



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of	)	PCY-2012-006
)	
ROBERT'S HAWAI'I SCHOOL BUS, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER (1) GRANTING
vs.	)	IN PART AND DENYING IN PART
	)	PETITIONER'S MOTION FOR
AMY S. KUNZ in her capacity as	)	SUMMARY JUDGMENT AND
ASSISTANT SUPERINTENDENT/CHIEF	)	(2) GRANTING IN PART AND
FINANCIAL OFFICER, STATE OF	)	DENYING IN PART
HAWAI'I DEPARTMENT OF	)	RESPONDENT'S MOTION
EDUCATION,	)	FOR SUMMARY JUDGMENT
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER (1) GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND (2) GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On February 13, 2012, Robert's Hawaii School Bus, Inc. ("Petitioner") filed a request for an administrative hearing to contest Respondent Amy S. Kunz in her capacity as Assistant Superintendent/Chief Financial Officer, State of Hawaii Department of Education's ("Respondent") February 6, 2012 denial of Petitioner's December 21, 2012 protest. The protest concerned Respondent's Invitation for Bids to furnish student bus transportation, regular services on the Big Island (West Hawaii), No. IFB D12-055. ("IFB"). 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 February 29, 2012, Petitioner and Respondent filed cross-motions for summary judgment.

The motions came before the undersigned Hearings Officer on March 9, 2012. Petitioner was represented by its attorneys, Jonathan S. Moore, Esq. and Michael F. Albanese, Esq. Respondent was represented by its attorney, James E. Raymond, 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 order.

II. FINDINGS OF FACT

1. On or about October 28, 2011, Respondent issued the IFB.
2. The IFB sought bids for 17 school bus routes on the Big Island. The routes were divided into two groups. Group 1 consisted of thirteen routes designated as K-01 to K-13. Group 2 consisted of four routes designated as K-20 to K-23.
3. Bids were scheduled to be opened on December 15, 2011.
4. Item No. 21 of the Special Conditions of the IFB provided:

21. Method of Award

Award, if any, shall be made on a group basis to the responsive and responsible bidder submitting the lowest **TOTAL SUM BID PER GROUP**. Bidder must bid on all routes within a group to be considered for an award of that group; however, Bidder need not bid on all groups. A formal written contract will be issued for each individual group awarded or, at the determination of the DOE, for two or more groups that can be effectively managed together.

* * * *

5. Prospective bidders were required by Respondent to complete a Registration Form. The Registration Form provided in relevant part:

- Companies interested in participating in this solicitation must first register participation by completing and submitting this Registration Form.
- This Form must be e-mailed to Nicole_Agena@notes.k12.hi.us or faxed to (808) 675-0133 prior to the deadline for bid submittal.
- Failure to register may result in the Company not receiving any addenda and/or other procurement notices; the Company's offer may therefore be rejected and not considered for award.
- After registration, Companies shall then complete and submit to the DOE **a hard copy of the bid**, in accordance with the instructions contained in the solicitation.

* * * *

6. On November 8, 2011, Respondent issued Addendum A to the IFB by publicly posting the addendum on the State Procurement Office's ("SPO") website.

7. Addendum A split the original thirteen Group 1 routes into two separate groups. Under Addendum A, Group 1 consisted of routes K-01 to K-08 and Group 2 consisted of routes K-09 to K-13. Group 3 consisted of all of the routes that had been included in the original Group 2, K-20 to K-23.

8. According to Respondent's standard business practice, only bidders who submitted Registration Forms prior to the date an addendum is issued are notified of the issuance of the addendum via email. Bidders who submit Registration Forms after the issuance of an addendum receive no notification email from Respondent regarding the issuance of the addendum.

9. Pursuant to its standard practice, Respondent emailed those bidders who had submitted Registration Forms prior to November 8, 2011 of the issuance of Addendum A.

10. On December 8, 2011, Petitioner submitted its completed Registration Form by email to Respondent.

11. Because Petitioner's Registration Form was not submitted until December 8, 2011, Petitioner was not notified or sent a copy of Addendum A prior to the opening of the bids on December 15, 2011.

12. Bids submitted in response to the IFB were opened on December 15, 2011.

13. Because it had not been aware of the issuance of Addendum A, Petitioner submitted a bid for the original Group 1 consisting of routes K-01 to K-13, and another bid for the original Group 2 consisting of routes K-20 to K-23. In its bid for the 13 routes in Group 1, Petitioner bid \$474.00 per route, per day or a total estimated first year bid price of \$85,320.00 per route based on an estimated 180 days of bus operation. Petitioner's bid for the thirteen Group 1 routes amounted to a total price of \$1,109,160.00.

14. Wasatch Transportation, Inc. ("Wasatch") submitted bids for the 8 routes designated as Group 1 (K-01 to K-08) and the 5 routes designated as Group 2 (K-09 to K-13) by Addendum A. Wasatch submitted a bid consisting of a bid price of \$479.00 per day for each of the Group 1 and 2 routes. Wasatch bid a total of \$689,760.00 for the 8 routes in Group 1 and a total of \$431,100.00 for the 5 routes in Group 2.

15. Hawaiian Discovery Trans, LLC ("Hawaiian Discovery") also submitted a bid for the routes included in Group 2 (K-09 to K-13). Hawaiian Discovery's bid consisted of a bid price of \$399.00 per day for each of the 5 routes in that group.

16. For the 4 routes of the original Group 2 (K-20 to K-23), Petitioner bid \$575.00 per route, per day. Wasatch, the only other bidder for those routes, submitted a bid which consisted of a bid price of \$479.00 per route, per day.

17. The bid results were emailed to the bidders on December 16, 2011.

18. On December 21, 2011, Petitioner filed a protest in connection with the IFB.

19. By letter dated February 6, 2012, Respondent denied Petitioner's protest:

This letter responds to your letter dated December 21, 2011, on behalf of Robert's Hawaii School Bus, Inc. (Robert's Hawaii). Your letter sets forth two bases for concern: (1) that Robert's Hawaii was not notified that an addendum to the original invitation for Bids (IFB) was issued despite Robert's Hawaii having registered as a bidder prior to the bid due date; and (2) that the apparent lowest bidder for one group of bus routes is precluded under HRS §84-15(b) from entering into a service contract with the Department of Education.

* * * *

In addition to the foregoing undisputed facts, on November 8, 2011, by email, the DOE Procurement and Contracting Branch(PCB), notified several entities that "An addendum to the above referenced IFB has been posted to the [the SPO's public website]."

This email was "blind copied" to three prospective bidders who had registered with PCB prior to the date Addendum A was posted. This email was not "blind copied" to two prospective bidders – one of whom was Robert's Hawaii – who submitted their respective registration form after Addendum A was posted on the public web site.

Robert's Hawaii asserts that PCB had an affirmative duty to send individual notices of a prior publicly-posted addendum to bidders who registered with PCB after the addendum was publicly available.

It is the Department's position that it has no affirmative duty to send a targeted e-mail notification of an addendum to a bidder who registers with the Department after the addendum has been issued but prior to the registration where that addendum is publicly available at the site where the original IFB and notices are posted. Rather, the duty falls on the bidder at all times prior to the submission of its bid to check the public site for the original solicitation and for all notices, updates, conferences, and addendum, if any.

In this case, Robert's Hawaii could have and should have easily checked the public website at any time during the approximately 30-day period between the positing of Addendum A and the submission of Robert's Hawaii bid.

* * * *

In addition, we find that to the extent your letter protests a possible award of a contract to the specific bidder who you assert is disqualified from contracting with the Department, your letter of protest is premature. There has been no award of a contract and no notice of an award.

* * * *

20. On or about February 9, 2012, Respondent sent a letter to Hawaiian Discovery. The letter informed Hawaiian Discovery that Respondent was disqualifying its bid based HRS §84-15(b).

21. On February 9, 2012, Petitioner received a letter from Respondent. The letter stated that, "your offer was non-responsive as it did not comply with the requirements set forth in subject Invitation for Bids (IFB)" and that Petitioner's "offer is hereby rejected and will not be considered for award."

22. On February 13, 2012, Petitioner filed a request for administrative review of Respondent's February 6, 2012 denial of its protest.

23. On February 17, 2012, Respondent awarded the contract(s) for Groups 1, 2, and 3 to Wasatch as the lowest responsive and responsible bidder.

24. At the February 22, 2012 pre-hearing conference in this matter, Respondent's attorney informed the Hearings Officer and Petitioner's attorney that Respondent had made a substantial interest determination and that the contracts pursuant to the IFB had been awarded.

III. CONCLUSIONS OF LAW

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations 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, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997). And in reviewing the contracting officer's determinations, 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).

The salient facts are not in dispute. On November 8, 2011, Respondent issued Addendum A to the IFB and notified, by email, those bidders who had previously submitted a Registration Form of the issuance of the addendum. Respondent also posted the addendum on the SPO's public website. Because Petitioner did not submit its Registration Form until December 8, 2011, it did not receive Respondent's email notice of the issuance of the addendum prior to the December 15, 2011 bid opening date. Because Petitioner was unaware of the addendum, it submitted a bid consisting of a bid price of \$474.00 per day for each of the 13 routes included in the original Group 1. The only other bidder, Wasatch¹, submitted bids for Group 1, consisting of routes K-01 to K-08 and Group 2, consisting of routes K-09 to K-13. Both of Wasatch's bids consisted of a bid price of \$479.00 per day for each of the routes in Groups 1 and 2 (K-01 to K-13). Because Petitioner's bid failed to divide the 13 routes into the two groups specified in the addendum, it was deemed to be nonresponsive to the IFB.

Petitioner does not take issue with the fact that its bid did not technically conform to the grouping set forth in Addendum A. Instead, Petitioner argues that its mistake was obvious and/or attributable to an arithmetical error and, as such, should have been waived or corrected. Hawaii Administrative Rule ("HAR") §3-122-31 provides in pertinent part:

Mistakes in Bids. (a) *An obvious mistake in a bid may be corrected or withdrawn, or waived by the offeror to the*

¹ On February 9, 2012, Respondent informed Hawaiian Discovery, the only other bidder, that its bid had been disqualified.

extent it is not contrary to the best interest of the purchasing agency or to the fair treatment of other bidders.

* * * *

(c) A mistake in a bid discovered after the deadline for receipt of bids but prior to award may be:

(1) Corrected or waived under the following conditions:

(A) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. In case of error in extension of bid price, unit price shall govern;

(B) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting documentation that demonstrates a mistake was made. Examples of mistakes include:

(i) Typographical errors;

(ii) Transposition errors;

(iii) Failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating the bidder's intent to be bound;

(C) The procurement officer may correct or waive the mistake if it is not allowable under subparagraphs (A) and (B), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the purchasing agency and is fair to other bidders;

* * * *

(Emphasis added).

Notwithstanding the fact that Petitioner did not divide the 13 routes into the two groups, its bid did identify each route and provided a specific bid price for each route. With that information, Respondent could undoubtedly have calculated Petitioner's total sum bids for routes K-1 to K-08 (\$682,560.00) and routes K-09 to K-13 (\$426,600.00). In

contrast, Wasatch's total sum bids for Groups 1 and 2 amounted to \$689,760.00 and \$431,100.00 respectively. Instead, Respondent determined Petitioner's total sum bid for Group 1 by simply adding the bid price per day for all 13 routes rather than adding the bid price per day for routes K-01 to K-8. As a result, Respondent determined Petitioner's total sum bid for Group 1 to be \$1,109,160.00, conspicuously higher than Wasatch's total sum bid of \$689,760.00 for Group 1. Petitioner's mistake and its intended bid were obvious on the face of its bid. See, *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001)*(the mistake and the intended bid must be evident on the face of the bid documents). Moreover, the savings that would result from Petitioner's lower bid would obviously have been in Respondent's and the public's best interest. See generally, *Standard Electric, Inc., vs. City & County of Honolulu, et. al, PCH 97-7 January 2, 1998*(a savings of \$21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement).

Respondent, however, contends that it would be unfair to the other bidder to correct Petitioner's bid under the circumstances presented here. According to Respondent, "it would be extremely likely that the per-route bid on the one hundred route IFB would be lower than the bid on an IFB for a single route due to economies of scale considerations."² Respondent's argument misses the mark. First, Respondent offered no declaration or other support for the contention that Petitioner had any advantage by bidding on all 13 routes. That contention can only be characterized as speculative. Second, it seems unlikely that any bidder would attempt to "low ball" its bid given the fact that Respondent maintains the discretion under the contract to terminate the contract in whole or in part for a number of reasons including where "[s]ervice is discontinued along a route or group of routes for reasons that may include the relocation or closing of a school, the reorganization of school districts and/or attendance areas, the reduction of riders, or the conversion of a public school to a charter school." *Section 43, Special Conditions*. Thus, any bidder submitting a "low ball" bid would run the risk of having the economies of scale disappear with a contract reduction and be forced to operate at a loss. Third, to the extent that Respondent divided

² Respondent's argument was in reference to the following example: An IFB for a hundred routes and 100 IFBs with one route each. According to Respondent, "if a bidder knew it might win only one route, it would have to assess its costs and

routes K-01 to K-13 into two separate groups to encourage competition from smaller companies who may not be able or willing to bid on all 13 routes, the larger companies, in anticipation of this added competition, may very well have lowered their prices to remain competitive. However, because Petitioner was unaware that the Group 1 routes had been divided into 2 smaller groups, it did not have the same opportunity to consider lowering its prices. Lastly, the correction of its bid would not allow Petitioner to adjust its prices or use the “economies of scale” to its advantage. On the contrary, Petitioner would still have to qualify as the lowest responsive responsible bidder for *each* group and, in that event, would be bound to its bid prices. Thus, any “low balling” by Petitioner would likely result in a windfall to Respondent. Based on these considerations, the Hearings Officer concludes that Petitioner’s mistake in failing to categorize routes K-01 to K-13 into the two groups specified in Addendum A was obvious and should have been corrected pursuant to HAR §3-122-31.

Petitioner also complains that Respondent was under a duty to send a copy of Addendum A to Petitioner after it had submitted its Registration Form on December 8, 2011. Respondent contends that it had no such obligation because the Registration Form “makes no representation that a company will receive all addenda or other procurement notices that were released prior to receipt of the Registration Form”, and that the IFB informs that addenda will be made available rather than sent “to bidders who register a month after an addendum is issued”. Respondent also cites HRS §3-122-16.06(d) for the proposition that “[a]ddenda shall be issued to all prospective offerors *known to have received a solicitation . . .*” (emphasis in original), and contends that Respondent could not have known if Petitioner had received a solicitation when Respondent issued Addendum A on November 8, 2011. In *Maui Kupono Builders, LLC, v. Dept. of Transportation, State of Hawaii, PCH-2011-11 (12/22/2011)*, the Hearings Officer concluded:

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

submit its bid based on servicing only that route. On the other hand, the bidder assessing costs to service one hundred routes would have a significantly different cost structure and make its bid accordingly.”

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 (footnote omitted)(“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 (footnote omitted). Moreover, because addenda for amendments may be issued up to bid opening, the expeditious transmission to, and receipt by, prospective bidders, of any addenda issued just prior to the deadline is particularly important to promoting maximum competition (footnote omitted).

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 (footnote omitted).

There is no dispute here that even after Petitioner submitted its Registration Form on December 8, 2011, Respondent did not provide Petitioner with a copy of Addendum A or otherwise notify Petitioner of the issuance of the addendum. Indeed, Respondent readily acknowledges that its standard business practice is to notify only those bidders who have submitted Registration Forms prior to the issuance of an addendum of its issuance. Respondent's practice and failure to provide Petitioner with Addendum A *after it submitted its Registration Form on December 8, 2011* was inconsistent with HAR §3-122-16.06 . Moreover, although Respondent justifies its practice on notions of "efficiency", the Hearings Officer fails to see how such a practice would accomplish that objective. On the contrary, the efficiency of the process, as well as the equally important goal of maximizing competition, would be better served by a timely notification of the issuance of addenda to all registered bidders³.

Finally, Petitioner urges the Hearings Officer to grant its request for a temporary restraining order. Petitioner, however, does not cite to nor can the Hearings Officer find any legal authority for such relief in this proceeding. Petitioner's request is therefore denied.

Having found Respondent's denial to be contrary to law, the Hearings Officer must determine an appropriate remedy. Because Respondent has awarded the contract(s) to Wasatch, HRS §103D-707 is applicable here. That section provides:

§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:

³ Furthermore, although Respondent contends that the Registration Form "makes no representation that a company will receive all addenda or other procurement notices that were released prior to receipt of the Registration Form", the form does provide in part, "Failure to register may result in the Company not receiving any addenda and/or other procurement notices; the Company's offer may therefore be rejected and not considered for award". At best, the foregoing statement raises an inference that registered Companies will receive all addenda and notices, and, at worst, is ambiguous and must be construed against the drafter.

(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 interests 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;

* * * *

Under the circumstances presented here, the Hearings Officer finds and concludes that unless the contract to Wasatch is terminated, Petitioner would be denied any meaningful relief, including the opportunity to have its bid properly evaluated by Respondent. *Kiewitt Pacific Co. v. Dept. of Land and Natural Resources et al.*, PCH-2008-20 (February 20, 2009); *Access Service Corp. v. City and County of Honolulu, et al.*, PCX-2009-3 (November 16, 2009). Furthermore, ratification of the contract would seriously 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); *Kiewitt Pacific Co. v. Dept. of Land and Natural Resources et al.*, *supra*. Ratification of the contract would therefore not be in the State's best interest.

On the basis of all of these considerations, the Hearings Officer concludes that there are no genuine issues of material fact and that Petitioner is entitled to judgment as a matter of law as to Respondent's February 6, 2012 denial.

IV. ORDER

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. Respondent's Motion for Summary Judgment is granted in part and denied in part as follows:

(a) Respondent's motion as to Petitioner's request for a temporary restraining order is GRANTED and that request is dismissed; and

(b) Respondent's motion as to its February 6, 2012 denial of Petitioner's protest is DENIED;

2. Petitioner's Motion for Summary Judgment is granted in part and denied in part as follows:

(a) Petitioner's motion as to its request for a temporary restraining order is DENIED; and

(b) Petitioner's motion as to Respondent's February 6, 2012 denial of Petitioner's protest is GRANTED and the denial is vacated;

3. The contract(s) awarded to Wasatch for routes K-01 to K-08 and K-09 to K-13 are hereby terminated pursuant to HRS §103D-707(1)(B) and Wasatch 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; and

4. The parties shall bear their own attorneys' fees and costs incurred in this matter.

This is a Final Order. No other issues remain for hearing.

DATED at Honolulu, Hawaii: MAR 14 2012



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

Hearings Officer's Findings of Fact, Conclusions of Law, and Final Order (1) Granting in Part and Denying in Part Petitioner's Motion for Summary Judgment and (2) Granting in Part and Denying in Part Respondent's Motion for Summary Judgment; PCY-2012-006; In Re Robert's Hawaii School Bus Inc.