



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

In the Matter of)	PCY-2012-009
)	
INTERIOR SHOWPLACE, LTD.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	DECISION
)	
vs.)	
)	Senior Hearings Officer:
DEPARTMENT OF HUMAN SERVICES,)	David H. Karlen
STATE OF HAWAII)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On March 2, 2012, Petitioner Interior Showplace, Ltd., ("Petitioner" or "Interior") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCY-2012-009. Respondent was the Department of Human Services, State of Hawaii ("DHS").

On March 19, 2012, the DHS filed Respondent's Motion to Dismiss or in the Alternative for Summary Judgment ("DHS' Motion"). On March 27, 2012, Petitioner filed its Memorandum in Opposition to DHS' Motion.

Oral argument on the DHS' Motion was heard March 27, 2012. Petitioner was represented by Harlan Y. Kimura, Esq. The DHS was represented by Deputy Attorney General Candace J Park, Esq.

At the conclusion of the hearing on the DHS' Motion, the Hearings Officer orally granted the DHS' Motion. This Decision, based on the record as of the conclusion of oral argument on March 27, 2012, more fully sets forth that ruling and stands as the formal order with respect to the aforesaid motion.

As a result of the ruling on the DHS' Motion, all issues in the case were resolved, and there was no need for an evidentiary hearing.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On or about December 23, 2011, Respondent published Invitation to Bid No. IFB-12-VRD-1111-O ("IFB") requesting Competitive Sealed Bids to Space Plan, Furnish, Deliver and Install Allsteel Concensys or Equal (Subject to Approval) Modular Systems Furniture.

2. The IFB Offer Form, page OF-2, states: "The following information is required:" and a line for "Contractor's C-25 License No." is provided. Nothing on this page concerning required information indicates that this requirement was "as applicable."

3. The IFB Specifications, page OF-3, Bid Restrictions and Design Consideration, states in part: "Vendor must have an active general contractor's license." Nothing on this page concerning the general contractor's license indicates that this requirement was "as applicable."

4. Under Offeror Qualifications, page SP-1, section 4, the IFB provides:

Offeror and/or Offeror's subcontractor(s) shall possess valid State of Hawaii General Excise Tax License, a valid State of Hawaii C-25 contractor's license (as applicable), and electrician shall possess a valid C-13 license.

5. Pursuant to Addendum D/Amendment 4 to the IFB, the bid closing date was changed from February 2, 2012 to February 9, 2012.

6. Petitioner discussed the requirement of a C-25 contractor's license with DHS prior to the submission of bids on February 9, 2012.

7. Prior to the submission of its bid, Petitioner had sent DHS a proposed work plan. On January 17, 2012, DHS called Petitioner, told Petitioner it liked the proposed work plan, but informed Petitioner that Petitioner would not be allowed to submit a bid because it did not have a C-25 license. Declaration of Pamela P. Montgomery, Par. 6.

8. Following further discussion between Petitioner and DHS, on January 18, 2012, the DHS informed Petitioner that Petitioner would be able to continue to bid but the C-25 license would stand as a requirement. Declaration of Pamela P. Montgomery, Par. 7, 8.

9. Petitioner was told by DHS on January 17, January 18, and January 24, 2012 that a C-25 license would be required.

10. DHS asserts that on or about January 18 or 19, 2012, the term "as applicable" was explained by DHS to Petitioner to mean that a C-25 contractor's license was not required of Peittioner if Peittioner hired a licensed subcontractor to install the furniture. Petitioner appears to dispute this assertion through Paragraph 19 of the Declaration of Pamela P. Montgomery. For purposes of deciding the DHS' Motion, the Hearings Officer makes no finding, one way or the other, on the above assertion by DHS.

11. On or about January 18 or 19, and 24, 2012, Petitioner advised DHS that Petitioner would look into the contractor's license situation because it never had to have one before.¹

12. On or about January 18 or 19, 2012, Petitioner informed DHS that if Petitioner was not awarded the contract, Petitioner would file a protest because of the "as applicable" wording in the IFB.

13. On or about January 24, 2012, Petitioner informed DHS that if Petitioner were not awarded the contract and was the lowest bidder, Petitioner would file a protest.

14. At a meeting with DHS on January 24, 2012, Petitioner suggested the project specifications be amended to eliminate the C-25 license requirement. However, the project specifications were not amended to eliminate the C-25 license requirement.

15. On February 9, 2012, Petitioner submitted its bid. In the space on page OF-2 where the "Contractor's C-25 License No." was to be filled in, Petitioner wrote "Not Applicable."

16. Petitioner's bid did list a licensed electrician but did not list any subcontractors.

17. By letter dated February 14, 2012, DHS informed Petitioner that Petitioner would not be awarded the contract under the IFB. The letter stated, in relevant part:

Upon review of your bid, the Offer Form (OF-2) did not provide the Contractor's C-25 License. Therefore, your offer did not meet the minimum requirement of the Invitation for Bid.

18. On or about February 16, 2012, Petitioner sent a letter of protest to the DHS.

¹ For purposes of deciding this Motion, the Hearings Officer assumes that Petitioner's modified version of DHS' Undisputed Material Fact No. 12 is correct. In addition, the Hearings Officer is not adopting or relying upon DHS' proposed Undisputed Material Facts Nos. 15 and 16.

19. On or about February 24, 2012, DHS sent Petitioner a letter denying Petitioner's protest.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

A. Authentication of Exhibits to the DHS' Motion

1. Petitioner first contends that the DHS' Motion must fail because the documents relied upon by DHS were not properly authenticated as required by Rule 56(e), Hawaii Rules of Civil Procedure.

2. At oral argument on the Motion, Petitioner admitted that the document attached to the Declaration of Shawn Yoshimoto submitted in support of the Motion was properly authenticated.

3. At oral argument on the Motion, Petitioner did not question the authenticity of any of the other documents relied upon in the DHS' Motion.

4. Rule 56, Hawaii Rules of Civil Procedure, is often used as a model for decision making in procurement protest proceedings before the Office of Administrative Hearings. However, all aspects of the rule are not binding upon the conduct of such proceedings. In particular, there is no basis in the rules governing these proceedings to require authentication of documents pursuant to the standards of Rule 56(e), Hawaii Rules of Civil Procedure, when there is, in reality, no question as to the authenticity of the documents in question.

5. Petitioner's insistence on following the technical provisions of Rule 56(e), Hawaii Rules of Civil Procedure, accomplishes no useful purpose in this situation. Instead, it

would only serve to unnecessarily prolong the proceedings, a delay which would be in contradiction to the overall State policy of resolving procurement protests in a fair and prompt manner.

6. In addition, all of the documents relied upon by the DHS in its motion, except for the e-mail attached to Mr. Yoshimoto's Declaration, were originally submitted in this proceeding as exhibits to Petitioner's own Request for Hearing. Having submitted the documents itself, it would be inappropriate for Petitioner to disavow their authenticity, and Petitioner should be estopped from doing so. Alternatively, Petitioner should be held to have waived any objections to the documents' authenticity.

7. Petitioner's objection to the procedural validity of the DHS' Motion being without merit, the Hearings Officer will proceed to consider the merits of the DHS' Motion.

B. Timeliness of the Protest over Requirement of a C-25 License

8. DHS' first argument is that Petitioner is challenging the requirement of a C-25 license. Since that license requirement is part of the contents of the solicitation in the IFB, pursuant to HRS §103D-701(a), a protest of that requirement had to be submitted in writing prior to February 9, 2012.

9. In relevant part, HRS §103D-701(a) provides that

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 thereto; . . . provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

10. If a C-25 license was required by the terms of the IFP, Petitioner's failure to have such a license and to put down its licensing information in the space required by the IFB, meant its bid was nonresponsive and properly rejected by the DHS.

11. Further, in the pre-bid period, Petitioner knew that the DHS was insisting on the possession of a C-25 license and Petitioner even asked the DHS to eliminate the

requirement. Accordingly, if Petitioner's complaint is that a C-25 license should not have been required, its protest is clearly untimely as asserted by the DHS' Motion.

12. In order to avoid dismissal of its protest on this basis, Petitioner asserts that a C-25 license was not required by the terms of the IFB. If that were the case, Petitioner then argues that its procurement protest was timely filed because the requirement of a C-25 license was not applied to Petitioner until the DHS letter of February 14, 2012, Petitioner filed its protest on February 16, 2012. Under this theory, Petitioner's protest would have been timely.

13. Petitioner's reading of the IFB, however, is not correct. Petitioner relies solely on the parenthetical phrase "as applicable" in Offeror Qualifications, page SP-1, section 4 of the IFB, which states in total:

Offeror and/or Offeror's subcontractor(s) shall possess valid State of Hawaii General Excise Tax License, a valid State of Hawaii C-25 contractor's license (as applicable), and electrician shall possess a valid C-13 license.

14. In doing so, Petitioner completely ignores two other sections of the IFB which require the contractor's license and contain no exceptions to that requirement.

a. The IFB Offer Form, page OF-2, states: "The following information is required:" (emphasis supplied) and a line for "Contractor's C-25 License No." is provided. Nothing on this page concerning required information indicates that this requirement was "as applicable."

b. The IFB Specifications, page OF-3, Bid Restrictions and Design Consideration, states in part: "Vendor must have an active general contractor's license." (emphasis supplied) Nothing on this page concerning the general contractor's license indicates that this "must have" requirement was "as applicable."

15. The IFB must be read as a whole with the intent of giving meaning to each section. The only reasonable reading of these three sections of the IFB is that a license was required but the licensee could be either the general contractor or a subcontractor. It makes no difference whether or not DHS articulated this reading of the IFB to Petitioner before or after the bids were submitted. In interpreting the IFB as a whole, absent ambiguity the meaning of its terms is a matter of law.

16. The terms of the IFB having required a contractor's license, Petitioner's bid was nonresponsive. At page 8 of its Memorandum in support of its Motion, the DHS anticipated that Petitioner would try to avoid a DHS claim of an untimely challenge to the content of the solicitation by recasting its protest as one of disqualification for a nonexistent requirement. Petitioner was unsuccessful in that regard.

c. **Alleged Ambiguity of the IFB**

16. Petitioner also argues, as an alternative or fallback position, that the terms of the IFB are ambiguous. According to Petitioner, since the IFB could be read as either requiring a license or as not requiring a license since such a requirement would not be "as applicable." Relying on Environmental Recycling v. County of Hawaii, Department of Finance, PCH-98-001 (July 2, 1998), Petitioner argues that the ambiguity surrounding the C-25 license requirement is properly interpreted against the party drafting the solicitation, namely the DHS.

17. While the general rule is that ambiguities in a government contract or solicitation are normally construed against the drafter, more recently the Hawaii Supreme Court has set forth an important exception to that general rule. In Foundation International, Inc. v. E.T. Ige Construction, Inc., 102 Haw. 487, 498-499, 78 P.3d 23, 34-35 (2003), the

Court held that a patent ambiguity on the face of the solicitation imposes a duty on the contractor to inquire and seek clarification before the contractor submits a bid.

18. In this case, if there is an ambiguity, as asserted by the Petitioner, it is a patent ambiguity on the face of the IFB. Petitioner was under a duty of inquiry regarding that ambiguity and should have inquired about it prior to submitting its bid

19. The pre-bid discussions between Petitioner and the DHS can be considered to include a pre-bid inquiry into the allegedly ambiguous terms of the IFB. While Petitioner does not assert that this was the case, for purposes of this motion the Hearings Officer will construe the facts in the light most favorable to the Peittioner, the non-moving party, and will consider those pre-bid discussions as satisfying Petitioner's duty of pre-bid inquiry under the Foundation International decision.

20. Having made that inquiry, Petitioner determined from those conversations that the DHS was interpreting the allegedly ambiguous IFB terms as requiring a license in all circumstances. Knowing the DHS' interpretation of the alleged ambiguity, Petitioner was not free to ignore that interpretation and submit a bid based on its own interpretation. In this situation, any ambiguity is to be construed against Petitioner as a matter of law, as it was aware of the DHS' interpretation of the contract. Foundation International, Inc. v. E.T. Ige Construction, Inc., 102 Haw. at 498, 78 P.3d at 34.

21. Instead of forging ahead as it did without taking into account the DHS' interpretation of the IFB, at that point in time Peittioner should have filed a procurement protest alleging that the allegedly ambiguous IFB terms were being interpreted incorrectly and creating an additional burden on bidders.

22. Summary judgment is appropriate because the record herein shows that there are no genuine issues as to any material fact and that the DHS 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, were viewed in the light most favorable to Petitioner. Koga Engineering & Construction, Inc. v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010). The DHS is entitled to have its motion granted.

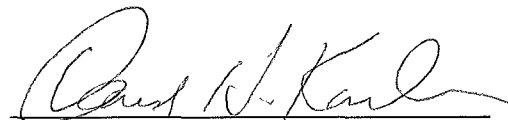
IV. DECISION

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

- a. The Department of Human Service's Motion is granted as stated above.
- b. Petitioner's procurement protest was not timely under HRS §103D-701(a), and its procurement protest is dismissed for lack of jurisdiction.
- c. To the extent that Petitioner attempts to avoid the timeliness requirements it failed to fulfill by claiming that a contractor's license is not required by the terms of the IFB, Petitioner's claim lacks merit.
- d. The DHS' denial of Petitioner's procurement protest is affirmed, and Petitioner's Request for Administrative Hearing herein is dismissed.
- e. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

APR - 2 2012

DATED: Honolulu, Hawai'i, _____.



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