



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

In the Matter of)	PCH-2009-16
)	
PARADIGM CONSTRUCTION LLC,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
DEPARTMENT OF HAWAIIAN HOME)	
LANDS, STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
DELTA CONSTRUCTION)	
CORPORATION,)	
)	
Intervenor.)	
_____)	

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

I. INTRODUCTION

On June 22, 2009, Paradigm Construction LLC ("Paradigm"), filed a request for administrative review of the Department of Hawaiian Home Lands, State of Hawaii's ("Respondent") decision to deny Paradigm's protest in connection with a project designated as DHHL East Kapolei II Development, East-West Road and Road "E", Honouliuli Oahu,

Hawaii, Tax Map Key: 9-1-17; Por. 71 and 88 (“Project”). Paradigm’s request for administrative review was made pursuant to Hawaii Revised Statutes (“HRS”) §103D-709. The matter was thereafter set for hearing on July 7, 2009, and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the June 26, 2009 pre-hearing conference, Paradigm and Respondent requested that the hearing be continued to August 25, 2009 in order to allow the parties to prepare for the hearing.

On July 6, 2009, the parties entered into a stipulation allowing Delta Construction Corporation (“Delta”) to intervene in this proceeding.

On August 25, 2009, this matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. David R. Rosen, Esq. appeared for Paradigm; Clayton L. Crowell, Esq. appeared for Respondent and Michael D. Tom, Esq. appeared for Delta.

At the conclusion of the hearing, the Hearings Officer directed the parties to file proposed findings of fact and conclusions of law. Accordingly, on September 15, 2009, the parties filed their proposed findings and conclusions.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties’ proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

II. FINDINGS OF FACT

1. On December 17, 2008 and March 9, 2009, Delta filed separate requests for administrative review of Respondent’s decisions to deny two protests filed by Delta in connection with the Project. Delta’s requests were designated as PCH 2008-22 and PCH 2009-7 and were consolidated for hearing.

2. Thereafter, counsel for Respondent and Delta engaged in discussions contemplating the cancellation and rebidding of the solicitation. On January 6, 2009, counsel for Delta and Respondent informed that Hearings Officer that the parties were continuing to work towards an agreement to allow Respondent to cancel the solicitation and resolicit bids for the Project

3. On February 4, 2009, the parties entered into a stipulation to allow Paradigm to intervene in PCH 2008-22 and PCH 2009-7 in order to fully adjudicate the dispute.

4. On March 20, 2009, PCH 2008-22 and PCH 2009-7 came on for hearing.

5. Paradigm opposed Delta's requests for administrative review by alleging, among other things, that the In-State Contractor Preference ("Preference") was "unenforceable because the law that required the preference was repealed". Paradigm *did not complain* that the Preference was unduly restrictive and therefore in violation of HRS §103D-405(a).

6. On April 9, 2009, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in PCH 2008-22 and PCH 2009-7 ("Decision"). The Decision included the following findings of fact:

1. On or about October 1, 2008, Respondent issued a Notice to Bidders, IFB No. 09-HHL-005 ("IFB") for the purpose of soliciting bids for the construction of the Project.

2. The IFB included an "In-State Contractor Preference" provision ("Preference") which provided in relevant part:

IN-STATE CONTRACTOR PREFERENCE

A 7 percent preference shall be given to qualified In-State Contractors when awarding a contract for Public Works projects to promote use of In-State Contractors pursuant to Act 352, SLH 1997. To qualify for the preference, Contractors must provide proof that they have filed State of Hawaii Unemployment, General Excise, and Income Tax returns and have paid all amounts owing on such returns for the two successive years immediately prior to submitting the bid when the amount of their bid is \$5,000,000 or less,

and for the four successive years immediately prior to submitting the bid when the amount of their bid is more than \$5,000,000.

Therefore, any Contractor desiring an In-State Contractor's preference shall submit a tax clearance certificate from the State of Hawaii Department of Taxation (DOTAX) with his Bid Proposal. Additionally, he must indicate in the following section that he wishes to be considered for the preference.

The tax clearance certificate required as a part of the bid proposal package described in the DHHL Interim General Conditions is acceptable for this purpose. However, the Bidder is cautioned that the "special letter" is not acceptable for this purpose. Failure to submit the tax clearance certificate automatically voids the selection of the In-State Contractor's preference.

Whenever any Bidder selects and qualifies for an In-State Contractor's preference, all original bid prices from bidders who do not select or qualify for the In-State Contractor's preference shall be increased by 7 percent for evaluation purposes.

* * * *

The Bidder agrees that the preference for In-State Contractor shall be taken into consideration to determine the low Bidder in accordance with said section and the rules promulgated. However, the award of contract will be in the amount of the bid offered exclusive of any preference.

* * * *

3. Both [Paradigm] and [Delta] indicated in their respective bids that they wished to be considered for the In-State Contractor Preference.

4. Bids in response to the IFB were due and scheduled to be opened on October 31, 2008.

5. Five bids were submitted and opened on October 31, 2008.

6. [Paradigm] was the apparent low bidder (\$18,036,405.00) followed by [Delta] (\$18,041,776.75)(footnote omitted).

* * * *

16. By letter dated November 18, 2008 (footnote omitted), [Delta] protested the award of the contract to Paradigm ("First Protest").

* * * *

18. The First Protest raised the following claims:

1. Delta has learned that Paradigm's bid submission was non-compliant with its request for consideration of the In-State Contractor Preference because Paradigm did not include the requisite number of tax years required for a project over \$5,000,000.

2. Paradigm's submission of the Certificate of Vendor Compliance did not conform to the requirement of the In-State Contractor Preference provision requiring the State of Hawaii Tax Clearance Certificate.

3. Even if Paradigm were to be awarded the contract for the Project, Delta believes that Paradigm cannot meet the requirement of the Department's General Conditions, section 3.7, which mandates that the successful bidder shall file good and sufficient performance and payment bonds in an amount equal to one hundred percent (100%) of the amount of the contract price. (footnote omitted).

19. By letter dated and hand-delivered to Respondent on December 9, 2008, [Delta] protested the award of the

contract to [Paradigm] (“Second Protest”) on the following additional grounds:

* * * *

3. Delta is concerned that Paradigm now intends to perform the Project with a previously unidentified joint venturer, which is both impermissible under the Solicitation, and may be a violation of the In-State Contractor Preference requirement. (footnote omitted).

4. Delta has been informed and believes that although the Department included the In-State Contractor Preference in the Solicitation documents, the Department now intends (after the bids are opened) to evaluate the bids and award the contract without giving consideration to Delta’s In-State Contractor Preference. This post-bid opening change of terms irreparably corrupted the competitive bid process and requires cancellation of this Solicitation.

* * * *

20. By letter dated December 4, 2008 to [Delta], Respondent denied the First Protest. The denial was mailed to [Delta] on December 10, 2008 as evidenced by the postmark date.

21. Respondent’s denial of the First Protest was based in part on the following:

* * * *

Items 1 and 2 allege non-compliance with the In-State Contractor Preference requirements. Section 103D-1007 of the Hawaii Revised Statutes (HRS) was repealed by Act 52, Section 8 of Session Laws of Hawaii 2003. The corresponding section of the Hawaii Administrative Rules (Chapter 3-124, Subchapter 6) was repealed effective May 20, 2004 by Procurement Directive No. 2004-1 (August 18,

2004). Thus, inclusion of In-State Contractor Preference in the bid documents was in error and its requirements are unenforceable.

* * * *

22. On December 17, 2008, [Delta] filed with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, a request for administrative review of the First Protest.

23. By letter dated February 25, 2009 and received by [Delta] on March 5, 2009, Respondent denied the Second Protest.

24. On March 9, 2009, [Delta] filed a request for administrative review of the Second Protest.

* * * *

7. The Hearings Officer rendered the following conclusions in PCH 2008-22 and PCH 2009-17:

* * * *

Intervenor also urges the Hearings Officer to determine that the Preference is “unenforceable because the law that required the preference was repealed.” Intervenor, however, does not articulate, and the Hearings Officer cannot find, any authority to support the conclusion that the repeal of HRS §103D-1007 in 2003 renders the Preference in the IFB unenforceable or void (footnote omitted). While the repeal of HRS §103D-1007 eliminates the requirement that agencies award HRS §§103D-302 and 103D-303 contracts to contractors meeting the criteria outlined in that section, it does not prohibit agencies from including such a provision in a solicitation. In the absence of any authority to the contrary (footnote omitted), the Hearings Officer must conclude that Respondent, having included the Preference in the IFB, must now apply the Preference according to the terms of the IFB to *all qualified* bidders who had elected to be considered for the Preference and

award the contract pursuant to HRS §103D-302. The Hearings Officer further concludes that Intervenor, having been established in June 2005 and having failed to provide proof (footnote omitted) that it has filed State unemployment, general excise, and income tax returns and that it has paid all amounts owing on such returns for four successive years immediately prior to submitting the bid, does not qualify for the Preference.

* * * *

8. The Decision ordered as follows:

Based upon the foregoing findings and conclusions, Respondent's denials of Petitioner's First and Second Protests are hereby vacated and this matter is remanded to Respondent for reevaluation of the bids consistent with the Hearings Officer's Findings of Fact and Conclusions of Law herein. The Hearings Officer further orders that each party shall bear its own attorneys' fees and costs incurred in this matter.

9. Pursuant to the Decision, Respondent reevaluated the bids by applying the Preference and rescored the bids accordingly. As a result of Respondent's reevaluation of the bids, Delta was determined to be the lowest responsive, responsible bidder.

10. By letter dated April 24, 2009, Paradigm protested the Respondent's "attempt to rescore the bids . . . rather than modifying the Preference provision to make it rational or rebidding the IFB." Alternatively, Paradigm argued that Delta did not qualify for the Preference.

11. By letter dated June 15, 2009, Respondent denied the protest.

12. On June 22, 2009, Paradigm filed the instant appeal.

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 the determinations 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, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997). And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

In this action, Paradigm alleges that the application of the Preference is contrary to law. More specifically, Paradigm asserts that the Preference is unduly restrictive and therefore in violation of HRS §103D-405(a). That provision provides:

Maximum practicable competition. (a) All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs, and shall not be unduly restrictive.

At the outset, the Hearings Officer notes that under HRS §103D-701(a), “no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.” HRS §103D-701 specifically requires that protests based on the content of the solicitation be submitted prior to the date set for the receipt of offers so as to minimize disruption to procurements and contract performance. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH 2002-7 (August 2, 2002). The requirement was designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services*; PCH 2000-8

(October 17, 2000). In order to effectuate the underlying purpose of HRS §103D-701(a), strict, rather than substantial compliance with the time constraints is required. *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services, supra.*

In its April 24, 2009 protest, Paradigm alleged that:

The only basis for excluding Paradigm from being considered for the Preference that is addressed in the OAH Decision is the fact that Paradigm had not been in existence for at least four years preceding the bid submission deadline.¹ The OAH Decision, therefore, concluded that it would be impossible for Paradigm to satisfy the requirements of the Preference.²

What the OAH Decision did not consider is whether [Respondent] could modify the Preference provision to give recognition to Paradigm for the more than 17 years of experience of its President, Alex Kwon, in Hawaii. . . To the extent that the justification for the Preference is to insure adequate experience and an understanding of construction practices in Hawaii, Mr. Kwon's *bona fides* should prove more than adequate. (emphasis in original). To the extent that the justification for the preference is strictly to prejudice non-Hawaii contractors from fairly competing for contracts in Hawaii, it is unconstitutional and unenforceable.³

* * * *

Paradigm's claim that the Preference is unduly restrictive because it required contractors to provide proof that all applicable returns had been filed and all corresponding payments had been made for the four successive years prior to the submission of their bids, and should be modified "to give recognition to Paradigm for the more than 17 years of experience

¹ The Preference required that in order to "qualify for the preference, Contractors must provide proof that they have filed State of Hawaii Unemployment, General Excise, and Income Tax returns and have paid all amounts owing on such returns . . . for the four successive years immediately prior to submitting the bid when the amount of their bid is more than \$5,000,000."

² As noted by the Hearings Officer in footnote 9 of his Decision, "[Paradigm] does not dispute that because [Paradigm] was registered in the State of Hawaii in June 2005, it cannot and did not provide proof that it has filed unemployment, general excise, and income tax returns and that it has paid all amounts owing on such returns for the four successive years immediately prior to the submission of its bid."

³ See footnote 5, *infra*. To the extent that Paradigm now claims that the Preference is unconstitutional, the Hearings Officer concludes that that claim has been waived by Paradigm.

of its President, Alex Kwon, in Hawaii”, constitutes a claim based upon the content of the solicitation. Thus, if Paradigm believed that the Preference was contrary to HRS §103D-405(a) and should be modified “to make it rational”, it was obligated to submit such a protest prior to the submission of bids. Rather than submit such a protest, however, Paradigm indicated in its bid that it wished to be considered for the Preference. Having failed to file a timely protest, Paradigm is now barred from asserting that the Preference is unduly restrictive and in violation of HRS §103D-405(a).

Additionally, Intervenor and Respondent contend that the propriety of Respondent’s application of the Preference has already been litigated and determined in PCH 2008-22 and PCH 2009-7 (“Prior Action”) and, as such, Petitioner is collaterally estopped from relitigating that issue in the present case. Collateral estoppel is a preclusionary rule within the res judicata doctrine. The rule “precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies.” *Marsland v. Int’l Soc’y for Krishna Consciousness*, 657 P.2d 1035 (1983). Collateral estoppel also precludes relitigation of a fact or issue which could have been determined in a suit on a different cause of action between the same parties or their privies. *Henderson v. Pence, et al.*, 434 P.2d 309 (1967).

In its request for administrative review in the present action, Paradigm asserted that:

whether application of the Preference to exclude Paradigm would violate the law was not before OAH and could not be considered at that time because [Respondent] had decided not to apply the Preference. Therefore, how the [Respondent] *might* apply the Preference was not ripe for consideration.” (emphasis in original). *Id.*, f.n.8 (“[T]hat issue is not properly before the Hearings Officer and will not be addressed.”).⁴

Since the [Respondent] has now decided to apply the Preference, rather than cancel the solicitation or revise the IFB to comply with the law, as provided in HRS §103D-

⁴ Paradigm miscites the Hearings Officer’s comment in footnote 8 of his Decision. The footnote provided in its entirety:

Neither Respondent nor [Paradigm] asserts that the application of the Preference is unconstitutional. Therefore, that issue is not properly before the Hearings Officer and will not be addressed.

706, this issue is now ripe for consideration and is the subject of Paradigm's Protest. *The issue currently before the OAH is, therefore, whether the [Respondent's] application of the Preference is legal.* Specifically, has the Preference been applied so as not to violate HRS §103D-405(a), which directs that "all specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs, and shall not be unduly restrictive.

(Emphasis added).

Contrary to Paradigm's assertions, however, the question as to whether the application of the Preference was "legal" was at the heart of the Prior Action. Paradigm opposed the application of the Preference in the Prior Action by choosing to rely on the argument that the Preference was "unenforceable because the law that required the preference was repealed".⁵ Paradigm could also have argued, as it does now, that the Preference violated the law for the additional reason that it was unduly restrictive and contrary to HRS §103D-405(a), and that therefore, the Preference, if applied, should be modified or the solicitation cancelled. Having intervened in the Prior Action, Paradigm had a full and fair opportunity to challenge the application of the Preference on that basis⁶. The Hearings Officer's Decision and Respondent's subsequent application of the Preference⁷ did nothing to change that. The Hearings Officer therefore concludes that Paradigm is collaterally estopped from challenging the legality of the Preference on the basis of HRS §103D-405(a).

Finally, Paradigm alleges that even if the Preference is applied, Respondent did not properly determine whether Delta qualified for the Preference. More specifically, Paradigm

⁵ Moreover, because the Prior Action directly involved the issue of whether the application of the Preference was legal, the Hearings Officer queried Paradigm's counsel and Paradigm's counsel acknowledged that Paradigm was not taking the position that the Preference was unconstitutional.

⁶ The very purpose of allowing Paradigm to intervene in the Prior Action was to avoid piece-meal litigation by providing Paradigm with the opportunity to fully respond to Delta's claim that Respondent was required to apply the Preference. By choosing to intervene in the Prior Action, Paradigm was required to raise all applicable arguments, including relevant alternative arguments. Paradigm cannot assert that the Preference is contrary to law on one legal theory and, after failing to prevail on that basis, advance another legal theory to support its argument that the Preference is contrary to law in a subsequent action.

⁷ Paradigm attempts to distinguish the issues in the Prior and instant actions by arguing that Respondent's *application* of the Preference gives rise to the question *whether the application of the Preference is legal*. Paradigm, however, is fully aware that that very issue was raised by Delta's Second Protest and, consequently, litigated in the Prior Action.

asserts that Respondent, in reevaluating the bids, “did not request tax returns or proof that returns had been filed for any period from Delta or any of the other bidders.” The Preference stated in relevant part:

A 7 percent preference shall be given to qualified In-State Contractors when awarding a contract for Public Works projects to promote use of In-State Contractors pursuant to Act 352, SLH 1997. To qualify for the preference, Contractors must provide proof that they have filed State of Hawaii Unemployment, General Excise, and Income Tax returns and have paid all amounts owing on such returns for the two successive years immediately prior to submitting the bid when the amount of their bid is \$5,000,000 or less, and for the four successive years immediately prior to submitting the bid when the amount of their bid is more than \$5,000,000.

Therefore, any Contractor desiring an In-State Contractor’s preference shall submit a tax clearance certificate from the State of Hawaii Department of Taxation (DOTAX) with his Bid Proposal.

* * * *

(Emphasis added).

The foregoing provision expressly required Delta to provide proof that it had filed the applicable tax returns and had paid any corresponding taxes for the relevant time period in order to qualify for the Preference. A tax clearance certificate issued by the Department of Taxation constituted the required proof. The evidence established that Delta submitted a tax clearance certificate that certified that Delta had filed all tax returns due, and paid all amounts owed as of the date the certificate was issued. *Tax Facts from the State of Hawaii Department of Taxation 2000-1 (rev. 7/2007)*. The certificate also established that the Department of Taxation had cleared Delta as having met all requirements in connection with the filing of its tax returns and in paying its taxes as of the issuance of the certificate. Moreover, even if Delta had not submitted the requisite proof with its bid, it would have been permitted to do so up to the awarding of the contract. *See Standard Electric, Inc., vs. City &*

County of Honolulu, et. al, PCH 97-7 January 2, 1998)(tax clearance certificate requirement relates to and remains a matter of responsibility rather than responsiveness. Petitioner was entitled to present the tax clearance statement after bid opening and up to the time of award, notwithstanding the requirement in the Notice to Bidders, and that Respondent's rejection of Petitioner's bid on that basis was improper). Based on this record and on these considerations, the Hearings Officer concludes that Paradigm's argument is without merit.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that Petitioner's request for administrative review be and is hereby dismissed and that each party bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: **October 7, 2009**

/s/ CRAIG H. UYEHARA

CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs