



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2011 DEC 22 A 11: 25

HEARINGS OFFICE

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

In the Matter of	)	PCH-2011-11
	)	
MAUI KUPONO BUILDERS, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER
vs.	)	GRANTING PETITIONER'S
	)	MOTION FOR SUMMARY
DEPARTMENT OF TRANSPORTATION,	)	JUDGMENT
STATE OF HAWAII,	)	
	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING  
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On October 21, 2011, Maui Kupono Builder, LLC ("Petitioner"), filed a request for an administrative hearing to contest Respondent Department of Transportation, State of Hawaii's ("Respondent") October 12, 2011 denial of Petitioner's May 2, 2011 protest. The protest concerned Respondent's Invitation for Bids in connection with a project designated as the Maunaloa Highway Resurfacing, Vicinity of Keonelele Avenue to Mahana, District of Moloka'i, Island of Moloka'i, Project No. 460A-01-11M ("Project"). Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On November 9, 2011, Petitioner filed the instant motion for summary judgment. On November 16, 2011, Respondent submitted a memorandum in opposition to the motion, and on November 21, 2011, Petitioner filed a reply memorandum in support of its motion.

On November 14, 2011, the parties waived the 21-day requirement to commence the hearing.

The motion came before the undersigned Hearings Officer on November 23, 2011. Petitioner was represented by Daniel T. Kim, Esq. Respondent was represented by Rowena A. Somerville, Esq.

Having reviewed and considered the argument of counsel, together with the memoranda, declarations and exhibits attached thereto along with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and final order.

II. FINDINGS OF FACT

1. In or about November 2010, Respondent issued an Invitation for Bids for the Project (“IFB”).

2. According to the terms of the IFB, the bid opening date was set for December 9, 2010.

3. Section 102.17 of the Specifications to the IFB stated in part:

**Addenda.** Addenda issued shall become part of the contract documents. Addenda to the bid documents will be provided to all prospective bidders at the respective offices furnished for such purposes. The terms and requirements of the bid documents (i.e. drawings, specifications and other bid and contract documents) cannot be changed prior to the bid opening except by a duly issued addendum.

4. Section 102.05 of the Specifications to the IFB stated:

\* \* \* \*

By the act of submitting a bid for the proposed contract, the bidder warrants that:

(1) The bidder and its Subcontractors have reviewed the contract documents and found them free from ambiguities and sufficient for the purpose intended.

\* \* \* \*

5. On or about November 23, 2010, Respondent issued Addendum No. 1 to the IFB.

6. Among other things, Addendum No. 1 amended the IFB as follows:

**A. PROPOSAL SCHEDULE**

1. Replace pages P-10 and P-11 dated 8/3/2010 with the attached pages P-10 and P-11 dated 11/23/2010.

7. Addenda No. 1 also included the minutes from a Pre-Bid Meeting held on November 23, 2010 (“Minutes”). Petitioner did not attend the meeting.

8. Item Six of the Minutes amended the IFB as follows:

The contractor’s estimated quantity of crack sealing is significantly different than the proposal and recommended changing it from LS to FA.

**Response:** Addendum will be processed to changed [sic] unit from L.S. to Force Account.

9. Item Seven of the Minutes amended the IFB as follows:

Trent Caban from Apply-A-Line pointed out some discrepancies between plans and special provisions regarding the use of Thermoplastic Hot Spray and Thermoplastic Extrusion. The inclusion of edge line and centerline rumble strips requires the use of Thermoplastic Hot Spray. Proposal Schedule called out Thermoplastic Extrusion.

**Response:** Addendum will be processed to address discrepancies.

10. Addendum No. 1 also required bidders to “acknowledge receipt of this Addendum No. 1 by recording the date of its receipt in the space provided on Page P-4 of the Proposal.”

11. According to Respondent, on December 7, 2010, Respondent’s Business Services Supervisor, Nancy Borge, left a telephone message on Petitioner’s voicemail notifying it of the issuance of Addendum No. 1 and explaining that Addendum No. 1 was available for pick up at Respondent’s Maui District Office. Petitioner denies receiving any such voicemail message.

12. Respondent did not send, fax, or otherwise transmit a copy of Addendum No. 1 to Petitioner.

13. Three bids were submitted to Respondent by the December 9, 2010 bid opening date. The bid submitted by Petitioner was the apparent low bid. The second lowest bid was submitted by Maui Paving, LLC (“Maui Paving”).

14. By letter dated April 25, 2011 to Petitioner, Respondent rejected Petitioner’s bid:

We regret to inform you that your bid submitted for the subject project on December 9, 2010, has been rejected. The rejection is due to your failure to use the revised proposal pages P-10 and P-11 that were issued with Addendum No. 1.

\* \* \* \*

15. On April 25, 2011, Respondent awarded the contract for the Project to Maui Paving, the second low bidder.

16. By letter dated May 2, 2011, Petitioner protested the rejection of its bid. Petitioner’s protested alleged:

\* \* \* \*

We protest the rejection based on the following:

1. Our company has no knowledge at this time of the existence of Addendum No. 1. [sic] and has not ever seen the Addendum No. 1.

2. We have had no notification that an Addendum No. 1 was issued by DOT.
3. DOT has not contacted any member of our company in regards to the issuance of Addendum No. 1.
4. No one from the DOT faxed the Addendum No. 1 to our office.
5. No one from the DOT contacted any member of our company by phone.
6. The project was bid back in December 9, 2010 and we only on April 29, 2011 received your letter.

We request that a full examination of the absence of the proper notification to bidders as required by the State statutes concerning proper notification to bidders be review [sic] in regards to this bid and pray that the award be given to Maui Kupono Builders, LLC or at the very least that the project be rebid.

17. By letter dated July 22, 2011 to Respondent, Petitioner said in relevant

part:

\* \* \* \*

I did not receive any notice from any source concerning the existence of any addendum on this project prior to the bid date, and then my notification came in the form of a rejection letter of my bid on May 2, 2011.

State statutes on procurement contain provisions for the method of broadcasting and advertising regarding the bid and notification process. I did not receive the proper notice as specified in theses statutes.

\* \* \* \*

18. By letter dated October 12, 2011, Respondent denied Petitioner's protest:

We are in receipt of your letter of protest dated May 2, 2011 and the follow-up letter dated July 22, 2011, in connection with the above mentioned Project. The State of Hawaii Department of Transportation ("DOT") has completed its evaluation of the bid documents for the

Project and has determined that Maui Paving, LLC was in fact the responsible bidder with the most responsive bid with the lowest evaluated bid price, as defined under section 103D-104, Hawaii Revised Statutes (“HRS”), and was therefore awarded the contract.

On November 23, 2010, the DOT issued Addendum No. 1 for the above mentioned project, making amendments to the Proposal Schedule, Special Provisions and Plans. On December 7, 2011 [sic] the DOT Highways Division notified all known prospective offerors, via telephone, of Addendum No. 1. The DOT records indicate that a telephone message was left on an answering machine for Maui Kupon Builders, LLC on December 7, 2011 [sic].

The Maui Kupon Builders, LLC submitted an irregular proposal, pursuant to section 102.07 of the Project specifications as it did not comply with Addendum No. 1. The irregular proposal was properly rejected by the DOT pursuant to Section 102.12(6) of the Project specifications.

\* \* \* \*

19. On October 21, 2011, Petitioner filed a request for administrative review of Respondent’s October 12, 2011 denial of its protest.

20. On November 9, 2011, Petitioner filed the instant motion for summary judgment.

### 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.

Although it denies receiving any message regarding Addendum No. 1 from Respondent prior to the bid opening date, Petitioner contends, for purposes of this motion, that even if Respondent left such a message on Respondent’s voicemail on December 7, 2010, it nevertheless did not receive proper notice of the addendum. Therefore, according to

Petitioner, the rejection of its bid based upon any noncompliance with the requirements of Addendum No. 1 was improper. Petitioner relies upon Hawaii Administrative Rule (“HAR”) §3-122-16.06 which provides:

- §3-122-16.06 Amendment and clarification to solicitation.
- (a) An addendum shall be issued for amendments and clarifications to a solicitation prior to submission of orders, except as provided in subsection (f).
    - (1) Amendments include any material changes to the solicitation as in quantity, purchase descriptions, delivery schedules, scope of work, and opening dates. The addendum shall reference the portions of the solicitation it amends and detail the amendments;
    - (2) Clarifications include pre-bid or pre-proposal communications other than amendments.
  - (b) Addenda shall be used to:
    - (1) Correct minor defects or ambiguities;
    - (2) Furnish to other offerors information given to one offeror if the information will assist the other offerors in submitting offers or if the lack of information would prejudice the other offerors; and
    - (3) Provide any other information or clarification to the solicitation that will result in fair competition.
  - (c) Addenda may require that offerors acknowledge receipt of the addendum issued.
  - (d) **Addenda shall be issued to all prospective offerors known to have received a solicitation**, or if issued after the deadline for submission of notice of intent to offer, to those persons who have submitted such notice.
  - (e) **Addenda for:**
    - (1) **Amendments shall be distributed within a reasonable time to allow prospective offerors to consider them in preparing their offers; however, if the time and date set for receipt of bids will not permit adequate time for preparation, the time shall be increased to the extent possible in the addendum or, if necessary, by facsimile or telephone and confirmed in the addendum;**
    - (2) Clarifications may be issued at any time up to the scheduled deadline for receipt of offers.

- (f) After submission of proposals, amendments may be made by addenda for solicitations pursuant to subchapter 6 and 6/5, subject to sections 3-122-53(d) and (e) and 3-122-54(b).

(Emphasis added).

It is Petitioner's contention that the foregoing rule and its reference to the *issuance* of addenda, required Respondent to send or otherwise transmit Addendum No. 1 to all prospective offerors known to have received a solicitation. According to Petitioner, "merely leaving telephone messages on answering machines do not serve as a proper, appropriate, or even effective means of notice under any circumstance." Respondent, on the other hand, argues that the IFB specifies how addenda are supposed to be provided to bidders. Section 102.17 of the Specifications to the IFB provides:

Addenda. Addenda issued shall become part of the contract documents. *Addenda to the bid documents will be provided to all prospective bidders at the respective offices furnished for such purposes.* Each addendum shall be an addition to the contract documents. The terms and requirements of the bid documents (i.e. drawings, specifications and other bid and contract documents) cannot be changed prior to the bid opening except by a duly issued addendum).

(Emphasis added).

Thus, Respondent contends that leaving a message on Petitioner's voicemail informing that Addendum No. 1 was available at its office for pickup satisfies the requirements of HAR §3-122-16.06. Additionally, Respondent argues that Petitioner had actual or constructive notice of Addendum No. 1 and therefore cannot claim ignorance of the addendum.

HAR §3-122-16.06(d) requires that addenda "shall be issued to all prospective offerors known to have received a solicitation." Additionally, subsection (e)(1) requires, among other things, that addenda for amendments "be *distributed* within a reasonable time to allow prospective offerors to consider them in preparing their offers." Construed together,



these subsections placed an affirmative obligation on Respondent to send or otherwise transmit a copy of Addendum No. 1 to Petitioner, notwithstanding Section 102.17 or any other provision of the IFB to the contrary. Moreover, it is significant to note that subsection (e)(1) was modeled after and is substantially identical to R3-202.09.3 of the Recommended Regulations for the American Bar Association’s Model Procurement Code for State and Local Governments<sup>1</sup> (“ABA Model Code”). R3-202.09.2 of the ABA Model Code, which addresses the distribution of amendments, provides that, “[a]mendments shall be *sent* to all prospective bidders known to have received an Invitation for Bids.” (emphasis added).

The conclusion that the procuring agency is required to send or otherwise transmit a copy of the addendum to all prospective offerors known to have received a solicitation is entirely consistent with and buttressed by HRS Chapter 103D’s (“Code”) goals of fostering broad-based competition among vendors and efficiency in the procurement process by ensuring that prospective bidders receive amendments as soon as possible in order to prepare their offers. *See generally, Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-3 (April 16, 1999)(consolidated)*( In construing the various provisions of the Code, the foremost obligation is to ascertain and give effect to the intention of the Legislature which is to be construed primarily from the language of the statute itself, and the language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose). On the other hand, a message left on Petitioner’s voicemail only 2 days prior to the bid submission deadline indicating that a copy of the addendum was available for pickup, undermines the Code’s objectives of promoting competition and efficiency<sup>2</sup>. Moreover, because addenda for amendments may be issued up to bid opening, the expeditious transmission to, and receipt by, prospective bidders, of any

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<sup>1</sup> In 1992, the Legislature requested that the State Auditor conduct a study to provide information and recommendations for the enactment of a comprehensive procurement code. **Act 274, Session Laws of Hawaii, 1992**. In Act 274, the Legislature specifically asked that the study review among other things, the American Bar Association’s *Model Procurement Code for State and Local Governments* (“model code”) and the procurement codes from the federal government and other states. And, in enacting Chapter 103D, the Legislature noted that “[a]fter careful review of various procurement models and thoughtful discussion and debate, your Committees agreed to use the American Bar Association’s (ABA) Model Procurement Code for State and Local Governments as their guide in establishing a comprehensive procurement system for Hawaii. **Standing Committee Report No. S8-93, 1993 Senate Journal, at 39**.

<sup>2</sup> These objectives were further undermined when Respondent did not attempt to notify Petitioner of Addendum No. 1 until 2 weeks after the addendum was issued and only 2 days before Petitioner’s bid was due.

addenda issued just prior to the deadline is particularly important to promoting maximum competition<sup>3</sup>.

Here, there is no dispute that Respondent did not send or otherwise transmit a copy of Addendum No. 1 to Petitioner. Accordingly, Petitioner's alleged noncompliance with the terms of the addendum was not a proper basis for the rejection of Petitioner's bid<sup>4</sup>.

Having concluded that HAR §3-122-16.06 required Respondent to transmit a copy of Addendum No. 1 to Petitioner, the Hearings Officer further concludes that Respondent's argument that Petitioner had actual and/or constructive notice of the addenda is without merit. Regardless of whether Petitioner had such knowledge, Respondent was required by HAR §3-122-16.06 to transmit a copy of the addendum to Petitioner and all other prospective bidders known to have received the solicitation. Having failed to do so, Respondent cannot now shift the burden to Petitioner to inquire as to the existence of any amendments or to confirm that no amendments had been issued.

#### IV. ORDER

Based upon the foregoing findings and conclusions and pursuant to HRS §103D-707(1)<sup>5</sup>, the Hearings Officer orders as follows:

1. Respondent's October 12, 2011 denial of Petitioner's protest is vacated;
2. The contract awarded to Maui Paving is terminated; and
3. The parties shall bear their own attorneys' fees and costs incurred in this matter.

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<sup>3</sup> HAR §3-122-16.06(b) requires that addenda be used to, among other things, furnish to other offerors information given to one offeror if the information will assist the other offerors in submitting offers or if the lack of information would prejudice the other offerors. Undoubtedly, the expeditious transmission of such an addendum would also promote the fair and equitable treatment of all bidders.

<sup>4</sup> HAR §3-122-16.06(e)(1) also provides that where the distribution of amendments will not permit adequate time for the preparation of bids prior to the bid submission deadline, the deadline shall be increased to the extent possible. In this case, Respondent allegedly left a message on Petitioner's voicemail just 2 days prior to the date set for the submission of bids indicating that a copy of Addendum No. 1 was available for pickup. However, in light of the Hearings Officer's conclusions herein and the fact that Petitioner did not raise the issue as to whether Respondent was required to extend the bid submission deadline when it issued the addendum, the Hearings Officer need not address that issue.

<sup>5</sup> Even where the solicitation or award is determined to be in violation of the law, HRS §103D-707(1) authorizes the ratification or modification of the contract if it is determined that doing so would be in the State's best interest. HRS §103D-707(1) also permits the Hearings Officer to terminate the contract. In this case, there was little, if any, evidence that ratification or modification of the contract would be in the State's best interest. On the contrary, ratification would unfairly deny the successful protestor any meaningful relief. Moreover, ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the procurement system and, in the long run, discourage competition. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998)*.

DATED at Honolulu, Hawaii: DEC 22 2011.



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

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*Hearings Officer's Findings of Fact, Conclusions of Law, and Order Granting Petitioner's Motion for Summary Judgment;  
PCH-2011-11; In Re Maui Kupono Builders, LLC.*