



OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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

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

In the Matter of	)	PCH 2011-4
	)	PCH 2011-5
OKADA TRUCKING CO., LTD.,	)	[CONSOLIDATED CASES]
	)	
Petitioner,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW AND
vs.	)	DECISION
	)	
BOARD OF WATER SUPPLY, CITY AND	)	
COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	

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

I. INTRODUCTION

On August 17, 2011, Okada Trucking Co., Ltd. ("Petitioner") filed its requests for hearing to contest the Board of Water Supply, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protests regarding the Mapunapuna Water System Improvements ("Mapunapuna Project") (PCH 2011-4) and the Kaiolohia Place and Way: 8-Inch Mains, Hawai'i Kai, Oahu, Hawai'i ("Kaiolohia Project") (PCH 2011-5). The matters were set for hearing and the Notices of Hearing and Pre-Hearing Conference were duly served on the parties.

At the pre-hearing conference held on August 25, 2011, the parties agreed to consolidate the matters for hearing. The parties also agreed that Respondent's Motion for

Summary Judgment (“Motion”) would be heard on September 7, 2011 and that if a hearing is necessary, it will commence after the ruling on the Motion.

On September 2, 2011, Respondent filed a Motion Re Disclosure of Information (“Motion Re Disclosure”). On September 6, 2011, Respondent filed its Memorandum in Opposition to the Motion Re Disclosure and Petitioner filed its Memorandum in Opposition to Respondent’s Motion.

A hearing on the motions was held on September 7, 2011. Petitioner was represented by Neal K. Aoki, Esq. Respondent was represented by Joseph A. Stewart, Esq. After a short recess, the Hearings Officer orally granted Respondent’s Motion on four of the five issues raised and denied Petitioner’s Motion Re Disclosure. Thereafter, the evidentiary portion of the hearing was held. At the conclusion of Petitioner’s presentation, Respondent moved to dismiss the matters. After hearing the oral arguments of counsel, the Hearings Officer took the matter under advisement. Respondent proceeded with the presentation of its case. The hearing reconvened on September 8, 2011.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments and proposed findings of fact and conclusions of law. The parties filed their post-hearing submissions on October 7, 2011.

The Hearings Officer’s Findings of Fact, Conclusions of Law and Decision Granting in Part and Denying in Party Respondent’s Motion for Summary Judgment and Order Denying Petitioner’s Motion Re Disclosure of Information is being issued concurrently with this Decision. In addition, the Hearings Officer hereby denies Respondent’s Motion to Dismiss.

Having reviewed and considered the evidence and arguments presented, 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

As a preliminary matter, the proposed findings of fact and conclusions of law filed by the parties have been considered. To the extent that the proposed findings and conclusions submitted are in accordance with the findings and conclusions stated herein,

they have been accepted, and to the extent they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as the Hearings Officer determined them to be not relevant or necessary to a proper determination of the material issues presented.

1. On May 27, 2011, Respondent issued requests for proposals (“RFP”) for the Mapunapuna and Kaiolohia Projects.

2. Section 4.4 of the RFP’s for both projects identifies the three (3) evaluation criteria as follows:

- |     |   |           |
|-----|---|-----------|
| (1) | Relevant construction services experience | 50 points |
| (2) | Strength of Proposer/References           | 40 points |
| (3) | Fee Proposal                              | 10 points |

3. Section 4.4.2 of the RFP’s for both projects describes the “Strength of Proposer/References as follows:

Proposer’s past performance on other BWS projects and projects of similar scope performed for other State of Hawai’i agencies including Proposer’s performance in completing projects on time and on budget. The whole team (construction crew including subcontractors) will be considered in the evaluation.

4. To rate the past performance of proposers, (evaluation criteria number 2) Respondent utilized a Proposer Past Performance Evaluation Form (“PPPE Form”).

5. The PPPE Form provides in relevant part:

Please rate the following questions on a scale from 0, lowest score, to 5, highest score (unrated questions will be given a rating of 2.5).

Rate the contractor’s quality of workmanship from 0 (poor workmanship) to 5 (very high quality workmanship)

Rate the contractor’s adherence to project milestones and overall completion time from 0 (poor adherence to schedule and completion dates) to 5 (high adherence to schedule and completion dates by making their own adjustments to meet or beat original schedules)

Rate the contractor's timeliness and completeness of submittals from 0 (slow AND incomplete submissions) to 5 (timely AND complete submissions)

Rate the contractor's effort to minimize complaints and address complaints in a timely manner from 0 (lack of effort and untimely response) to 5 (being proactive and timely)

Rate the contractor's fairness in proposing reasonable pricing and time for additional work from 0 (unreasonable proposals) to 5 (highly reasonable proposals)

Rate the contractor's conformance to the contract drawings and specifications from 0 (constant oversight and corrective actions) to 5 (very little oversight required)

Rate the contractor's cooperativeness in resolving unexpected situations encountered and offering solutions from 0 (uncooperative and unresponsive) to 5 (highly cooperative and highly responsive)

Rate the contractor's compliance with permits, rules, and regulations from 0 (not compliant, advisories constantly issued) to 5 (highly compliant)

Rate your overall impression of this contractor from 0 (low) to 5 (high)

Rate how likely you would want to work with this contractor again on a similar project from 0 (not likely) to 5 (highly likely)

6. The PPPE Form was prepared and completed prior to the issuance of the RFPs for the Mapunapuna and Kaiolohia Projects but were not included as part of the RFPs.

7. The PPPE Forms were completed by Respondent's construction inspectors and then given to the evaluation committees for the respective projects. The scores were tabulated and recorded on the summary RFP Scoring Sheet. The evaluation committee members did not question the construction inspectors about their ratings.

8. On July 7, 2011, Respondent awarded the Mapunapuna Project to Ideal Construction, Inc. (“Ideal”) and awarded the Kaiolohia Project to Koga Engineering and Construction, Inc. (“Koga”).

9. Petitioner requested a debriefing and as part of the debriefing, Respondent provided Petitioner with copies of the PPPE Forms with certain information redacted. Respondent declared the debriefing concluded on July 27, 2011.

10. On August 3, 2011, Petitioner filed its protests with Respondent. By a letter dated August 10, 2011, Respondent denied Petitioner’s protests.

11. On August 17, 2011, Petitioner filed its requests for hearing with the Office of Administrative Hearings to contest Respondent’s denials of its protests.

### III. CONCLUSIONS OF LAW

The issues to be resolved is whether the evaluation criteria contained in the PPPE Form should have been included in the RFPs and whether that criteria are arbitrary, capricious and/or contrary to the purposes of the Hawai’i Procurement Code. Petitioner has the burden of proving by a preponderance of the evidence that Respondent’s determinations were not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Hawai’i Revised Statutes (“HRS”) § 103D-303 provides in relevant part:

**§ 103D-303 Competitive sealed proposals.**

...

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made[.]

Hawai’i Administrative Rules (“HAR”) § 3-122-52 provides in relevant part:

**3-122-52 Evaluation of proposals.** (a) Evaluation factors shall be set out in the request for proposals and the evaluation shall be based only on the evaluation factors. Evaluation factors not specified in the request for proposals may not be considered[.]

Additionally, HAR § 3-122-57 discusses the award of contracts for RFPs and provides in relevant part:

**3-122-57 Award of contract.** (a) The award shall be issued in writing to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals...Other criteria may not be used in the evaluation. The contract file shall include the basis for selecting the successful offeror[.]

The RFPs state that proposers will be evaluated on past performance, including completing projects on time and on budget. Petitioner argued that the RFPs should be read as only evaluating a proposer's ability to complete projects on time and on budget. The Hearings Officer finds that the language contained in the RFPs was sufficient to put the proposers on notice that their past performance, including but not limited to being on time and on budget, would be evaluated and concludes that it was not necessary for the PPPE Form or the evaluation criteria contained therein to be included in the RFPs.

Petitioner also argued that the evaluation criteria are arbitrary and capricious and contrary to the purposes of the Hawai'i Procurement Code, which is to provide fairness, equity and broad based competition among the proposers as well as to increase public confidence in the integrity of the procurement system. Respondent cited the Office of Federal Procurement Policy's Best Practices for Collecting and Using Past Performance Information ("Federal Policy") in support of its use of the evaluation criteria contained in the PPPE Form. Respondent, however, did not follow the Federal Policy in one important aspect—there was no supporting documentation for the scores given to the proposers. The Federal Policy recognizes that "a past performance rating is not a precise mechanical process, therefore a supporting rationale for the final rating needs to be included in the contract file." *Chapter 3, Section M of the Federal Policy* (Exhibit "A" of Respondent's Closing Brief). Instead, the evaluation committees for the respective projects took the ratings from the construction inspectors at face value and tallied and recorded the scores on the RFP Scoring Sheet without any independent verification or questioning of the construction inspectors. The Federal Policy further states:

The documentation need not be voluminous. The assessment should include rationale for the conclusions reached. As long as

that rationale is reasonable, i.e., based on analysis, verification, or corroboration of the past performance information, and is evaluated against the evaluation factors stated in the solicitation, it will withstand scrutiny by the courts. *Id.*

Especially for criteria such as “overall impression of contractor” and “how likely you would want to work with this contractor again on a similar project”, supporting rationale is essential to insure that the evaluators’ personal biases and prejudices are not reflected and the rating has a reasonable basis. Accordingly, the Hearings Office concludes that the evaluation committees’ use of the evaluation criteria contained in the PPPE Form for the Mapunapuna and Kaiolohia Projects were arbitrary and capricious and contrary to law.

### Remedies

The remedies available to an aggrieved party following the award of the contract are set forth in HRS § 103D-707 and Hawaii Administrative Rules (“HAR”) § 3-126-38 and provide in relevant part:

**§ 103D-707 Remedies after an award.** If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interest of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney’s fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination[.]

**§ 3-126-38 Remedies after an award.** (a) When there is no fraud or bad faith by a contractor:

(1) Upon finding after award that a state or county employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law

where there is no finding of fraud or bad faith, the chief procurement officer or designee may ratify and affirm, modify, or terminate the contract in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.

(2) If the violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.

(3) If the violation cannot be waived without prejudice to the State or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is no time for resoliciting bids or offers, the contract may be amended appropriately, ratified, and affirmed.

(4) If the violation cannot be waived without prejudice to the State or other bidders or offerors and if performance has begun, the chief procurement officer or designee shall determine in writing whether it is in the best interest of the State to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the State's best interest:

- (A) The cost to the State in terminating and resoliciting;
- (B) The possibility of returning goods delivered under the contract and thus decreasing the costs of termination;
- (C) The progress made toward performing the whole contract; and
- (D) The possibility of obtaining a more advantageous contract by resoliciting.


Based on the evidence presented, the Hearings Officer finds that Respondent did not act in bad faith in awarding the contracts, but that the violation cannot be waived without prejudice to the Respondent or the other offerors. Since no evidence was presented to show that performance has begun or that there was no time for resoliciting offers, the Hearings Officer concludes that the award of the contracts should be terminated.



IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby orders that the contracts awarded to Ideal and Koga be terminated. Ideal and Koga shall be compensated for actual expenses, other than attorney's fees, reasonably incurred under the contract plus a reasonable profit, with such expenses and profit calculated to the point of termination. Each party is to bear its own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, NOV - 1 2011.

  
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SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs



DEPT. OF COMMERCE  
1000 JESSIE STREET

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OFFICE OF ADMINISTRATIVE HEARINGS  
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	)	PCH 2011-5
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	)	FACT, CONCLUSIONS OF LAW AND
vs.	)	DECISION GRANTING IN PART AND
	)	DENYING IN PART RESPONDENT’S
BOARD OF WATER SUPPLY, CITY AND)	)	MOTION FOR SUMMARY JUDGMENT
COUNTY OF HONOLULU,	)	AND DENYING PETITIONER’S MOTION
	)	RE DISCLOSURE OF INFORMATION
Respondent.	)	
	)	
	)	

HEARINGS OFFICER’S FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECISION GRANTING IN PART AND DENYING IN PART  
RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND  
DENYING PETITIONER’S MOTION RE DISCLOSURE OF INFORMATION

I. INTRODUCTION

On August 17, 2011, Okada Trucking Co., Ltd. (“Petitioner”) filed its requests for hearing to contest the Board of Water Supply, City and County of Honolulu’s (“Respondent”) decisions to deny Petitioner’s protests regarding the Mapunapuna Water System Improvements (“Mapunapuna Project”) (PCH 2011-4) and the Kaiolohia Place and Way: 8-Inch Mains, Hawai’i Kai, Oahu, Hawai’i (“Kaiolohia Project”) (PCH 2011-5) . The matters were set for hearing and Notices of Hearing and Pre-Hearing Conference were duly served on the parties.

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A hearing on the motions was held on September 7, 2011. Petitioner was represented by Neal K. Aoki Esq. Respondent was represented by Joseph A. Stewart, Esq. After a short recess, the Hearings Officer orally granted Respondent’s Motion on four of the five issues raised and denied Petitioner’s Motion Re Disclosure.

Having reviewed and considered the evidence and arguments presented, 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. In a memorandum dated July 23, 2010, Respondent determined, in writing, that the procurement of construction services for the Mapunapuna Project through competitive sealed bidding was neither practicable nor advantageous to Respondent.

2. In a memorandum dated November 15, 2010, Respondent determined, in writing, that the procurement of construction services for the Kaiolohia Project through competitive sealed bidding was neither practicable nor advantageous to Respondent.

3. On May 27, 2011, Respondent issued requests for proposals (“RFP”) for the Mapunapuna and Kaiolohia Projects.

4. Section 4.4 of the RFP’s for both projects identifies the three (3) evaluation criteria as follows:

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6. To rate the past performance of proposers, (evaluation criteria number 2)  
Respondent utilized a Proposer Past Performance Evaluation Form ("PPPE Form").

7. The PPPE Form provides in relevant part:

Please rate the following questions on a scale from 0, lowest score, to 5, highest score (unrated questions will be given a rating of 2.5).

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Rate how likely you would want to work with this contractor again on a similar project from 0 (not likely) to 5 (highly likely)

8. On July 7, 2011, Respondent awarded the Mapunapuna Project to Ideal Construction, Inc. and awarded the Kaiolohia Project to Koga Engineering and Construction, Inc.

9. Petitioner requested a debriefing and as part of the debriefing, Respondent provided Petitioner with copies of the PPPE Forms with certain information redacted. Respondent declared the debriefing concluded on July 27, 2011.

10. On August 3, 2011, Petitioner filed its protests with Respondent. By a letter dated August 10, 2011, Respondent denied Petitioner's protests.

11. On August 17, 2011, Petitioner filed its requests for hearing with the Office of Administrative Hearings to contest Respondent's denials of its protests.

### III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH 96-9 (November 20, 1996).

Petitioner's protest challenged: (1) Respondent's use of sealed proposals versus sealed bidding, (2) Respondent's use of the sealed proposal method based on Respondent's failure to make a written determination on the sealed proposal method as required by Hawai'i Administrative Rules Section 3-122-45, (3) Respondent's use of past performance as an evaluation criteria as clearly erroneous, (4) the weight given to the three evaluation criteria as arbitrary and capricious and (5) the criteria used to evaluate past performance as arbitrary, capricious and/or contrary to the purposes of the Hawai'i Procurement Code.

As to issues 1, 2, 3 and 4, the Hearings Officer finds that those issues relate to the content of the proposal. Because Hawai'i Revised Statutes ("HRS") Section 103D-701(a) states that protests based on the content of the solicitation shall not be considered unless it is submitted in writing prior to the date of receipt of offers, the Hearings Officer concludes that Petitioner's protest of those issues was untimely and the Hearings Officer does not have jurisdiction to address those issues. Accordingly, Respondent's Motion is granted as to those issues.

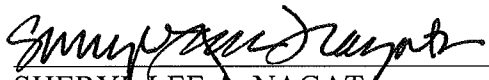
As to issue 5, Respondent's Motion is denied as the Hearings Officer finds that Petitioner's protest on that issue was timely filed as Petitioner was not given the PPPE forms until the debriefing. Accordingly, Respondent's Motion is denied as to that issue.

Petitioner's Motion Re Disclosure is denied as the disclosure of the information requested is not relevant to the remaining issue to be resolved.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion for Summary Judgment is granted in part as to issue numbers 1, 2, 3 and 4 and denied as to issue number 5. Petitioner's Motion Re Disclosure is denied.

DATED: Honolulu, Hawaii, NOV - 1 2011

  
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SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs