



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2012 APR 27 P 2:04

HEARINGS OFFICE

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

In the Matter of	)	PCY-2012-013
	)	
ROAD BUILDERS CORPORATION,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,	)	DECISION; EXHIBITS "A" – "B"
	)	
vs.	)	
	)	Senior Hearings Officer:
CITY AND COUNTY OF HONOLULU,	)	David H. Karlen
DEPARTMENT OF BUDGET AND	)	
FISCAL SERVICES,	)	
	)	
Respondent.	)	
	)	
GRACE PACIFIC CORPORATION,	)	
	)	
Intervenor	)	
_____	)	

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

**I. INTRODUCTION**

By letter dated March 27, 2012, Petitioner Road Builders Corporation (hereinafter "Petitioner" or "Road Builders") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCY-2011-013. Respondent was the City and County of Honolulu, Department of Budget and Fiscal Services (hereinafter "Respondent" or "City").

A Notice of Hearing and Pre-Hearing Conference; Order for Service of Request for Hearing was filed on March 28, 2012. A pre-hearing conference was set for April 10, 2012 and a hearing was set for April 17, 2012.

Petitioner served its RFAH on Respondent on March 28, 2012. The City filed its Response to Road Builders' RFAH on April 9, 2012.

By Stipulation filed April 9, 2012, and an order signed April 10, 2012, Grace Pacific Corporation (hereinafter "Grace Pacific") was granted leave to intervene in this matter.

Grace Pacific filed its response to Road Builders' RFAH on April 9, 2012.

A pre-hearing conference was held in this matter on April 10, 2012. Daniel T. Kim, Esq., represented Road Builders. Amy R. Kondo, Esq., and Lynn Y. Wakatsuki, Esq., represented the City. Kristi L. Arakaki, Esq., represented Grace Pacific

The following motions were filed on April 10, 2012:

- a. Road Builders' Motion for Summary Judgment ("Road Builders Motion");
- b. The City's Motion for Dismissal or, in the Alternative, Summary Disposition regarding Petitioner Road Builders Corporation's Request for Administrative Hearing Filed March 27, 2012 ("City's Motion"); and
- c. Grace Pacific's Motion for Summary Judgment ("Grace Pacific's Motion).

On April 16, 2012, the parties filed the following memoranda:

- a. The City's Memorandum in Opposition to Road Builder's Motion;
- b. Grace Pacific's Memorandum in Opposition to Road Builders' Motion;
- c. The City's Memorandum in Opposition to Grace Pacific's Motion;
- d. Road Builders' Memorandum in Opposition to (1) the City's Motion; and (2) Grace Pacific's Motion;
- e. Grace Pacific's Memorandum in Partial Opposition to the City's Motion.

All motions came on for hearing on April 17, 2012. Daniel T. Kim, Esq., represented Road Builders. Amy R. Kondo, Esq., and Lynn Y. Wakatsuki, Esq., represented the City. Kristi L. Arakaki, Esq., represented Grace Pacific. At the conclusion of the hearing, all motions were taken under advisement.

## **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 October 4, 2011, the City issued a request for bids, RFB-DDC-454418, and, on October 24, 2011, issued Addendum No. 1 thereto (hereinafter collectively “Solicitation”) to solicit bid proposals to the City for the Rehabilitation of Localized Streets, Phase 7B, Kalihi Valley, Ewa Beach, West Loch and Ewa Villages Areas, Oahu, Hawaii, Job No. SP11-02,

2. The bid opening for this Solicitation was held on November 3, 2011.

3. The City received timely bid proposals from Grace Pacific, Jas. W. Glover Ltd. (hereinafter “Glover”), and Road Builders.

4. Grace Pacific had a bid proposal of \$14,215,834.00, Road Builders had a bid proposal of \$14,767,598.60, and Glover had a bid proposal of \$15,547,890.00.

5. Grace Pacific’s bid proposal contained claims for Hawaii Products preference in asphalt materials (with a Hawaii Product price of \$8,310,050) and concrete materials (with a Hawaii Product price of \$583,000).

6. Road Builder’s bid proposal contained a claim for Hawaii Products preference in asphalt materials (Hawaii product price of \$6,100,000) but contained no claim for Hawaii Products preference in concrete materials.

7. Glover’s bid proposal contained a claim for Hawaii Products preference in asphalt materials (with a Hawaii Product price of \$6,478,000) and concrete materials (with a Hawaii Product price of \$73,150).

8. Unit prices for asphalt materials work are to be filled in on lines 11, 12, 13, 35, 36, 37, 57, 58, and 59 of the bid form for this Solicitation. The total of the nine unit

prices line items in Grace Pacific's bid for asphalt materials work was \$8,310,050. This was the same amount as Grace Pacific's Hawaii Products preference price for asphalt materials.

9. Unit prices for concrete materials work were to be filled in on lines 14, 15, 16, 38, and 60 of the bid form for this Solicitation. The total of the five unit price line items in Grace Pacific's bid for concrete materials work was \$583,000. This was the same amount of Grace Pacific's Hawaii Product preference price for concrete materials

10. On November 10, 2011, the City received Road Builders' protest letter dated November 10, 2011 protesting Grace Pacific's proposal.

11. Following receipt of the November 10, 2011 letter from Road Builders, the City stayed all action regarding the Solicitation while the City investigated Road Builders' protest issues.

12. Upon receipt of the protest, the City sent letters dated December 30, 2011, January 31, 2012, and February 24, 2012 requesting responses from Grace Pacific to Road Builders' protest.

13. Grace Pacific responded to the City by its letters dated January 13, 2012, February 7, 2012, and March 2, 2012.

14. In the City's letter of February 24, 2012, the City requested information from Grace Pacific on the components, especially the labor elements, of Grace Pacific's Hawaii Product preference prices.

15. In its letter dated March 2, 2012 to the City, Grace Pacific confirmed that "labor costs used in Grace Pacific's calculations of the Hawaii Product preference credit included costs for labor to produce the material and costs for labor to install the material" for both asphalt materials and concrete materials.

16. The City sent a letter dated March 21, 2012 to Road Builders responding to Road Builders' protest. It first denied the protest as untimely because the City had not yet taken official action to issue an award of the contract or had not otherwise taken any action adverse to Road Builders. Alternatively, and without waiving its position as to the protest being premature, the City sustained Road Builders' argument that Grace Pacific's Hawaii Product preferences prices for the asphalt and concrete materials contained elements that should not have been included in those prices. The City then determined that no preference credits should be applied to Grace Pacific's bid and that no preference credit should be given to any bidder for asphalt materials. Under the City's analysis, Grace Pacific continued to be the apparent low bidder. See Exhibit "A" hereto for a table illustrating the City's conclusion.

17. By letter dated Mach 27, 2012, Road Builders requested an administrative hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

### **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. JURISDICTIONAL ISSUES**

##### **1. Timeliness of Road Builders' Protest**

The City first contends that Road Builders' protest was untimely because it was premature. At the time the protest was received by the City, the City had taken no official action to award the contract to Grace Pacific and had not even announced any intention to award the contract to Grace Pacific.

The relevant statute on the timeliness of procurement protests is HRS §103D-701 (a), which provides:

**§103D-701 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. Except as provided in sections 103D-303 and 103D-304, 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 that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; 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.

(Emphasis supplied)

Thus, the statute sets up several requirements that must be met in order to have standing to protest to the procuring agency. As relevant here, the protestor first must be an actual or prospective bidder. There is no question that Road Builders meets that requirement. Second, the actual bidder must be “aggrieved in connection with the solicitation or award of a contract.” That requirement is the basis of the issue raised by the City. Third, the protest must be submitted in writing within five working days after the aggrieved person knew or should have known of the facts giving rise to the protest. Road Builders submitted its protest timely in that regard, except that the statute refers to that time frame only with respect to an “aggrieved person.” That brings the analysis back to the second statutory requirement—was Road Builders an “aggrieved person” at the time it submitted its protest.

The statute does not define “aggrieved” in this situation and the Hawaii Administrative Rules pertinent to procurement protests likewise provides no definition.

