



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of:)	PCH-2009-18
)	
OKADA TRUCKING CO., LTD.,)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

On June 26, 2009, Okada Trucking Co., Ltd. ("Petitioner") filed a request for administrative review in connection with Respondent Department of Education, State of Hawaii's ("Respondent") June 25, 2009 denial of Petitioner's April 8, 2009 protest. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 7, 2009, the parties agreed to waive the statutory requirement that the hearing begin within 21 days and the hearing was rescheduled for August 6, 2009.

On August 5, 2009, the parties filed a stipulation and order to continue the administrative hearing until moved on by either party. The matter was subsequently

consolidated with *Designer Built Systems, Inc. v. Department of Education, State of Hawaii, PCX-2009-8*.

In or about January 2011, the parties in PCX-2009-8 entered into a settlement and that matter was dismissed. Thereafter, this case was reset for hearing.

On March 31, 2011, Respondent filed a motion to dismiss Petitioner's request for hearing. By order dated April 21, 2011, the Hearings Officer denied the motion.

On May 25, 2011, Respondent filed a motion to dismiss Petitioner's request for its bid preparation costs and attorney's fees.

On August 30, 2011, the parties filed Stipulated Facts.

On August 30, 2011, this matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Neal K. Aoki, Esq. appeared for Petitioner; Jerrold G.H. Yashiro, Esq. appeared for Respondent. Prior to the commencement of the hearing, the parties were provided with the opportunity to address Respondent's motion to dismiss. After hearing the argument of counsel, the Hearings Officer denied the motion.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit proposed findings of fact and conclusions of law. Accordingly, on September 30, 2011, Petitioner and Respondent filed their respective briefs.

Having reviewed and considered the evidence and arguments presented by the respective parties, 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. In 2008, Respondent issued an invitation for bids for a construction project designated as, Hickam Elementary School, New Administration/Library Building, Job No. P00020-06 ("IFB") for the Central School District, Department of Education ("Project").

2. The IFB established the bid opening date as August 26, 2008.

3. Among other things, the IFB provided as follows:

* * * *

ALTERNATES

Bidder offers to incorporate in the work, the alternates that are described on the drawings and in specification "SECTION 01230-Alternates". For the purposes of evaluating the bid, the alternates listed in the COST AND TIME article and in "SECTION 01230-Alternates", are in the order of precedence.

PREFERENCE

Bidder agrees that:

1. Preferences are considered in the evaluation of bids; however, the award of the contract will be in the amount of the bid offered exclusive of any preferences.

2. If granted Hawaii product or recycled product preference, and awarded the contract, the bidder must use the designated products in the work; otherwise, the bidder (Contractor) may be in default of the contract.

HAWAII PRODUCT PREFERENCE

Certain Hawaii products are acceptable for use in this project. Any bidder proposing to use the Hawaii product preference must fill in the schedules below.

* * * *

4. On August 26, 2008, prior to the submission and opening of the bids, South Pacific Steel Corp. ("South Pacific Steel") faxed to a number of bidders including Design Built Systems, Inc. ("DBS"), a proposal to furnish, fabricate and install in place, reinforcing steel for the Project at the price of \$148,968.00 (plus \$9,829.00 for the alternate work).

5. South Pacific Steel is a C-41 reinforcing steel subcontractor.

6. Respondent received approximately 11 bids for the Project by the August 26, 2008 deadline including bids from Petitioner, 57 Builders, Ltd., ("57 Builders") and DBS.

7. All bids were opened publicly by Respondent on August 26, 2008.

8. Following the opening of the bids, DBS was determined to be the apparent low bidder, having submitted a bid of \$6,491,627.00 which consisted of its lump sum base bid price of \$6,061,627.00 and its alternate A-1 price of \$430,000.00. Petitioner's bid amounted to \$7,217,800.00 which consisted of a total lump sum base bid price of \$6,672,800.00 and its alternate A-1 price of \$545,000.00. 57 Builders' bid amounted to \$7,219,730.00 which consisted of a total lump sum base bid price of \$6,709,730.00 and its alternate A-1 price of \$510,000.00.

9. After applying the Hawaii Product Preference credits to each bid, Respondent calculated the amount of the bids received from Petitioner, DBS and 57 Builders (Base Bid plus Alternates) as follows: DBS: \$6,480,877.00; 57 Builders: \$7,200,340.00; and Petitioner: \$7,206,975.00.

10. The bids were available for inspection by the public following the opening of the bids on August 26, 2008. Petitioner inspected DBS's bid and discovered that DBS had not listed a reinforcing steel contractor (C-41 specialty contractor license) and a termite control contractor (Pest Control Operator license).

11. By letter dated September 23, 2008 to Respondent, Petitioner protested the proposed award of the contract for the Project to DBS. In part, the protest stated:

In accordance with Article 2.13 of the General Conditions, Okada Trucking Co., Ltd. hereby protests this proposed award on the basis that Designer Built Systems, Inc.'s Proposal failed to properly list subcontractors in two Specialty License Classifications in which it is not licensed and which exceed 1% of the contract amount (Article 2.7.3).

Designer Built Systems, Inc. did not list a subcontractor for Classification C-41 Reinforcing Steel. Okada Trucking Co., Ltd. received quotations from four licensed reinforcing steel subcontractors prior to the bid opening and listed the low bidder, Aloha Steel Corp. (see attached quotations from Aloha Steel Corp., Paradise Reinforcing, Inc.,

Associated Steel Workers, Ltd., and Simmons Steel Corporation)[.] All quotations for this scope of work exceed 1% of the proposed award amount.

Designer Build [sic] Systems, Inc. also did not list a subcontractor(s) for work described in Specification Section 02361 Termite Control. This Specification Section involves two systems: Chemical Soil Treatment, which requires a PCO license, and Termite Control Barrier, which requires certification by a Termite Control Barrier System. Attached is a listing from Termi Mesh Hawaii of Certified Installers of their termite control barrier system. Okada Trucking Co., Ltd. received quotations from four licensed PCO subcontractors and two certified Termi Mesh installers and listed the low bidder, Gima Pest Control, Inc. which is a licensed PCO contractor and a certified Termi Mesh installer. (see attached quotations from Gima Pest Control, Inc., Vet's Termite Service, Structural Pest Control, Termite Control Service, Inc., and Prime Construction, Inc.) All complete quotations for this section of work exceed 1% of the proposed award amount.

For these reasons, Okada Trucking Co., Ltd. hereby protests the proposed award of this contract to Designer Built Systems, Inc.

* * * *

12. Petitioner's September 23, 2008 protest included copies of the written proposals it had received from various subcontractors for the reinforcing steel and termite control work required for the Project. All of the proposals were written on the respective subcontractor's letterhead, contained a description of the work to be performed including any applicable exclusions, and, with one exception, was signed by the subcontractor and specified the period the proposal would be good for.

13. DBS did not list in its bid any subcontractor possessing a C-41 contractor's license or a pest control operator's license for the work in connection with the base bid.

14. By letter dated September 24, 2008, Respondent provided a written response to Petitioner's September 23, 2008 protest. The letter stated in part:

Thank you for your letter of September 23, 2008, regarding the subject project. In reviewing your inquiry, it is clear that you wish to protest the proposed award of this project. Section 2.13.1 of the Interim General Conditions for construction projects provides that protests be adjudicated in accordance with §103D-701, Hawaii Revised Statutes (HRS). This statute provides 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.**" (emphasis in original).

Although you have submitted your request in writing and in a timely manner, no award of the contract has yet been issued or posted. We are therefore unable to treat this request as a protest.

Nevertheless, we appreciate your concern, and have forwarded your inquiry to the Office of School Facilities and School Support (OSFSS) Facilities Development Branch (FDB). You should receive a response from OSFSS, FDB shortly.

* * * *

15. By letter dated September 30, 2008 to Respondent, Petitioner responded to Respondent's September 24, 2008 letter. It said in relevant part:

* * * *

To avoid any misunderstanding, I state what I understand you have said: that no award of this project will be made by the Department of Education until a review of my inquiry is completed by the Office of School Facilities and School Support (OSFSS) Facilities Development Branch (FDB), and a response is sent to me. If this is not the case, I request a further clarification of this review process.

If an award is proposed or issued to Designer Built Systems, Inc., I respectfully request that Okada Trucking Co., Ltd. be notified immediately via FAX at 847-4983 and/or via Email at wnakamura@okadatrucking.com and to Mr. Gavin Hubbard, President, at

ghubbard@okadatrucking.com. If this notification is not possible, please let me know at this time. My request is the result of my monitoring of the State web sites on which awards are posted and noting that some awards are listed days after the actual award date, leaving little or no time for the submission of a valid protest.

* * * *

16. By letter dated October 2, 2008, Respondent informed the bidders that the apparent low bidder had allegedly failed to “properly list necessary subcontractors having Specialty License Classifications whose value of work exceeds one-percent of the contract amount”, and asked bidders to submit “within five calendar days of the date of this letter a complete listing and breakdown of ALL subcontractor quotes included in the total lump sum base bid” in order to evaluate the allegation and complete the awarding of the contract.

17. On October 6, 2008, Petitioner transmitted to Respondent a complete listing and breakdown of all subcontractor quotes included in its bid for the Project and copies of each of the subcontractor’s quotation.

18. By letter dated October 6, 2008, DBS, through its chief estimator, Joshua Huck, provided Respondent with a list of its subcontractors for the Project and the dollar amount for each subcontractor. Huck represented that the subcontractor’s price for the reinforcing steel labor and materials was \$42,560.00, and that since that price fell under 1% of the total contract, the reinforcing steel subcontractor was not listed in the bid. The letter stated in part:

Upon review of the subcontractor bids for this project and based on the Department of Educations [sic] 1% policy, we did not list the termite control subcontractor as their contract amount falls under the 1% of the total contract value. We did show it on the alternate pricing list though. As for reinforcing steel, the total amount, including labor and materials is \$42,560. Since the reinforcing steel price falls under the 1% of the total contract AND since the reinforcing steel was not listed as a separate specification section in the contract documents as it should be, we did not list the subcontractor performing the work.

* * * *

19. By email sent October 10, 2008, Respondent asked DBS to confirm “that the task identified in your base bid subcontractor listing as ‘surface treatment and soil stabilization’ includes all plan and specification termite control requirements, inclusive of all work within section 02361? And can you kindly copy us with the Gima Pest Control proposal for your base bid in the amount of \$54,069.00 and Alternate A-1 in the amount of \$10,510.00. These documents are requested to allow us to complete our inquiry into this matter.”

20. By email sent on October 13, 2008, DBS said:

We confirm that our price for the termite control includes all applicable spec sections and job specific requirements (section 02361). Attached is the quote from GIMA Pest Control. Not sure how he bid the other contractors but we get a discount from him (usually at cost) since we do a lot of work together. Please hold the attached quote in the strictest of confidence and do not under any circumstances distribute it to any other contractors as this quote and price are considered to be highly sensitive and confidential information.

* * * *

21. On October 23, 2008, Respondent awarded the contract for the Project to DBS notwithstanding Petitioner’s September 23, 2008 protest.

22. By letter dated October 30, 2008 to Respondent, Petitioner again protested the awarding of the contract to DBS “on the basis that their Proposal failed to properly list subcontractors in two Specialty License Classification in which it is not licensed and which exceed 1% of the contract amount (Article 2.7.3).”

23. On November 19, 2008, DBS, through Huck, sent an email to Respondent representing that its reinforcing steel subcontractor, South Pacific Steel’s quote for the Project was \$42,560.00 (base bid) and \$3,900.00 for the alternate.

24. On December 11, 2008, Respondent sent an email to Huck requesting documentation on South Pacific Steel’s quote.

25. On December 16, 2008¹, Huck responded by email to Respondent's December 11, 2008 email request by attaching a proposal allegedly from South Pacific Steel for \$42,560.00 (Base Bid) and \$3,900.00 (Alternate #1). The "proposal" which was dated August 23, 2008, was not contained on South Pacific Steel's letterhead, did not contain any exclusions normally included in such proposals, and described the work as, "Supply and Install Reinforcing Steel for Concrete and CMU".

26. Huck informed Respondent that the South Pacific Steel proposal it had provided to Respondent was for labor only and that DBS would be supplying the necessary materials.

27. By letter dated January 5, 2009, Respondent informed Petitioner that:

After a careful review of the documentation provided, the DOE has determined there is insufficient documentation to uphold the award to DBS. Therefore, the DOE recommends the award to DBS be rescinded. The DOE further recommends the Office of School Facilities and Support Services reevaluate all offers received prior to issuance of an award to the next lowest, responsive and responsible bidder.

This decision is final.

* * * *

28. On April 6, 2009, Respondent reawarded the contract for the Project to DBS notwithstanding its January 5, 2009 "final" decision on Petitioner's October 30, 2009 protest.

29. By letter dated April 8, 2009, Petitioner protested the reawarding of the contract to DBS. The letter stated in relevant part:

Reference is made to our letter dated Oct. 30, 2008 formally protesting the award of subject project to Designer Built Systems. Reference is also made to the Department of Education letter dated January 5, 2009 from Mr. James M. Brese which states in part, "the DOE recommends the award to DBS be rescinded. The DOE further recommends the Office of School Facilities and Support Services reevaluate all offers received prior to issuance of an award

¹ According to Robert Purdie, Respondent's acting public works manager, he did not see the proposal until sometime in January 2009.

to the next lowest, responsive and responsible bidder. This decision is final.”

Yesterday I learned that Designer Built Systems was (re)awarded the project this week. We have not received any correspondence or communication from the DOE to update us on any further developments after Mr. Brese’s January 5th letter, or received any explanation as to why the findings of this January 5th letter was overturned.

For this reason, Okada Trucking Co., Ltd. hereby formally protests this most recent award of this contract to Designer Built Systems, Inc. and requests a formal response to the concerns outlined in our letter of Oct. 30, 2008 and an explanation as to why these concerns, while originally found valid, were apparently disregarded.

* * * *

30. By letter dated June 25, 2009, Respondent denied Petitioner’s April 8, 2009 protest:

* * * *

In compliance with HRS §103[sic]-302(b), OSFSS’ bid instructions requires all bidders to list all of their subcontractors. Thus, all bidders for the subject IFB were required to list all of their subcontractors, regardless of the value of their work.

As asserted by Okada, DBS had in fact failed to list all of the subcontractors it intended to use for the Project. Specifically, they failed to list subcontractors for classification C-41 reinforcing steel work, and also for classification specification Section 02361 termite control work. This violated the IFB instructions, and DBS’ bid document was therefore non-compliant at the time of the initial award as well as the re-award.

Nonetheless, HRS §103[sic]-302(b) would allow OSFSS to accept DBS’ bid for re-evaluation if, prior to the April 6, 2009 re-award, OSFSS found that “acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.”

OSFSS indicated that DBS will be using South Pacific Steel Corp. (SPS) for its C-41 reinforcing steel work. According to OSFSS, SPS' estimate of \$46,460 is .7157% of DBS's total lump sum bid. OSFSS also indicated that DBS will be using Gima Pest Control, Inc. (Gima), for termite control. According to OSFSS, Gima's estimate of \$64,579 is .994805% of DBS's total lump sum bid.

Because the value of both SPS's and Gima's work were each less than one per cent of the DBS' total lump-sum bid price, OSFSS had the discretion to accept DBS' bid if OSFSS determined that to do so would be in the State's best interest.

OSFSS determined in the cases noted above, that the unnamed subcontractors' work was reasonable and was less than or equal to one per cent of DBS' respective total bid price; and that it was in the best interest of the State to accept these bids based on competition and pricing. Consequently, OSFSS found that accepting the DBS bid offer would be in the best interest of the State.

* * * *

31. On June 26, 2009, Petitioner filed the instant request for administrative review of Respondent's June 25, 2009 denial of Petitioner's April 8, 2009 protest.

32. On June 26, 2009, Petitioner requested from South Pacific Steel copies of the proposals it had sent to the bidders on the Project including the proposal sent to DBS. In response, South Pacific Steel provided Petitioner with copies of the requested proposals it had provided to 11 contractors in connection with the Project.

33. Each of the proposals South Pacific Steel provided to the contractors in connection with the Project was written on South Pacific Steel letterhead, listed a number of exclusions to its proposal, and stated:

REINFORCING STEEL PROPOSAL – SUPPLY AND INSTALL:

South Pacific Steel is submitting for your consideration this proposal for furnishing, fabricating and installing in place reinforcing steel on the above reference project only as required by:

DRWG: STRUCTURAL DATED 6/18/08
SPCS: STD
ADD: 1

34. Each of the proposals provided to the contractors in connection with the Project, including the proposal provided to DBS, included the following prices: New Administration/Library Building - \$148,968.00, and Additive Alternate #1 - \$9,829.00.

35. Petitioner provided Respondent with a copy of the actual proposal sent by South Pacific Steel to DBS in connection with the Project.

36. The proposal that DBS, through Huck, had sent to Respondent on or about December 16, 2008 was a document that had been fabricated by Huck to circumvent the subcontractor listing requirement set forth in HRS §103D-302.

37. On October 7, 2009, Respondent rescinded the award of the contract for the Project to DBS and found that DBS had acted in bad faith in responding to requests for information regarding subcontractor work.

38. On October 20, 2009, DBS filed a protest in PCX-2009-8.

39. By stipulation of the parties, PCX-2009-8 and the instant matter were consolidated.

40. On January 21, 2011, DBS and Respondent entered into a settlement of PCX-2009-8 wherein, among other things, the contract award to DBS for the Project was rescinded and Respondent withdrew the finding of bad faith on the part of DBS without prejudice.

41. Although the award of the contract for the Project to DBS has been rescinded, no official determination has been made by Respondent as to awarding of the contract to the next lowest, responsive, responsible bidder pending the outcome of 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.

Hawaii Revised Statutes (“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 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).

Petitioner's September 23, 2008, October 30, 2008 and April 8, 2009 protests were each grounded on the claim that DBS's bid failed to list necessary subcontractors and, as such, was nonresponsive to the IFB. On October 7, 2009, however, Respondent rescinded the award to DBS. Accordingly, the issue as to whether DBS's bid was nonresponsive has been rendered moot. Nevertheless, Petitioner argues that given the circumstances leading up to Respondent's rescission of the award to DBS, Petitioner should be awarded its bid preparation costs and attorney's fees in pursuing this matter.

1. Bid Preparation Costs.

HRS §103D-701(g) provides:

In addition to any other relief, when a protest is sustained and the protestor should have been awarded the contract under the solicitation but is not, then the protestor shall be entitled to the actual costs reasonably incurred in connection with the solicitation, including bid or proposal preparation costs but not attorney's fees.

In *Carl Corp. v. Dept. of Educ., 85 Hawaii 431 (1997)*, the court construed HRS §103D-701(g) and held that the provision was only applicable where the contract has been awarded *before* the resolution of the protest:

It is implicit in [HRS §103D-701(g)] that it applies only in those cases where the contract has been awarded before the resolution of the protest. Were this not the case, a determination that a protestor "should have been awarded the contract under the solicitation but is not" would be premature and nonsensical because, in the typical protest, pursuant to HRSD §§103D-701(f) and 103D-709(e), the award of the contract does not occur until after the protest is finally resolved by a hearings officer.

(Emphasis added).

Thus, where the contract has been awarded before the resolution of a protest, HRS §103D-701(g) entitles the protestor to recover its bid preparation costs provided (1) the protest is sustained; (2) the protestor should have been awarded the contract; and (3) *the protestor is not awarded the contract (emphasis added)*. It therefore stands to reason that under HRS §103D-701(g), a bidder is *not* entitled to recover its bid preparation costs if it is eventually awarded the contract.

In this case, Respondent rescinded the award to DBS but has made no determination as to who should be awarded the contract as the next lowest, responsible, responsive bidder. Both parties acknowledge that Respondent is unable to make that determination until the stay that was triggered by Petitioner's April 8, 2009 protest is lifted. Nevertheless, there remains the possibility that Petitioner will be awarded the contract once the stay is removed. In that event, HRS §103D-701(g) would be inapplicable. If, on the other hand, the contract is awarded to another bidder, Petitioner will be free to protest and, if its protest is sustained, pursue a claim to recover its bid preparation costs under HRS §103D-701(g). Under the present circumstances, however, Petitioner's claim for bid preparation costs is premature.

Petitioner nevertheless complains that Respondent will or has applied the Hawaii Product Preference improperly to its bid which will eventually result in the awarding of the contract to 57 Builders or another bidder over its bid. At this point, however, such a claim can only be construed as speculative². Moreover, HRS §103D-709(a) bestows upon the Hearings Officer jurisdiction to review any request from a bidder or offeror who is *aggrieved* by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer. Thus, unless or until Respondent decides to award the contract to another bidder, there is no basis upon which Petitioner can claim aggrieved party status. *See, Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14, PCH-2003-20 (Consolidated on remand from Third Circuit Court)(June 24, 2004)(a party is*

² Petitioner contends that it inadvertently omitted from its bid the values of the Hawaii products its subcontractors intended to use on the Project and that Respondent should apply those omitted values to Petitioner's bid in calculating Petitioner's bid amount for purposes of determining the winning bidder. According to Petitioner, the application of those omitted values to its bid would result in Petitioner being the next lowest bidder. However, because there is no indication in the record that Respondent has made *any* official determination as to the next lowest, responsible, responsive bidder, the question whether the Hawaii Product Preference was properly applied to Petitioner's bid is premature and not properly before the Hearings Officer.

not aggrieved until official action, adverse to it, has been taken). See also, Dick Pacific Constr. Co., Ltd. v. DOT, et al., PCH-2005-5 (September 23, 2005).

Additionally, Petitioner cannot show that any of its protests were sustained. That is because, according to the evidence, none of its protests were timely. HRS §103D-701(a) requires that “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.” This Office has previously recognized that strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute’s underlying purpose. *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services, PCH 2000-8 (October 17, 2000)*; *CR Dispatch Service, Inc. dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007)*; *Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009)*; *Paradigm Constr. v. Dept of Hawaiian Home Lands, State of Hawaii, PCH-2009-16 (October 7, 2009)*. Thus, the filing of a protest 14 days after bids have been submitted has been found to be untimely. *See, Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services, PCH 2000-8 (October 17, 2000)(filing of protest 14 days after bids submitted defeated the very purpose for which the statute was intended).*

Here, the evidence clearly established that Petitioner was aware of the facts giving rise to its protests upon the opening of the bids on August 26, 2008, but failed to submit any protest until September 23, 2008. Gavin Hubbard, Petitioner’s president testified:

Q. At what point - - do you review the other bids, for example?

A. At the – on the day of the bid, it’s a public bid opening, so at 2:00 o’clock or soon thereafter, the agency or agency representative will read out the bids. And at that time, you will have an idea who was the apparent low bidder, based on the number. You can then see who that apparent low bidder listed as subcontractors, and the, see if there potentially may be a concern or not.

Q. And that's what Okada did here, right?

A. Yes.

Q. Or at least, subcontractor listing form?

A. That's correct.

Q. And what did you guys note?

A. So, at that time, we noted that both a termite control subcontractor and a reinforcing steel subcontractor were not listed.

Q. Okay. And then, that was the reason, then, why Okada files or submits their Petitioner's Exhibit 5, their September 23, 2008 letter?

A. That is correct.

Q. Was this letter intended to be an inquiry or a protest?

A. It was intended to be a protest.

Q. And again, you know, I'm not going to go over this letter with you in detail. Essentially, Okada is complaining that DBS failed to meet the subcontractor listing requirement, is that correct?

A. That's correct.

(Hearing Transcript, pages 71-72).

On this record, the Hearings Officer concludes that Petitioner's protests were untimely³ and, consequently, cannot be sustained. For all of the foregoing reasons, the Hearings Officer further concludes that Petitioner is not entitled to recover its bid preparation costs.

³ Respondent misconstrued HRS §103D-701(a) in failing to treat Petitioner's September 23, 2008 letter as a protest. That section required Petitioner to submit its protest within 5 working days after it learned of the facts upon which its protest was based, but no later than 5 working days after the posting of the award. See, *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH 2002-18 (February 13, 2003). Notwithstanding that, however, it was incumbent upon Petitioner to submit its protest within the time required by HRS §103D-701(a).

2. Attorney's Fees.

Petitioner also seeks to recover its attorney's fees incurred in pursuing this matter. Petitioner points out that but for its persistent actions in pursuing its protest in the face of Respondent's inaction in investigating the claim raised by the protest, Respondent would have, in all likelihood, awarded the contract to DBS based on falsified information. Indeed, the Hearings Officer found Respondent's acceptance of DBS' assurances that the value of its reinforcing steel subcontractor's work was less than 1% of the contract without any verification and in the face of several "red flags" to be extremely troublesome. According to the evidence, Respondent wrote to the bidders in October 2008 and requested a complete listing and breakdown of all subcontractor quotes included in their bids in order to evaluate an allegation that the apparent low bidder had failed to list necessary subcontractors. By letter dated October 6, 2008, DBS, through Huck, provided Respondent with a list of its subcontractors for the Project and the amount for each subcontractor. In that letter, Huck represented that its subcontractor's price for the reinforcing steel labor and materials was \$42,560.00, and that since that price fell under 1% of the total contract, the reinforcing steel subcontractor, who Huck did not identify, was not listed in the bid. On October 23, 2008, Respondent awarded the contract for the Project to DBS after apparently accepting Huck's representation without any verification. Indeed, prior to awarding the contract to DBS, Respondent did not make any effort to verify Huck's representation even though Respondent was aware that all of the steel reinforcing subcontractor quotes it had received from the other bidders were significantly higher than the \$42,560.00 quote and that Huck had not identified its reinforcing steel subcontractor. Moreover, even after receiving the falsified quote from Huck in or about January 2009, Respondent readily accepted the quote without question and reawarded the contract to DBS despite having represented to Petitioner that the award to DBS would be rescinded, and even though the "proposal" was not on South Pacific Steel's letterhead, did not contain any of the exclusions normally included in such quotes, and described the work as, "Supply and Install Reinforcing Steel for Concrete and CMU" even though Huck had informed Respondent that the \$42,560.00 quote was for labor only⁴:

⁴ As early as October 2008, Huck had assured Respondent that South Pacific Steel's \$42,560.00 "proposal" was for both labor and materials.

Q: Did it concern you that back in October 2008, [Huck's] telling you 42,560 is for both labor and materials, and now, all of a sudden in January 2009, he's saying it's for labor only, and he also submits a document in January 2009 that says, "Supply and Install Reinforcing Steel, 42,560."

Did it concern you that there's this inconsistency between what he says in 2008, labor and materials; what he puts in his - - this supposed proposal for South Pacific Steel, supply and install; and then, you said - - you represent to us that he told you that despite all of those documents, it's only for labor?

A. Yeah, it was concerning.

Q. So nevertheless, DOE awarded the contract.

* * * *

A. Yes

* * * *

(Testimony of Robert Purdie at pages 142-143).

In fact, Respondent did not bother to contact South Pacific Steel to verify whether the quote it had received from DBS was authentic until after the initiation of the present action. Under these circumstances, Petitioner's argument that, as a matter of policy, it should be entitled to recover its attorney's fees for its efforts in enforcing HRS Chapter 103D ("Code") is compelling. Nonetheless, it is not the Hearings Officer's function to legislate but rather, to interpret and apply the law as written.

In *Carl, supra*, the court held that even though the Code did not expressly authorize the award of attorney's fees, a protestor is entitled to recover its attorney's fees incurred in prosecuting its protest where (1) the protestor has proven that the solicitation was in violation of the Code; (2) the contract was awarded in violation of HRS §103D-701(f); and (3) the award of the contract was in bad faith. In arriving at this conclusion, the court explained:

There are only two mechanisms for enforcing the provisions of the code. Intentional violation of its provisions by “any person” is a misdemeanor, and in addition to the applicable criminal penalty, the violator is subject to removal from office and liable to the State for its costs incurred. *HRS §10-3D-106*. Enforcement under this provision, like any criminal statute, is at the discretion of the prosecutor.

Where, however, the contract has been awarded before the protest is decided, there is no “remedy” for the protestor who has proven that the process was in violation of the Code. After the award of the contract, the contract can only be ratified or terminated, with the relevant factors favoring ratification in direct relation to the progress made towards completion of the contract. Although ratification or termination of a contract found to have been awarded in violation of the Code may vindicate the public’s interest in the integrity of the procurement process, neither “remedy” affords the protestor the opportunity to be awarded the contract based on the merits of its proposal.

* * * *

(Emphasis added).

The *Carl* court’s holding was based on the recognition that under the Code, once the contract was awarded, the successful protestor no longer had the opportunity to be awarded the contract based on the merits of its proposal and therefore, was deprived of any meaningful relief. Here, however, because the award of the contract to DBS has been rescinded, Petitioner now has the opportunity to be considered for the contract. For this reason, the Hearings Officer must conclude that Petitioner is not entitled to an award of attorney’s fees under the *Carl* holding⁵. Moreover, as discussed previously, Petitioner’s failure to initiate a timely protest precludes a finding that the contract was awarded in violation of HRS §103D-701(f)⁶.

⁵ If, as a matter of policy, the Legislature desires a rule that allows protestors to recover their attorneys’ fees even though the protestor still has the opportunity to be awarded the contract, they can so provide. They have not done so and the Hearings Officer has no authority to establish a policy contrary to that previously established by the Legislature.

⁶ HRS §103D-701(f) provides that, “[i]n the event of a *timely* protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the State.” (*Emphasis added*).

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: NOV 15 2011



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