



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2010 FEB 11 P 2: 50

HEARINGS OFFICE

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

In the Matter of:	)	PCX-2010-1
	)	
MARSH USA INC.,	)	HEARINGS OFFICER'S FINDINGS
	)	OF FACT, CONCLUSIONS OF LAW,
Petitioner,	)	AND FINAL ORDER
vs.	)	
	)	
RIX MAURER, III, DEPARTMENT OF	)	
BUDGET AND FISCAL SERVICES,	)	
CITY AND COUNTY OF HONOLULU,	)	
	)	
Respondents.	)	
	)	

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HEARINGS OFFICER'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

I. INTRODUCTION

On January 5, 2010, Marsh USA Inc. ("Petitioner") filed a request for hearing in connection with Respondents Rix Maurer, III, Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondents") December 29, 2009 determination that Petitioner's November 23, 2009 protest was untimely. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On January 14, 2010, Petitioner and Respondents entered into a Stipulation regarding the timeliness of Petitioner's protest.

On January 20, 2010, Petitioner filed a Motion for Attorneys' Fees and Costs and for Ratification of Award of Contract. On the same date, Respondents filed a Motion for Dismissal and Remand of Petitioner Marsh USA Inc.'s Petition for Hearing.

On January 22, 2010, the foregoing motions came on for hearing before the undersigned Hearings Officer; Robert K. Fricke, Esq., Joachim P. Cox, Esq., and Mihoko E. Ito, Esq. appearing for Petitioner; and Robert G. Klein, Esq. and Christopher D. Bain, Esq. appearing for Respondents.

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

## II. FINDINGS OF FACT

1. On May 1, 2009, Respondents issued Request for Proposals No. RFP-BFS-174907 ("RFP") for the Owner Controlled Insurance Program ("OCIP") Broker Services for the Honolulu High-Capacity Transit Corridor Project of the City and County of Honolulu ("Project").

2. The RFP established June 1, 2009 as the deadline for receipt of proposals. On June 1, 2009, Petitioner submitted its proposal for the RFP. Two additional offerors, Aon Risk Services, Inc. ("Aon") and Willis Group also submitted proposals.

3. Respondents issued Addenda to the RFP on May 26, 2009, June 30, 2009, July 1, 2009, and July 10, 2009. The contract award date set forth in the amended RFP was July 30, 2009.

4. On July 28, 2009, Respondents awarded Petitioner the contract for the Project.

5. On August 7, 2009, Aon protested Respondents' award of the contract to Petitioner, on the grounds that Petitioner was "non-responsive" and that Respondents acted in bad faith in its evaluation of the proposals.

6. By letter dated November 12, 2009 to Aon's attorney, Respondents responded to Aon's protest:

This is in response to your letter dated August 7, 2009 ("Bid Protest"), protesting the award of CT-BFS-0900306 to Marsh USA, Inc. ("Marsh") on behalf of your client Aon Risk Services, Inc. of Hawaii ("Aon"). After careful consideration of the grounds of protest you included in the Bid Protest, the Chief Procurement Officer, through its undersigned authorized designee, has come to the conclusion that Marsh's Technical and Price Proposals were responsive to the request for proposals ("RFP").

This notwithstanding, the Department of Budget and Fiscal Services ("BFS"), in conducting its investigation, discovered certain irregularities in the evaluation process, which may have prejudiced the City's and other offerors' interests. Specifically, during the evaluation process, the sealed Pricing Proposals were inadvertently presented to all members of the Evaluation Committee together with the Technical Proposals in contravention of RFP Part IV, and, at least one member unwittingly opened and viewed the Price Proposals before the Technical Proposals were scored.

Furthermore, the investigation revealed that individual written evaluations were not provided by each member of the Evaluation Committee as required under HAR Section 3-122-52(c)(1), thus precluding subsequent verification as to whether instructions regarding the grading parameters of the scores were understood correctly by the members of the Evaluation Committee.

This said, BFS did not find any involvement of fraud or bad faith on the part of any member(s) of the Evaluation Committee, or on the part of any employee or representative of the City and County of Honolulu; neither was there any finding of involvement of fraud or bad faith on the part of the offerors.

Therefore, the City, through the Department of Budget and Fiscal Services, hereby sustains your protest request to terminate CT-BFS-0900396 (“Contract”) and provide for a new RFP. However, the determination to terminate the award of the Contract was based on BFS’ own independent investigation and not on grounds of protest raised in the Bid Protest.

BFS’s decision to terminate the award of CT-0900396, amend the OCIP RFP, and re-solicit proposals is final and conclusive in accordance with HAR Sections 3-126-4(b)(2)(B) and 3-126-7(a). Aon is not entitled to recoup costs incurred in connection with the solicitation or attorneys’ fees relating to the Bid Protest. *See id.* § 3-126-7(d); *Carl Corp. v. Dep’t of Educ.*, 85 Hawaii 431, 560-61, 946 P.2d 1, 30-31 (1997)(no attorneys’ fees unless contract awarded in bad faith and in violation of HRS § 103D-701(f)).

Pursuant to HRS §103D-709, and as amended by Act 175, SLH 2009, you may appeal this decision by filing a request for administrative review within seven (7) calendar days from the issuance of this letter to:

Office of Administrative Hearings  
Department of Commerce and Consumer Affairs  
335 Merchant Street, Suite 100  
Honolulu, Hawaii 96813

You must notify the undersigned Purchasing Administrator within seven (7) calendar days of the issuance of this decision if a request for an administrative review will be filed.

7. Respondents sent its November 12, 2009 letter to counsel for Aon via certified mail on November 12, 2009.

8. Respondents did not send its November 12, 2009 letter to Petitioner on November 12, 2009. Respondents did not notify Petitioner that its contract had been terminated until November 16, 2009, when Petitioner’s counsel received from Respondents a facsimile copy of Respondents’ November 12, 2009 letter to Aon.

9. On November 23, 2009, Petitioner protested Respondents' decision to cancel the contract award to Petitioner and resolicit proposals for the Project.

10. By letter dated December 29, 2009, Respondents notified Petitioner that its protest was untimely:

This acknowledges receipt of your letter dated November 23, 2009, addressed to Mr. Rix Maurer, III, regarding the above-referenced matter, on behalf of your client Marsh USA Inc. (Marsh), and protesting the determination made by the City dated and posted November 12, 2009.

Your protest is untimely. Under Hawaii Revised Statutes (HRS) § 103D-701(a), “. . . 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 there . . .” The City's response to Aon Risk Services, Inc. of Hawaii (Aon) was issued and sent out on November 12, 2009. Attached is a copy of the certified receipt. On the same day, a copy was sent to Marsh at 745 Fort Street, #1100, Honolulu, HI 96813. The deadline for filing a protest on the City's determination was November 19, 2009. This decision is final and conclusive.

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11. Respondent's December 29, 2009 determination did not address the substantive arguments contained in Petitioner's protest.

12. On January 5, 2010, Petitioner filed its Petition for Hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

13. On January 8, 2010, Respondents filed its response to Petitioner's Request for Hearing, admitting that “a recent investigation revealed that a copy of the November 12 letter to Aon was not sent to Marsh until November 16, 2009.”

14. On January 14, 2010, Respondents stipulated that Petitioner did not receive the November 12, 2009 letter until November 16, 2009, and that Petitioner's November 23, 2009 protest was timely filed.

### 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.<sup>1</sup> 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).

This appeal was brought to challenge Respondents’ December 29, 2009 determination that Petitioner’s November 23, 2009 protest was untimely. Following the filing of this appeal, however, Respondents acknowledged and stipulated that Petitioner’s protest was timely filed. Petitioner is therefore entitled to summary judgment on this issue and to an order vacating Respondent’s December 29, 2009 determination.<sup>2</sup> Furthermore, having arrived at this conclusion, Respondents’ motion for dismissal is denied.

Petitioner also alleges that Respondents’ failure to address all of the issues raised in the protest constitutes a waiver of Respondents’ “right to address and decide the substantive issues raised in Marsh’s protest.” Respondents, on the other hand, argue that because they lack jurisdiction over an untimely protest, they are not required to and cannot address the substantive issues of such a protest. Respondents’ argument, however, assumes that the determination that a protest is untimely is correct. If that determination proves to be incorrect, as in this case, Respondents’ failure to address all of the issues raised in the protest would only result in unnecessary delays and piecemeal litigation.

In enacting HRS Chapter 103D (“Code”), the Legislature sought to establish a comprehensive code that would, among other things, ensure efficiency in the procurement

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<sup>1</sup> Accordingly, the Hearings Officer’s jurisdiction in this case is limited to a review of Respondents’ December 29, 2009 determination regarding the timeliness of the protest and does not extend to the substantive issues raised in Petitioner’s protest.

<sup>2</sup> Both parties agreed that their motions are properly construed as motions for summary judgment.

process. *Standing Committee Report No. S8-93, 1993, Senate Journal at 39; HAR §3-120-1.* Thus, in *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998)*, this Office recognized the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. Consistent with this policy, HRS §103D-701 provides strict time limitations for the submission of protests and requires that the procuring agency “promptly issue a decision in writing to uphold or deny the protest”.<sup>3</sup> HRS §103D-701 also provides that the agency’s decision shall be “final and conclusive”. These considerations lead the Hearings Officer to conclude that just as a protestor is required to raise all of its claims in a timely and “efficient” manner, so is the procuring agency required to respond to all of those claims in its decision. The practice of responding to a protest in piecemeal fashion which may result in the need for multiple proceedings is directly contrary to HRS §103D-701 and the Legislature’s desire to minimize the disruption to procurements and contract performance. The Hearings Officer does not believe the Legislature intended this result. Accordingly, a procuring agency’s failure to promptly address all of the protestor’s claims in its decision may constitute a waiver of the agency’s right to challenge those claims.

A waiver occurs when there is “an intentional relinquishment of a known right, a voluntary relinquishment of rights, and the relinquishment or refusal to use a right” *Coon v. City & County of Honolulu, 98 Hawaii 233 (2002)*, and is determined by a consideration of the totality of the circumstances. *State v. Mariano, 114 Hawaii 271 (2007)*. An effective waiver presupposes full knowledge of the right or privilege being waived and some act done designedly or knowingly to relinquish it. The waiver must be accomplished with sufficient awareness of the relevant circumstances and likely consequences. *State of Connecticut v. Nelson, \_\_ A.2d \_\_ (2010)*.

Having carefully reviewed the totality of the circumstances presented here, the Hearings Officer concludes that Respondents did not intend to waive their right to consider and determine the remaining issues raised in Petitioner’s protest. Instead, according to the record presented here, the Hearings Officer finds that Respondents were unaware that their

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<sup>3</sup> Pursuant to Hawaii Administrative Rules §3-126-4(b) and §3-126-7, a decision on a protest shall be made “as expeditiously as possible”.

failure to address all of the claims in the protest could constitute a waiver of their right to challenge those claims and did not intend such a consequence. In that regard, the Hearings Officer notes that there has been no prior decision from this Office directly addressing that issue<sup>4</sup>. *However, governmental agencies are henceforth placed on notice that their failure to promptly address in their decision all of the claims raised in a protest may result in the waiver of their ability to later challenge those unaddressed claims.*

Petitioner also seeks an award of its attorneys' fees and costs. According to Petitioner, Respondents denied its protest in bad faith and, as a result, urges the Hearings Officer to award Petitioner its attorneys' fees and costs. In *Carl Corp. v. Dept. of Educ.*, 85 *Hawaii* 431 (1997), the court carved out a limited basis for an award of attorneys' fees. There, the court held that 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. Even assuming *arguendo* that Respondents denied the protest in bad faith, there is no basis here to conclude that the *solicitation* was in violation of the Code or that the contract was awarded in violation of HRS §103D-701(f) and in bad faith. Nor does the Hearings Officer have the authority to expand the narrow holding of *Carl*.

The *Carl* court also held that 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. Because of the limited scope of this proceeding, there has been no showing at this point that Petitioner should have been but was not awarded the contract. Any claim for bid preparation costs is therefore premature.

Having acknowledged and stipulated that Petitioner's protest was timely filed, Respondents urge the Hearings Officer to remand this matter to Respondent pursuant to HRS §103D-706 to consider the remaining substantive issues raised in the protest. Petitioner, on

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<sup>4</sup> Nor is the Code, as presently written, altogether clear on this issue.



the other hand, asserts that pursuant to HRS §103D-707, the proper remedy is the ratification of the contract that was awarded to Petitioner. The applicability of these sections of the Code, however, are expressly conditioned on a determination that “a solicitation or (proposed) award of a contract is in violation of the law.” Because there has been no such determination here, these sections are inapplicable.

IV. DECISION

Based on the foregoing findings of fact and conclusions of law, the Hearings Officer orders as follows:

1. Respondents’ December 29, 2009 determination and rejection of Petitioner’s protest is vacated. Respondents are reminded that Petitioner’s protest remains outstanding and Respondents are obligated to respond to the protest in accordance with HRS §103D-701 and its implementing rules, and consistent with this decision;
2. Respondents’ motion for dismissal and remand is denied;
3. Petitioner’s motion for attorneys’ fees and costs and for ratification of award of contract is denied; and
4. Petitioner, having prevailed in this proceeding, is entitled to the return of its bond.

FEB 11 2010

Dated at Honolulu, Hawaii: \_\_\_\_\_

/s/ CRAIG H. UYEHARA

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