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

In the Matter of	)	PCH-2011-12
	)	
OHANA FLOORING	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,	)	DECISION
	)	
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF HAWAII,	)	
Respondent.	)	
	)	

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

I. INTRODUCTION

On October 21, 2011, Petitioner Ohana Flooring ("Petitioner" or "Ohana") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCH-2011-12. Respondent was the Department of Transportation, State of Hawaii ("DOT").

On November 7, 2011, Ohana filed its Motion for Summary Judgment. On November 7, 2011, the DOT also filed its Motion for Summary Judgment.

On November 9, 2011, Ohana filed its "Motion to Extend Deadline for Response to Respondent's Motion for Summary Judgment," which was, in effect, a motion to continue

the hearing on the motions for summary judgment as well as any evidentiary hearing that might have followed the motions for summary judgment.

Oral argument on all motions was held on November 10, 2011. Ohana was represented by Mr. S.J. Melendrez, a consultant to Ohana, and Mr. Daniel Chavarria, a principal of Ohana. The DOT was represented by Deputy Attorney General Rowena A. Somerville, Esq.

At the beginning of the hearing, the Hearings Officer orally denied Ohana's motion to extend the deadline for the response to the DOT's motion for summary judgment.

At the conclusion of the hearing, the Hearings Officer orally granted the DOT's Motion for Summary Judgment and denied Ohana's Motion for Summary Judgment. This Decision, based on the record as of the conclusion of oral argument on November 10, 2011, more fully sets forth those rulings and stands as the formal order with respect to all of the aforesaid summary judgment motions.

As a result of the rulings on the summary judgment motions, all issues in the case were resolved, and there was no need for an evidentiary hearing.

II. FINDINGS OF FACT

In making the following Findings of Fact, the Hearings Officer at times refers to various exhibits submitted by the parties. The parties often presented the same documents as their own respective exhibits. The Findings of Fact, however, may refer to only one exhibit even though the same document may be an exhibit of the other party as well. In doing so, the choice of one party's exhibit under these circumstances is solely a matter of convenience and should not taken in any way as favoring the party whose exhibit is referenced or disfavoring the party whose exhibit is not referenced.

1. In September of 2011, the DOT issued a Request for Solicitation ("RFS") for the Repolish and Repair Terrazzo at Main Terminal, Honolulu International Airport, State Project No. OT-119999 ("Project"). The Solicitation closing date was September 20, 2011 at noon, and the contract start date was supposed to be September 26, 2011. DOT Exhibit E.

2. Section 2.1 of the Special Provisions, Specifications and Proposal for the Project ("Specifications") require that the material to be used "shall be Dex-O-Tex Spectrum Terrazzo or approved equal." DOT Exhibit A.

3. On September 14, 2011, Mr. Gaudencio Lopez, the Oahu District Engineer of the Airports Division, DOT, conducted a Pre-Bid Meeting to discuss the scope of work, schedule, and requirements for the Project.

4. Mr. Danny Chavarria, a principal of Ohana, was present at this Pre-Bid Meeting. At that time, Mr. Chavarria stated that he would be using Dex-O-Tex products. DOT Exhibit G (E-mail of 9/26/11).

5. At this Pre-Bid Meeting, the potential contractors present were told that the contract time would be thirty (30) calendar days inclusive of long lead items with completion no later than October 31, 2011. Ohana Trial Exhibit 6.[1] This information is also stated on the cover page of Addendum No. 1 to the Project Specifications. Ohana Trial Exhibit 7.

6. Section 1.4.A. of the Specifications stated:

> Installer Qualifications: Installer or applicator shall be manufacturer trained or certified installer who has specialized experience in installing polyacrylate terrazzo flooring types similar to that required for this Project and who is acceptable to manufacturer. The contractor's personnel shall have 5 years experience repairing terrazzo floors of similar complexity.

[1] The consideration of trial exhibits with respect to the motions is discussed in the Conclusions of Law portion or this Decision.

DOT Exhibit B. This provision is found at page 09 66 32-2 of the Specifications and is part of Technical Provisions Section 09 66 23 "REPAIR WITH POLYACRYLATE MATRIX TERRAZZO." Ohana Trial Exhibit 4.

7. Section 1.3.F. of the Specifications required bidders to submit "Proof of manufacturer certified applicator for the system proposed for this project." DOT Exhibit C. This provision is found at page 09 66 32-1 of the Specifications and is also part of Technical Provisions Section 09 66 23 "REPAIR WITH POLYACRYLATE MATRIX TERRAZZO." Ohana Trial Exhibit 4.

8. General Note 2 on Sheet T-1 of the Project plans states:

> The contractor shall ensure that all pre-award documentation is submitted to the State as well as ensure that all technical provision requirements are met within 3 calendar days after bid opening. Failure to meet these requirements may result in the State's rejection of the contractor's bid & may result in the award of contract to another bidder.

DOT Exhibit F.

9. General Note 9 on Sheet T-1 of the Project plans states in relevant part:

> All floor construction shall be completed and opened for public use in entirety by October 31, 2011. Timeframe coincides with the subsequent start of the Asian Pacific Economic Conference Summit (APEC).

DOT Exhibit F

10. The DOT received two bids for the Project by the September 20, 2011 closing date and time. Ohana's bid was $114,884.25, and Kahanaio Specialty Coatings, LLC's ("KSC") bid was $207,062.88. DOT Exhibit E.

11. On September 22, 2011, Ohana sent an e-mail to the DOT stating that some required Project documentation was being sent with the e-mail and additional documentation

would be forthcoming shortly. The e-mail did not specifically discuss the required Dex-O-Tex manufacturer's certification. DOT Exhibit G

12. On September 26, 2011, at 2:11 p.m., the DOT sent Ohana an e-mail stating in relevant part:

> Mr. Chavarria stated in the pre-bid that he will be using Dex-O-Tex products specified as the design basis in the specs. Please submit your manufacturer certification

DOT Exhibit G (Emphasis supplied).

13. On September 27, 2011, at 8:33 a.m., the DOT e-mailed Ohana:

> Your response to my last two e-mails is requested as you are past due since 9/23 per General Notes 2 on Sheet T-1 with regards to the submission of your technical documentation (missing manufacturer certification per section 09 66 23 1.3.f). We will move on to the next bidder should we not receive a satisfactory response in a timely manner.

DOT Exhibit G.

14. On September 27, 2011, at 3:30 p.m., Ohana sent an e-mail to the DOT thanking the DOT for a telephone call that afternoon. The e-mail stated that "just got your email," and promised a written response by the next day. DOT Exhibit H.

15. At 3:52 p.m. on September 27, 2011, the DOT granted Ohana additional time for its response and submittal and extended the deadline to the close of business on the following day, September 28, 2011. DOT Exhibit H.

16. At 7:09 a.m. on September 28, 2011, Ohana acknowledged receipt of the DOT e-mail of 3:52 pm. on September 27, 2011 and stated that Ohana "will proceed accordingly." DOT Exhibit I.

17. At 8:28 a.m. on September 28, 2011, Ohana called Dex-O-Tex in California but could not get a response and had to leave a voicemail message. Ohana also had to leave a

message when it called Michelle Solomon (also known as Michelle Mercado and Michelle Mercado-Solomon), Hawaii sales representative for Dex-O-Tex, at 8:30 a.m. that morning. These are the first calls identified by Ohana as its attempts to contact Dex-O-Tex to get the certification documents. Ohana Trial Exhibit 10. There was no explanation in the record as to why Ohana waited this long before attempting to obtain the manufacturer's certification.

18. Ms. Solomon returned Ohana's call at 10:02 that morning but Ohana missed the call and she left a voicemail message. A call by Ohana to Dex-O-Tex at 10:06 a.m. that morning again resulted in no response, and Ohana left another voicemail message. A call to Ms. Solomon at 5:48 p.m. that day as well as a call at 12:56 p.m. on September 29 also resulted in no contact and the leaving of a voicemail message. Later calls by Ohana to those two parties on October 3, and October 4, 2011 also resulted in voicemail messages. Ohana Trial Exhibit 10.

19. Ohana submitted what purported to be the required documentation to the DOT by e-mail at 3:47 p.m. on September 28, 2011. DOT Exhibit I.

20. At 4:00 p.m. on September 28, 2011, the DOT informed Ohana that it could not open the attachments to Ohana's e-mail sent 8 minutes earlier and asked Ohana to fax the certification or scan it or walk it in before 10:00 a.m. the next morning. The e-mail further stated:

> I need evidence that Danny Chavarria is a certified installer. That is a hard deadline. I will not extend the time any further as I've given Danny Chavarria dba Ohana flooring and [sic] additional 3 business days (5 calendar days) to comply. This will serve as your final notice. Your timely response is appreciated.

DOT Exhibit I.

21. Ohana's reply e-mail that afternoon at 5:12 p.m. admitted that Ohana did not have and/or could not find the required installer certification documentation from the manufacturer of Dex-O-Tex. DOT Exhibit I.

22. On September 28, 2011, Dex-O-Tex sent a letter to Ms. Mercado stating that Dex-O-Tex would not issue a letter or state that Mr. Danny Chavarria was a factory trained applicator of Dex-O-Tex products. DOT Exhibit L. At the November 10, 2011 hearing, the DOT represented on the record that it received a copy of this letter on September 28, 2011.

23. The DOT did not provide a copy of this letter to Ohana until November 3, 2011.

24. At the hearing, Ohana asserted that it was prejudiced by DOT's delay in providing Ohana a copy of this letter, asserting that had it known of the letter at the time it would have proposed an alternative product from another manufacturer.

25. On September 29, 2011, Ohana sent a letter to the DOT again admitting that it did not have the required installer certification documentation from Dex-O-Tex. The letter stated in part:

> Mr. Chavarria has requested the manufacturer of the material, Dex-O-Tex for a copy of his original authorized certification for installation and product usage. Mr. Chavarria has been certified for over 15 years and evidently Dex-O-Tex is having difficulty locating original record. He has also asked the company for a memo to the effect of his authorization to install, which is in process.

DOT Exhibit K. This reference to asking the company for a memo "which is in process" is misleading because at this point in time Ohana had not directly spoken to anyone at Dex-O-Tex about obtaining the certification and had only left voicemail messages about Ohana's need for certification.

26. On September 29, 2011, Ohana sent another letter to the DOT finally replying to the questions posed in the DOT's e-mail of September 26, 2011 (DOT Exhibit G). In response to the DOT's request for Ohana's manufacturer's certification, Ohana stated:

> Ohana flooring will be providing Dex-O-Tex original products for Spectrum Terrazzo (attached). Mr. Chavarria original manufacture certification was 15 years ago, memo affirming same is attached.

DOT Exhibit S, pages 18-19. No manufacturer's certification was attached.

27. Instead of providing the manufacturer's certification, Ohana tried to submit a letter of recommendation from United Terrazzo Supply Co, Inc. ("United"), a distributor and not a manufacturer, as a substitute. DOT Exhibit L. As a distributor, United does not install Dex-O-Tex and cannot warrant the installation or application of the product. Declaration of Steven Schroeder.

28. A letter of recommendation from a distributor does not satisfy the requirement of Specification Section 1.3.F. that Ohana submit documentary proof that it is a manufacturer certified applicator.

29. While Mr. Chavarria may have been a factory certified installer when he worked for another employer in California over ten years ago, as of September of 2011 Mr. Chavarria's status as a Dex-O-Tex factory certified installer had previously lapsed and he could not obtain a current certification from Dex-O-Tex. Without that certification, if Ohana installed the Dex-O-Tex product, there would be no manufacturer's warranty. Declaration of Steven Schroeder.

30. On September 30, 2011, the DOT notified Ohana by e-mail that Ohana would not be awarded the contract, stating:

> Daniel Chavarria dba Ohana flooring has failed to demonstrate manufacturer certification within the pre-award deadline even after

> additional time was provided. It is not in the State's interest to indefinitely wait as this is an APEC priority project in addition to conflicting with the timeline established to show such evidence. I have called Dex-O-Tex, which you have made claim to have certification and they have stated that Daniel [sic] Chavarria is no longer a factory trained applicator of their products and have [sic] not been so for several years. This is troubling as it conflicts with several e-mail and phone messages sent by you as a representative of Ohana flooring. Your transactions may be construed as providing false or misleading information. No further discussion will be necessary as we will be moving on to the next responsible bidder.

DOT Exhibit P

31. On October 1, 2011, at 7:46 a.m., Ohana sent an e-mail to the DOT, Ohana Trial Exhibit 11, claiming the contract should be awarded to Ohana or re-bid, and incorrectly and misleadingly asserting that Dex-O-Tex had certified Mr. Chavarria as an authorized applicator and installer when Ohana already knew from the DOT's e-mail (DOT Exhibit P) that Dex-O-Tex had told the DOT that Mr. Chavarria was no longer certified.

32. On October 3, 2011, the DOT notified Ohana that KSC received the contract award and that Ohana Flooring was not awarded the contract "due to insufficient documentation." DOT Exhibit Q.

33. Later that day, Ohana Flooring sent an e-mail to the DOT stating "we thought the direct telecom with Mr. Lopez and Dex-O-Tex was sufficient for his verification of original certification," ignoring the fact that Ohana was not currently certified and that it knew from the DOT that in that telephone conversation between Mr. Lopez of the DOT and Dex-O-Tex that Dex-O-Tex informed Mr. Lopez that it would not certify Ohana. The e-mail also stated Ohana thought the United Terrazzo letter was sufficient to meet current requirements. It promised that a formal protest would be forthcoming. The DOT promptly replied by e-mail to Ohana stating that Ohana had not submitted required documentation and

continued to introduce new positions (e.g. "original" versus "current" certification) which were irrelevant and did not meet the requirements of the specifications. DOT Exhibit Q.

34. On October 3, 2011, Ohana sent another e-mail to the DOT stating, in relevant part:

> Today we spoke with Dex-O-Tex and evidently the reason why Ohana Flooring did not receive a memo verifying his certification is about money, it is not about certification. Mr. Chavarria is not a captive business owner, ie, he provides the best products at the best costing with the best warrant and provides the professional best practices installation and repair of flooring per the manufacturer's specifications.
>
> It is not about certification, it is about money.

DOT Exhibit S, page 21.[2]

35. In its RFAH of October 24, 2011, Ohana stated in Paragraph 3f:

> ...the manufacturer Crossfield, provider of Dex-O-Tex materials was reluctant to provide the certification, as attested to by the Crossfield/Dex-O-Tex Hawaii authorized representative: Ms. Michelle Solomon-Mercado. Whom stated that Crossfield regards Mr. Chavarria, the owner of Ohana Flooring to be a potential competitor because Mr. Chavarria provides not only Crossfield/Dex-O-Tex products but also other manufacturer's product line to his customers in order to provide the best product with the best warranty at the best costing, with the most durability.
>
> The certification issue with Crossfield was a business decision, not a certification issue.

36. The contract was awarded to KSC on October 3, 2011. DOT Exhibit R.

37. Ohana submitted its formal protest of the award to KSC by a submission to the DOT on October 5, 2011. DOT Exhibit S.

[2] Ohana never explained why it was asserting through its Trial Exhibit 10 that it did not have any calls with Dex-O-Tex, and could not reach Ms. Solomon, on October 3, 2011.

38. In this protest submittal, Ohana took issue with the DOT's conclusion that it had not submitted sufficient documentation of its status as a manufacturer certified applicator. It asserted that Mr. Chavarria was originally certified by the manufacturer but is not currently certified because of a business dispute with the manufacturer arising out of Ohana's sales and installation of terrazzo products from other manufacturers. The protest also asserted, without any factual backup, that the manufacturer of Dex-O-Tex "may have a vested interest" in KSC receiving the award. Included with the protest were a letter of reference from a distributor and from another manufacturer attesting to the qualifications of Mr. Chavarria.

39. There was no evidence that the DOT played any part in, or was responsible in any way for, the Dex-O-Tex decision to refuse to provide the manufacturer's certification to Ohana and/or Mr. Chavarria.

40. The DOT denied Ohana's protest by letter dated October 14, 2011 "for failure to meet the certification requirements," referencing Specification Sections 1.3 and 1.4. DOT Exhibit T.

41. Thereafter, Ohana filed its RFAH on October 24, 2011.

42. At the conclusion of the parties' arguments at the hearing on November 10, 2011, the parties agreed that there were no disputed issues of fact in this proceeding.

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.

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

While it filed a motion for summary judgment, Ohana did not file an opposition to the DOT's motion for summary judgment. Because the cross-motions were dealing with the same issues, the Hearings Officer considered Ohana's motion to also be an opposition to the DOT's motion. In addition, at the hearing on the summary judgment motions, Ohana was allowed to supplement the record with its proposed trial exhibits. The DOT did not have any specific objections to any of these exhibits. It only objected generally that the exhibits had not been properly authenticated as is required by the Hawaii Rules of Civil Procedure concerning summary judgment motions. This objection is overruled, as, for all intents and purposes, Ohana's proposed trial exhibits did not appear problematical in terms of authenticity and the Hearings Officer desired to allow Ohana to make a complete documentary record with respect to the motions.

Contracts can only be awarded to bidders who are both responsive and responsible. HRS §103D-302(h) states:

> The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.

See also Hawaii Administrative Rules ("HAR") §3-122-33(a):

> The award shall be made to the lowest responsive, responsible bidder and shall be based on the criteria set forth in the invitation for bids.

Bids that do not meet these requirements must be rejected pursuant to HAR §13-122-97(a)

A responsible offeror is defined by HRS §103D-104 as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance."

The concept of responsibility addresses the performance capability of the bidder and normally involves an inquiry into the potential contractor's experience and other areas of qualifications.

Responsibility is normally not determined at bid opening. Instead, it is determined at any time up to the award based upon information available up to that time. See, e.g., Okada Trucking Co., Ltd. v. Board of Water Supply, 77 Haw. 544, 556, 40 P.3d 946, 958 (Haw. App. 2001).

Specifications sections 1.4.A. and 1.3.F. required that the contractor (1) be acceptable to the terrazzo flooring manufacturer, and (2) provide proof that the contractor was a manufacturer certified applicator.

The certification requirement directly impacts capability, as well as integrity and reliability, of the contractor. These are matters of responsibility.

General Note 2 on Sheet T-1 of the Project Plans required that all Technical Provisions requirements be met, and all pre-award documentation submitted, within 3 calendar days after bid opening. The bidders were warned by General Note 2 that failure to meet these requirements might result in rejection of the bid and an award of the contract to

another bidder. Ohana had to comply with the requirements of General Note 2 in order to obtain the contract for the Project.

The effect of General Note 2 was to make submission of documentation necessary to meet the requirements of Specifications Sections 1.4.A. and 1.3.F. a matter of responsibility. While the necessary documentation could be submitted after the bid, it had to be submitted prior to award.

In this case, the DOT gave Ohana extra time over and above the three days allowed by General Note 2 on Sheet T-1 to provide the required documentation. However, the DOT could not provide unlimited time to Ohana because the contract called for thirty days of work to be completed by October 31, 2011. If Ohana could not satisfy its obligation to demonstrate its responsibility, the DOT would need additional time to award the contract to another bidder (who would need to perform by October 31, 2011).

Ohana's position that Mr. Chavarria formerly was certified by Dex-O-Tex and was currently highly recommended by a distributor and another manufacturer was not sufficient to meet the Project's certification requirements.

The DOT acted appropriately when it decided to decline to give Ohana more time to obtain the required certification from Dex-O-Tex and instead make the award to KSC.

In the days following the bid opening on September 20, 2011, it should have become apparent to Ohana that (a) it did not have the required certification from Dex-O-Tex; and (b) it was increasingly unlikely that it would timely obtain that certification because neither Dex-O-Tex nor its Hawaii sales representative were returning its calls. Instead of pursuing its strategy of trying to satisfy the certification requirement through an alternative means not provided for in the Specifications, i.e., recommendations from parties that could not supply

the manufacturer's certification, it should have proposed an alternative source of supply, where it could be a manufacturer certified applicator, as an "or equal" under the contract provisions. However, it made no attempt to do so even after the DOT told Ohana on September 30, 2011 about the DOT's the telephone conversation with Dex-O-Tex.

The DOT's motion for summary judgment based on the claim that Ohana was not a responsible bidder is granted.

The DOT also contends that Ohana's bid was non-responsive.

Bids that do not conform in all material respects with the specifications are nonresponsive. A material nonconformity is one that affects price, quantity, or quality. It goes to the substance of the bid or works an injustice on other bidders. Southern Foods Group L.P. v. State, 89 Haw. 443, 934 P.2d 1033 (1999).

In this regard, the DOT asserts that failure to submit proof of manufacturer certified applicator status meant that Ohana's bid contained a material nonconformity. However, Ohana did not have to submit that documentation with its bid. The DOT's motion does not identify any portion of the Project Specifications to that effect. To the contrary, the entire course of events in connection with this Project is premised on Ohana's opportunity to, and its failure to, submit this documentation after the bids were opened and prior to award, i.e., matters of responsibility and not responsiveness. "Responsiveness is determined by reference to when [the bids] are opened..." Okada Trucking Co. v. Board of Water Supply, 101 Haw. 68, 75, 62 P.3d 631, 638 (Haw. App. 2002).

The DOT's motion for summary judgment based on the claim that Ohana was not a responsive bidder is denied.

The Ohana bid protest can also be read as asserting that the manufacturer's certification is not a reasonable requirement because Mr. Chavarria's extensive experience

and capabilities sufficiently demonstrates his ability to perform admirably on this Project. Therefore, according to Ohana, "[w]e have found the request for a memo from Crossfield for Dex-O-Tex not be sufficient reason to not award the project to Ohana Flooring and Mr. Chavarria." DOT Exhibit S at page 5.

Ohana is asserting there that the Project Specifications should have been written differently so as to provide for alternatives to the requirement of the manufacturer's certification.

Under HRS §103D-701(a) a protest as to the content of the solicitation had to be submitted within five working days of when Ohana knew or should have known of this claim, and, in any event, it must be "submitted in writing prior to the date set for the receipt of offers."

Ohana might have had a good idea here but was required to submit a protest on this point before September 20, 2011 and not at a later time when it found out it could not meet the requirements of the Specifications.

The DOT's motion for summary judgment to dismiss this portion of Ohana's claims for lack of jurisdiction is granted.

The DOT contests Ohana's claims regarding KSC's pricing and KSC's ability to perform the contract as irrelevant. The question here is more properly denominated as one of jurisdiction rather than relevancy.

The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the Hearings Officer, as jurisdiction is a statutory matter and cannot be conferred by the stipulation or agreement of the parties. Captain

Andy's Sailing, Inc. v. Department of Natural Resources, 113 Haw. 184, 193-194, 150 P.3d 833, 842-843 (2006).

HRS §103D-701(a) states in relevant part:

> **Authority to resolve protested solicitations and awards.** (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation.

Further, HRS §103D-709(a) provides the Hearings Officer with jurisdiction to:

> **Administrative proceedings for review.** (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

Ohana was an actual bidder on this project. However, its bid was rejected by the DOT, and that rejection of its bid by the DOT has been upheld as valid by the Hearings Officer. At the point when Ohana's bid was properly rejected, it correspondingly had no possibility of receiving an award of the contract for the Project.

After Ohana had no possibility of receiving an award of the contract for the Project, the DOT awarded the contract to KSC. At that point, Ohana was not "aggrieved" in connection with the award to KSC. "Knocking out" KSC's award could not possibly lead to Ohana being awarded the contract for the Project. Not being "aggrieved," Ohana has no standing under HRS §103D-701(a) or HRS §103D-709(a) to challenge the award to KSC.

Although the factual circumstances are not identical, the principles of the holdings in the cases of Stoneridge Recoveries, LLC v. Department of Budget and Fiscal Services, City

and County of Honolulu, PCH-2003-5, and Hawaii Newspaper Agency, et al., v. State Dept. of Accounting & General Services, et. Al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. Al, PCH 99-2 and PCH 99-3 (consolidated)(April 16, 1999), are to the same effect. In a post-award situation, a protestor who has no realistic expectation of being awarded the contract is not an "aggrieved" party.

The standing rule for post-award procurement protests in the federal system is essentially the same. Prejudice, i.e., injury, is a necessary element of standing in the federal system, and to establish prejudice a party must show a substantial chance it would have received the contract award but for the alleged error in the procurement process. Information Technology & Applications Corporation v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003). Here, Ohana would have no choice of receiving the award if there were errors in awarding the contract to KSC because Ohana's bid had already been properly rejected.

Accordingly, while the DOT makes substantial arguments at pages 7-9 of its Memorandum in Opposition to Ohana's Motion for Summary Judgment that Ohana's challenged of the award to KSC is without merit, the Hearings Officer is not making a ruling based on those arguments. Instead, because Ohana's bid was properly rejected, it has no standing to contest the subsequent award to KSC, and its challenge to the KSC award is dismissed for lack of jurisdiction.

Ohana's complaint about late receipt from the DOT of a copy of the Dex-O-Tex letter of September 28, 2011 was not part of its procurement protest submitted to the DOT on October 6, 2011 and decided by the DOT on October 14, 2011 (nor could it have been because, on the facts asserted herein, Ohana did not receive the letter until November 3, 2011).

The Hearings Officer's jurisdiction is limited by HRS §103D-709(h), which provides:

> The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer.

Accordingly, there is no jurisdiction in this proceeding to hear and determine Ohana's complaint based on the timing of the delivery of the letter of September 28, 2011. That claim would have had to be the subject of a separate procurement protest. The Hearings Officer makes no ruling, one way or another, on the merits of any such possible protest.

IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

a. The Department of Transportation's Motion for Summary Judgment is granted as stated above.

b. Ohana Flooring's Motion for Summary Judgment is denied.

c. To the extent that Ohana Flooring advocates a change in the terms of the Specifications in its procurement protest, Ohana's procurement protest was not timely under HRS §103D-701(a) and its procurement protest is dismissed for lack of jurisdiction.

d. As set forth in detail above with respect to the summary judgment motions, Ohana Flooring has failed to prove by a preponderance of the evidence that the DOT's denial of Ohana Flooring's procurement protest regarding rejection of Ohana Flooring's bid was improper and not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation. Accordingly, the DOT's denial of Ohana Flooring's procurement protest in that regard is affirmed and Ohana Flooring's RFAH herein is dismissed.

e. To the extent that Ohana Flooring is challenging the DOT's award of the contract for the Project to KSC, Ohana Flooring does not have standing to make such a challenge, and Ohana Flooring's procurement protest in that regard is dismissed for lack of jurisdiction.

f. To the extent that Ohana Flooring is challenging the timing of the delivery to it of a copy of the September 28, 2011 letter from Dex-O-Tex, that claim is dismissed, without prejudice, for failure to exhaust administrative remedies.

f. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawai`i, NOV 18 2011.

DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce
and Consumer Affairs