (Emphasis added).

When Petitioner filed its Protest on September 10, 2025, Respondent had not awarded the contract for the Project, nor had it published any intent to award the contract to any particular bidder. In fact, Respondent was in the process of evaluating the bid submittals. Both the Protest Denial Letter and testimony of Ms. Mahi indicate that the evaluation process was underway and not yet completed. Petitioner argues that publication of the bid submittals constituted an intent to award to Earthworks.<sup>7</sup> HRS § 103D-302(d) requires that, “Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids. **The amount of each bid and other relevant information specified by rule, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection.**” (Emphasis added). As such, it appears that Petitioner’s Exhibit 5, “Final tabulation Bid IFB-G/S #4049 – Services to Load and Haul Soil to Kekaha Landfill” is Respondent’s effort to comply with HRS §103D-302(d). The IFB’s Solicitation Instructions Section 8 states, “Award information will also be posted on the County of Kaua‘i Division of Purchasing web site under ‘Tabulation, Awards, and Other Information.’” Petitioner’s Exhibit 5 makes no indication of or reference to an award, but appears to merely be a record of bid submittal information as of September 5, 2025. Nothing in the record supports the allegation that Earthworks was a responsive and responsible bidder and that Respondent intended to award them the contract at the time of the Protest. Therefore, because there was no official, adverse action taken by Respondent, the Protest was untimely.

### **C. Documents were not required at the time of bid submission.**

Further *assuming arguendo* that Petitioner was aggrieved and the Protest was timely, Respondent addressed Petitioner’s substantive claims that Earthworks’ bid submission was defective in that it did not include three additional documents: 1) the subcontractor agreement; 2)

---

<sup>7</sup> Petitioner erroneously referred to Petitioner’s Exhibit 5 as the “Award Tabulation” and testified that it showed Respondent’s intent to award.

proof of compliance with the Hawaii Compliance Express; and 3) the certificate of insurance. A bid may be rejected if it is nonresponsive.<sup>8</sup> HRS § 103D-302(f) states,

Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be as objectively measurable as possible, such as discounts, transportation costs, total or life cycle costs, and the bidder's past performance, if available. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

Therefore, in determining whether a bid is responsive or not, “bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening.” *Environmental Recycling v. County of Hawaii, Department of Finance*, PCH-98-1 at page 12.

**1. Subcontractor Agreement is not required at bid submission.**

Petitioner argues that the IFB requires that bidders must submit proof of an agreement with subcontractors it intends to use in performance of the contract with the bid submittal. To support its argument, Petitioner relies upon the IFB’s attached Questionnaire form item 5.c. which states, “Submit subcontractor agreement (may be tentative or pending)”. However, the term tentative means “not fully worked out or developed”. *See Merriam-Webster Online Dictionary*. Pending means “not yet decided; being in continuance”. *Id.* Therefore, based on the plain reading of the requirement, while the Questionnaire does call for the subcontractor agreement, it contemplates that it may not yet be finalized or completed at the time of submitting the Questionnaire. Additionally, when read in conjunction with the IFB Scope of Work’s Section II, which states, “At the time of award, the successful Offeror will provide proof of a subcontracting agreement between itself and any subcontractor to be engaged in this contract”, a bidder may reasonably assume that it had until the time of award to provide the subcontractor agreement to Respondent. As discussed above, Petitioner’s subcontractor agreement is not legally binding and would likely not satisfy the IFB’s requirement to obtain proof of a subcontractor agreement assuming that the IFB’s intent is to obtain proof of an enforceable subcontractor agreement. Petitioner also submitted Exhibit 9

---

<sup>8</sup> The Hearings Officer elects to address the substantive issues as they are determinations made by the chief procurement officer and instructive with regards to these particular documents only. The Hearings Officer makes no determination as to whether Earthworks’ bid submittal was responsive and responsible, nor whether Petitioner’s bid submittal was responsive and responsible as Respondent have not completed its evaluation.



which included an excerpt from the Hawaii Public Procurement Code Desk Reference outlining a statement from *Okada Trucking Co., Ltd. v. Board of Water Supply*, PCH-99-11 (November 10, 1999) which originally held that, “The bidder’s failure to have a subcontractor bound and ready to perform on the contract at the time of bid submission, let alone at bid opening, resulted in a non-responsive bid which should have been rejected. . . .” However, the decision was reversed by the Hawaii Intermediate Court of Appeals at 101 Hawaii 68 at 74-76 (2002) where it clarified that in terms of responsiveness and responsibility, “bidders are not required to have their subcontractors ‘lined up’ and contractually bound at the time of bid opening in order to be considered ‘responsible’ and see no reason to interpret similar language in the IFB otherwise.” Therefore, because there was no requirement for there to be a fully executed subcontractor agreement at the time of bid submission either by the terms of the IFB or by law, Respondent’s denial of this requirement is affirmed.

**2. Proof of compliance with Hawaii Compliance Express is not required with bid submission.**

Secondly, Petitioner alleges that proof of compliance with Hawaii Compliance Express is required with the bid submittal. The IFB does require proof of compliance with Hawaii Compliance Express in its Minimum Specifications section, but does not specify when the proof is to be submitted.<sup>9</sup> The Hawaii Compliance Express is a method in which vendors or contractors doing business with the state or counties may furnish proof of the requirements of HRS 103D-310(c) relating to responsibility of the offeror. HRS § 103D-310(c), in relevant part, states, “All offerors, **upon award of contract**, shall comply with all laws governing entities doing business in the State, including chapters 237, 383, 386, 392, and 393. Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection. . . .” (Emphasis added). Similarly, Respondent assert that its General Terms and Conditions does require verification of compliance “as a pre-requisite to award.” See Petitioner’s Exhibit 6. Therefore, as Petitioner does not provide evidence that the IFB required offerors to submit proof of compliance with Hawaii Compliance Express with their bid submittals, it cannot demand that an offeror’s be deemed non-responsive for failing to submit the proof of compliance with the bid submittals. Respondents’ denial is affirmed.

---

<sup>9</sup> IFB Minimum Specifications section A.i. states, “Contractor must provide copies of applicable annual renewals, insurance policies, and proof of compliance with Hawai’i Compliance Express.” See Petitioner’s Exhibit 1.

**3. The IFB does not require the certificate of insurance with the bid submittal.**

Finally, Petitioner alleges that Earthworks' bid submittal is defective as it does not include the required certificate of insurance. Petitioner did not provide specific evidence that the IFB actually required the certificate of insurance with the bid submittal. The IFB does require that the "Contractor shall procure and maintain, on primary basis and at its sole expense, at all times during the life of the contract insurance coverages, limits, including endorsements described herein against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work by the Contractor . . . " See Petitioner's Exhibit 1 section 10 at page 5. The IFB also states, "Concurrent with the execution of the contract [*sic*] Contractor shall furnish the County with original certificates and endorsements effecting required coverage(s)." Clearly, the IFB's instructions regarding the certificate of insurance required the awardee to provide certificate(s) of insurance no later than the execution of the contract, which is obviously a point in time after bid submittal. Therefore, Respondent's denial is affirmed.

**IV. DECISION**

Based upon the foregoing findings of fact and conclusions of law, the Hearings Officer hereby DISMISSES Petitioner's Request for Administrative Review for lack of jurisdiction for failing to timely perfect its request. In the event that a court of competent jurisdiction determines that Petitioner's Request for Administrative Review was properly filed, the Hearings Officer DISMISSES the request by finding that Petitioner was not an aggrieved party at the time of the Protest. Finally, regarding the substantive merits of the Protest, the Hearings Officer would AFFIRM Respondent's denial of Petitioner's Request for Administrative Review for the reasons stated above finding that the determinations by the chief procurement officer were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation. As there was no protest bond posted in this matter, no determination pursuant to HRS §103D-709(e) is required. The parties are to bear their own attorney's fees and costs.

DATED: Honolulu, Hawaii, 11/07/2025.

  
\_\_\_\_\_  
RYAN H. OTA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs