



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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 UPON REMAND
vs.)	FROM THE FIRST CIRCUIT COURT
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND DECISION
UPON REMAND FROM THE FIRST CIRCUIT COURT

I. INTRODUCTION

On November 15, 2011, the undersigned Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in this matter. On May 25, 2012, the First Circuit Court, State of Hawaii, entered an Order Modifying Hearings Officer's Findings of Fact, Conclusions of Law, and Decision, Dated November 15, 2011, and Remanding Case to the Hearings Officer for Further Action and Determination Consistent with this Order ("Court's Order"). A copy of the order was transmitted to the Hearings Officer by Petitioner Okada Trucking Co., Ltd. ("Petitioner") on May 30, 2012.

On July 27, 2012, Petitioner and Respondent Department of Education, State of Hawaii ("Respondent") entered into a Stipulation to Lift Stay to the Extent that Any Stay Exists and is Applicable. On August 24, 2012 and September 17, 2012 respectively, the parties submitted a set of Stipulated Facts and First Amended Stipulated Facts to the

Hearings Officer and agreed to a determination of the issues without an administrative hearing.

On August 30, 2012, Petitioner filed its Opening Brief on Remand to Administrative Hearings Officer, and on September 14, 2012, Respondent filed its Answering Brief. A reply brief was filed by Petitioner on September 19, 2012.

Having reviewed and considered the memoranda submitted by the parties along with the exhibits and affidavits attached thereto, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On November 15, 2011, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in this matter (“Decision”).

2. On or about November 25, 2011, Petitioner appealed the Decision to the First Circuit Court, State of Hawaii.

3. On May 25, 2012, the Court entered an Order Modifying Hearings Officer’s Findings of Fact, Conclusions of Law, and Decision, Dated November 15, 2011, and Remanding Case to the Hearings Officer for Further Action and Determination Consistent with this Order (“Court’s Order”).

4. The Court’s Order provided in relevant part:

* * * *

Upon consideration of the briefs filed, having heard the arguments of counsel, and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Administrative Decision is MODIFIED, and the case is REMANDED to the Hearings Officer for further action and determination consistent with this Order, as follows:

1. The Administrative Decision is modified to conclude that

(i) the opening of the bid in and of itself is not dispositive as to the entitlement of costs in this situation; and

(ii) the posting of the award is the triggering date for determination of whether or not the protests were timely.

2. This matter is remanded to the Hearings Officer to determine whether, in consideration of the above, Appellant is now entitled to an award of bid preparation costs under *Hawaii Revised Statutes* §103D-701(g), and if the answer is “yes”, then to determine the amount of Appellant’s bid preparation costs and to award the same to Appellant.

3. The matter is also remanded to the Hearings Officer to determine, consistent with this Order and the Hawaii Supreme Court’s decision in *Carl Corp. v. Dept. of Educ.*, 85 Hawaii 431 (1997), whether Appellant is entitled to an award of its attorney’s fees, and if answer is “yes”, then to determine the amount of such attorney’s fees and award the same to Appellant.

5. The Court’s Order was transmitted to the Hearings Officer by Petitioner on or about May 30, 2012.

6. On July 9, 2012, July 23, 2012 and August 13, 2012, the Hearings Officer met with the parties. Among other things, the parties agreed to submit this matter to the Hearings Officer by way of briefs.

7. On August 24, 2012, the parties submitted a set of Stipulated Facts and on September 17, 2012, the parties submitted a First Amended Stipulated Facts to the Hearings Officer. Pursuant to the First Amended Stipulated Facts, the parties agreed to the following:

- a. As of September 24, 2008, Respondent had not yet posted any contract award of the Project;
- b. On October 23, 2008, Respondent posted its initial contract award of the Project to DBS;
- c. On April 6, 2009, Respondent posted its re-award of the contract to DBS; and
- d. Petitioner filed protests on the contract award and re-award on October 30, 2008 and April 8, 2009, respectively.

8. On August 30, 2012, Petitioner filed its Opening Brief on Remand to Administrative Hearings Officer, and on September 14, 2012, Respondent filed its Answering Brief. A reply brief was filed by Petitioner on September 19, 2012.

III. CONCLUSIONS OF LAW

At issue on remand is Petitioner's entitlement to recover its bid preparation costs and attorney's fees, notwithstanding the fact that on October 7, 2009, Respondent rescinded its award of the contract to another bidder, and, to date, no official determination has been made as to the awarding of the contract to the next lowest, responsive bidder. See Decision at FOF Nos. 37 and 41. The Hearings Officer determined that under those circumstances, Petitioner's claim for bid preparation costs was premature and explained in his Decision:

* * * *

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 HRS §§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 speculative (footnote omitted). 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 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).*

Because there remains the possibility that Petitioner will be awarded the contract, the requirement in HRS §103D-701(g) that “the protestor should have been awarded the contract under the solicitation but is not” is undoubtedly lacking. For that reason, the Hearings Officer concluded that Petitioner’s claim was premature.

The Hearings Officer also determined that Petitioner was not entitled to its bid preparation costs for the *additional reason*, that Petitioner’s protests were untimely. Consequently, the Hearings Officer reasoned that Petitioner could not establish another element required by HRS §103D-701(g) for the recovery of bid preparation costs - that “its protest is sustained”.

As to Petitioner’s claim for attorney’s fees, the Hearings Officer looked to the *Carl Court’s* decision and reasoned as follows:

* * * *

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 holding* (footnote omitted).

(Emphasis added).

And because Petitioner's protests were found to have been untimely, the Hearings Officer concluded that Petitioner's claim for attorney's fees failed for the *additional* reason that, "Petitioner's failure to initiate a timely protest precludes a finding that the contract was awarded in violation of HRS §103D-701(f)."

The Court's Order modified the Hearings Officer's Decision by concluding that "the opening of the bid in and of itself is not dispositive as to the entitlement of costs in this situation" and that "the posting of the award is the triggering date for determination of whether or not the protests were timely". The Court remanded the case to the Hearings Officer to determine whether, in consideration of the modifications, Petitioner was entitled to its bid preparation costs and attorney's fees. Following the entry of the Court's Order, the parties stipulated that Respondent posted its contract award on October 23, 2008 and, again, on April 6, 2009; and that Petitioner filed its protests on October 30, 2008 and April 8, 2009 respectively. Thus, according to the Court's modifications and the stipulated facts,