The City’s argument that there can be a protest of either a solicitation or an award is too abbreviated. The Hearings Officer understands that the City would agree that an announcement of an intent to award the contract to Grace Pacific, as opposed to an actual award, would nevertheless establish Road Builder’s standing to protest. Likewise, a decision to disqualify a bid would establish the disqualified bidder’s standing to protest even though

there was no decision to award the contract to another bidder or an announcement of the intention to award to another bidder. The City's argument must take these possibilities into consideration. It appears to at least impliedly do so when the City asserts that some action or decision by the procuring agency is necessary before a protest can be filed but does not limit that action or decision solely to one of making an award.

Road Builders asserts at page four of its Memorandum in opposition to the City's Motion that standing to protest is a broader concept covering parties with a "substantial interest" in the outcome of the solicitation. However, an "interested" party is not necessarily an "aggrieved" party. See AlohaCare v. Ito, 126 Haw. 326, 271 P.3d 621 (2012). Furthermore, Road Builders incorrectly interprets the case it cites in support of this proposition, Preston Carroll Co. v. Florida Keys Aqueduct Authority, 400 So 2d 524 (Fla. App. 1981), because the procuring agency in that case had made an award decision before the protest was filed.<sup>1</sup>

Although not cited by the parties, the Hearings Officer notes that the definition of an aggrieved person in HAR §16-201-2 does not necessarily require an agency decision:

"Aggrieved person" means any person who shall be adversely affected by an action, decision, order, or rule of the authority or who shall be adversely affected by the action or conduct of any person if the action or conduct is within the authority's jurisdiction to regulate...(Emphasis supplied).

This regulation does not apply to procurement protests. It is cited only to point out that the definition of aggrieved person may vary depending upon the statutory or regulatory circumstances. Further, this expansive definition supports the proposition that, if not defined by statute or regulation, the term should be interpreted to effectuate the intent and purpose of the administrative or regulatory system to which it applies.

---

<sup>1</sup> Road Builders also cites a federal regulation in this part of its argument but argues strenuously in another portion of its Memorandum that federal law is different from Hawaii law and should not apply.

The City relies on the authority of GTE Hawaiian telephone Company v. Department of Finance, County of Maui, PCH 98-6 (December 9, 1998). That case arose in the opposite context of the present one. There, the County of Maui asserted that a protest that the lowest bid was nonresponsive was not timely because it was not made within five working days of bid opening while the protestor asserted it could be made within five working days of the its knowledge of the County's announcement of its intent to award the contract to the low bidder. The Hearings Officer subscribed to the protestor's position but the actual ultimate holding of his decision was that the protest was untimely because it was sent in by fax after the close of business on the fifth working day, and, additionally, was insufficient in stating the reasons for the protest.

The City also relies on Dick Pacific Construction Co., Ltd. v. Department of Transportation, State of Hawaii, PCH -2005-5 (September 23, 2005). That case, however, which did not involve a factual situation similar to the one herein, relied on Eckard Brandes, Inc., v. Department of Finance, County of Hawaii, PCH-2003-14 and PCH-2003-20. In the first Eckard Brandes case, PCH-2003-14 (July 15, 2003), the protest was based on a claim that the low bidder should have been disqualified because of a conflict of interest involving a County employee. The County asserted that the protest was untimely because it should have been filed within five working days of discovering this conflict of interest, which was before bid opening. The hearings officer rejected this proposition because filing at that time would have been premature, citing the GTE case. However, the hearings officer went on to hold

Petitioner should have filed its protest within five working days of bid opening, or March 19, 2003, as that is when it knew or should have known that Kamaaina Pumping was the low bidder and Respondent would be awarding the contract to Kamaaina Pumping.

This decision was adopted by a different hearings officer in the second Eckard Brandes protest, PCH 2003-20 (September 4, 2003). These two decisions clearly favor Road Builders.

The City's position has additional problems. It halted all procurement actions on this solicitation after receiving Road Builders' protest. See, e.g., the City's Memorandum in support of its Motion at page 3:

Pursuant to HAR §3-126-5, all City action regarding this Solicitation was stayed while Respondent investigated Petitioner's protest issues.

See also the City's Memorandum in support of its Motion at page 14:

In order to issue an award of contract for this Solicitation, the City must still complete its review and evaluation of other aspects of GPC's bid as required under the Hawaii Public Procurement Code, but may do so only after the Protest stay has been lifted through the dismissal or resolution of the Protest and DCCA appeal.

That cessation of activity, however, is only required in the case of timely protests, as set forth in HRS §103D-701(f):

In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State. (Emphasis supplied)

The City was thus apparently of two minds and considered the protest as timely at some point prior to its letter of March 21, 2012.<sup>2</sup>

In addition, for several reasons the Hearings Officer cannot accept the City's proposition that its letter denying Road Builders' initial administrative protest, dated March 21, 2012, triggers the time period for Road Builders to file a timely administrative protest.

1. The letter states that it is denying the protest as untimely. This is not an agency decision on the merits of Road Builders' substantive protest.

2. The letter goes on to say that the substantive merits of Road Builders' protest are, in the end, not going to change Grace Pacific's status as low bidder. However, this

---

<sup>2</sup> While HAR §3-126-5 does not refer to a "timely" protest, it cannot go beyond the provisions of HRS §103D-701(f) and stay procurements because of untimely protests. Further, it applies to protests pursuant to sections 3-126-3 and 3-126-4 and both of those sections pertain to a "protestor," which term is defined in section 3-126-1 as someone who is "aggrieved." Since the City's position herein is that Road Builders is not "aggrieved," HAR 3-126-5 would, like HRS 103D-701(f), not serve to stay a procurement on account of an untimely protest.

position is stated only “should it be deemed that RBC was aggrieved.” But if Road Builders was deemed aggrieved, it should not have to file another administrative protest.

3. The letter concludes by informing Road Builders of its right to an administrative hearing before the Office of Administrative Hearings. If Road Builders had that right, as stated by the City, how was Road Builders supposed to divine that the City really meant that it should file another administrative protest with the City?

4. Given the City’s determination on the substantive merits of Road Builders protest in its March 21, 2012 letter, it would be futile for Road Builders to file another administrative protest with the City on the same grounds that the City had already rejected.

In Koga Engineering Construction, Inc. v. State, 122 Haw. 60, 222 P. 3d 979 (Haw. 2010), the Hawaii Supreme Court considered a claim that it would be futile to exhaust administrative remedies in a “contract controversy” governed by a portion of the Hawaii Procurement Code. The Court examined in detail the merits of this claim before concluding that it would not be futile to pursue the administrative remedies required by the Procurement Code. While a different part of the Procurement Code is involved in this case, what is significant about the Koga case is that the Hawaii Supreme Court was willing to apply the doctrine of futility to Procurement Code controversies if the factual basis for that application were present.

In the present case, there is no need for an initial review of the Road Builders protest because the City has already reviewed the protest claims. In addition, there is no realistic possibility that the City would look upon the merits of a Road Builders’ protest submitted in response to the City’s letter of March 21, 2012, any differently than it had already concluded in that letter. Unlike the factual situation in the Koga case, the factual predicate for applying the doctrine of futility to excuse a failure to exhaust administrative remedies is present in this case.

In the absence of specific guidance in the statute or any appellate opinion<sup>3</sup>, the Hearings Officer concludes that the best way to resolve the dilemma created by the contradictory positions and impractical proposed solutions is to look to the underlying purposes of the Procurement Code.

One of those purposes is to resolve procurement protests in a fair and prompt manner. Protests are not supposed to unnecessarily hold up procurements while the parties debate. That is why there is a strict statutory time limit of five working days for filing an administrative protest. The underlying goal of a prompt resolution, however, is not implicated by an allegedly premature protest as long as the issues are clearly defined.<sup>4</sup> In fact, deciding the merits of the protest herein advances the timeliness of the resolution whereas the City's position serves no useful purpose and necessarily prolongs the resolution process in contravention of one of the main purposes of the Procurement Code.

For these reasons, and under these particular circumstances, the Hearings Officer concludes that Road Builders' protest was timely and its merits should be considered in this proceeding.

Alternatively, the Hearings Officer concludes that it would be futile for Road Builders to file another administrative protest based on the City's letter of March 21, 2012, and that the timely filing of its request for an administrative hearing following receipt of that letter (a course of action specifically set forth in that letter) is sufficient to bring the merits of its protest before this proceeding.

---

<sup>3</sup> The Hearings Officer concludes that the Supreme Court's summary affirmance of the GTE decision is not an endorsement of that decision's comments on the issue of a premature filing which, in the end, turned out to be dicta. The actual holding in that case was that protest was inadequate because it was submitted after the close of business on the last possible day it could have been submitted and because it failed to specifically and adequately state the grounds for the protest.

<sup>4</sup> That is the case with claims of non-responsiveness. That may or may not be the case with other types of claims, and this decision does not purport to establish a general rule covering all claims.

**2. Exhaustion of Administrative Remedies**

The City contends that there is no jurisdiction to consider all of the claims in Road Builders' protest because of its failure to exhaust administrative remedies as to all of those claims. It is a general rule of jurisdiction in these proceedings that the hearings officer does not have authority to make decisions about matters that were not previously presented to the chief procurement officer of the contracting agency.

Under the Procurement Code, the hearings examiner has the jurisdiction to consider and decide Road Builders' protest. Pursuant to HRS §103D-709(a), the hearings officer:

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.<sup>5</sup>

This jurisdiction, however, is not unlimited. Instead, it is specifically 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. Order Denying Without Prejudice Department of Transportation's Oral Motion for Partial Dismissal Based on Lack

---

<sup>5</sup> This hearing involves Section 103D-701.

of Jurisdiction, pages 3-4, attached as Exhibit “B” to Kiewit Infrastructure West co. v. Department of Transportation, State of Hawaii, PCX-2011-2 and PCX-2011-3 (June 6, 2011).

In this case, Road Builders submitted a protest letter to the City dated November 10, 2011. City’s Motion Exhibit C. The City asserts at page 9 of its Memorandum in support of its Motion that Road Builders’ original protest “only argued that GPC be precluded from receiving Hawaii Product preference price” and did not assert that Grace Pacific’s proposal should be rejected as non-responsive.

The grounds of Road Builders’ protest were stated in the first paragraph of that November 10, 2011 letter as follows:

RBC hereby PROTESTS against GPC’s bid on the ground that GPC submitted an unbalanced, irregular and ambiguous bid that should be rejected as non-responsive and alternatively, that GPC should be precluded from receiving any Hawaii products preference. (Emphasis supplied)

After setting forth details on prices in GPC’s bid, the letter went on to argue on page 3 that the bid was ambiguous, unbalanced and irregular and should be rejected as nonresponsive. On that same page, the letter also argued alternatively that GPC was not entitled to the benefits of the Hawaii products preference. The two arguments were then repeated in a one sentence summary format on page 4 of that letter.

The City’s position here must be rejected because the administrative protest clearly asserted as its first point that Grace Pacific’s bid was non-responsive.

The City did indeed respond to and reject this claim. In its letter of March 21, 2012, the City discussed and rejected Road Builders’ claim that the Grace Pacific bid was unbalanced and irregular. Later, on page 3 of that letter, the City rejected Road Builders’ claim of nonresponsiveness:

For the reasons stated above, although the City agrees in part with RBC's alternative contention with regard to Issue #2 that GPC should be precluded from application of the Hawaii product preferences, the remaining grounds raised in your protest do not warrant rejection of GPC's bid as non-responsive, and therefore, your protest is sustained in part, and denied in part.

At page 11 of its Memorandum in opposition to Road Builders' Motion, the City even admits that the responsiveness issue was raised in the administrative protest when it states:

Based on this determination [excluding Grace Pacific's preferences from bid evaluation], the City concluded that Petitioner's first argument that GPC's Proposal was unbalanced, irregular, and ambiguous because the labor costs for asphalt were hidden in other line items and GPC's bid proposal was therefore non-responsive, should be denied.

The responsiveness issue was clearly raised in the original administrative protest letter, it was denied by the City, and Road Builders is therefore entitled to raise the responsiveness issue in this proceeding.

**B. RESPONSIVENESS OF GRACE PACIFIC'S BID**

A bid is responsive if it conforms in all material respects to the invitation for bids. HRS 103D-104. Material terms involve price, quality, quantity and delivery. Southern Foods Group, L.P. v. State, 89 Haw. 443, 456-457, 974 P.2d 1033, 1046-1047 (Haw. 1999). A bid that is ambiguous is non-responsive. Id., 89 Haw. at 457, 974 P 2d at 1047.

The determination of responsiveness is made solely by reference to the bid submissions and facts available to the government at the time of bid opening. Okada Trucking Co. v. Board of Water Supply, 101 Haw. 68, 75, 62 P.3d 631-638 (Haw. App. 2003).

In this case, Grace Pacific's bid price for performing asphalt work was exactly the same as the price that it claimed as a Hawaii product preference for asphalt. Similarly, Grace Pacific's bid price for performing the concrete work on the project was exactly the same as the price that it claimed as a Hawaii product preference for concrete. Road Builders asserts

that this means either its bid prices for asphalt and concrete work did not include any cost for installation labor, tools, equipment or incidental work for those items or Grace Pacific's product preferences improperly included installation, labor, tools, equipment and incidental work and were thus substantially inflated. Road Builders' Memorandum in Support of Motion for Summary Judgment, pages 7-8.

In response to Road Builders' Motion, the City does not directly take on this claim of non-responsiveness. Instead, it argues that this issue was eliminated when the City precluded Grace Pacific from claiming Hawaii product preferences for asphalt and concrete. This was based on an admission in Grace Pacific's letter of March 2, 2012 that Grace Pacific preference prices included costs to install the materials. Based on that information, the City concluded that Grace Pacific's bid included all labor costs, that no labor costs for asphalt or concrete work were hidden in other line items, and that Grace Pacific's bid was therefore responsive. This argument is essentially contained in one paragraph on page 11 of the City's Memorandum in opposition to Road Builders' Motion.

The City expanded on this argument in its own motion. It argues at pages 14-15 of its Memorandum in support of its Motion that a request for a preference credit is a separate issue from the responsiveness of the bid proposal itself. A preference claim is optional and not mandatory. The denial of a preference only denies a preference benefit for bid evaluation purposes. Denial of a preference claim, asserts the City, does not render the entire bid non-responsive.

HRS §103D-1001, et seq. sets up a system for establishing a Hawaii products list and preferences for bids or proposals using Hawaii products in a variety of situations. The statutes are supplemented by HAR §§3-124-1 through 8. The product preferences thus established, two of which are at issue here, do not reduce the price offered by the bidders. The preferences only affect how that contract price is evaluated.

The preference system should be viewed as a modification of the traditional competitive bidding system for public contracts. The Hawaii Legislature has determined that certain worthwhile goals, e.g. the use of Hawaii products, justify giving some bidders an advantage in evaluating their bids.

Thus, if only registered Hawaii products are offered, no preference is considered when evaluating the bids. HAR §3-124-5(b). The reason for this is that the socially worthwhile goal of using Hawaii products has been accomplished because all of the bidders have committed to use Hawaii products. There is thus no need for a preference to give an advantage to one over the other in order to encourage the use of Hawaii products. In that case, the bids are all evaluated based on the bid prices submitted and the lowest bidder normally receives the award.

As another example, if a bid or proposal contains both Hawaii and non-Hawaii products, for evaluation purposes the price or bid offered for a Hawaii product is decreased by ten percent or fifteen percent depending upon the product. The preference is applied only to the price for the Hawaii product and not to the entire bid. HRS 103D0-1002(d).

In this situation, the bid prices are thus evaluated based on the lowering of certain portions due to the preferences. However, the actual contract price is not lowered due to any preference. This is made clear by the last sentence in HRS §103D-1002(d): “The contract amount of any contract awarded, however, shall be the amount of the bid or price offered, exclusive of the preferences.”<sup>6</sup>

When Grace Pacific’s bid is properly viewed in this light, Road Builders has not identified any ambiguities in its bid price. If Grace Pacific was awarded the contract, its contract price would be \$14,215,834.00 no matter what preferences it received during the

---

<sup>6</sup> It is thus possible that a bidder who does not submit the lowest price nevertheless obtains the contract because a preference resulted in an evaluated price lower than the bid price of the lowest bidder. In that case, the Legislature has made the policy decision that encouragement of the use of Hawaii products is worth paying more than the lowest bid for the contract.

evaluation process, and this price would cover all work and materials supplied without any exceptions. There are material variations in Grace Pacific's bid and bid prices that would make the bid non-responsive.

Further discussion of Grace Pacific's preference prices is contained in Section III.D below.

**C. IMBALANCE OF GRACE PACIFIC'S BID**

While Road Builders has not identified any ambiguity in Grace Pacific's bid price, its protest also raised a question as to whether the bid price was imbalanced. Based on the identity of the bid prices for asphalt and concrete and the prices claimed for application of the preferences for asphalt and concrete, there is the possibility revealed on the face of Grace Pacific's bid submittal that the bid prices for asphalt and concrete do not include installation costs. However, since the overall contract requires installation, it follows under this argument that the installation costs for asphalt and concrete must be contained in other, unspecified portions of the bid price. Road Builders' Memorandum in support of its Motion, page 8.

A bid with "unbalanced pricing" occurs when "despite an acceptable total evaluated price, the price of one [or] more contract line items is significantly over or understated as indicated by the application of cost or price analysis techniques." Al Ghanim Combined Group Co. v. United States, 56 Fed. Cl. 502, 513 (Cl. Ct. 2003).

In its motion, Road Builders does not identify where the possible imbalance occurs or provide any information on the amount of the imbalance. It does not claim the line item costs for installation of asphalt and concrete are significantly lower (or higher) than the same line item costs in Road Builders' or Glover's bid. This is a necessary prerequisite in establishing a claim that Grace Pacific's bid was imbalanced. In addition, it does not identify any other line items in Grace Pacific's bid that are materially overstated in order to make up

for any materially understated prices for installed asphalt and concrete. Road Builders merely asserts that the installation costs are “somewhere in the remaining line items and rendered GPC’s bid to be unbalanced.” This is insufficient to establish a claim that Grace Pacific’s bid was sufficiently imbalanced that it must be rejected.<sup>7</sup>

On page 13 of its opposition to Grace Pacific’s motion, Road Builders asserts for the first time that a particular line item price in Grace Pacific’s bid is materially overstated. Its line item price for cold planing in one location is more than twice Road Builders’ price and about 40% greater than Glover’s price for that same location while its cold planing prices for two other locations are substantially in line with the prices for those two other locations from the other two bidders. This evidence does not change the result in this case for four reasons:

a. Evidence, and arguments based on that evidence, not asserted in Road Builders’ Motion cannot be belatedly used to support that motion when the City and Grace Pacific did not have an opportunity to reply to the specifics in their memoranda in opposition to Road Builders’ Motion.

b. The evidence does not create a disputed issue of material fact sufficient to deny Grace Pacific’s motion for summary judgment (and the City’s joinder therein) on this issue because Road Builders did not establish the first prerequisite of its claim. It never established that Grace Pacific’s bid prices for asphalt and concrete work were materially understated. Since that was not done, the Hearings Officer need not and does not proceed to the next step of determining whether other line item prices are materially overstated.

c. With respect to both Road Builders’ Motion and Road Builders’ opposition to Grace Pacific’s Motion, furthermore, Road Builders never brought this specific argument to the City’s attention when it filed its administrative protest. See, e.g., HAR §3-126-4 which

---

<sup>7</sup> Generally speaking, a materially unbalanced bid is not acceptable because it demonstrates the bidder did not understand the solicitation and/or it posed significant risks to the procuring agency. Under the circumstances of the present case, there is no need to reach these aspects of a claim of an unbalanced bid.

provides in section (b)(1) that the protest be filed “in accordance with section 3-126-3(c) and (d) as well as with supporting exhibits, evidence, or documents to substantiate the protest.”

Section 3-126-3(c), in turn, requires a “statement of reasons” and supporting documentation. Without a statement of reasons pointing to this evidence, it is unrealistic for Road Builders to expect the City to search through a total of 76 line items in the three bids to find this one line item price that might be overstated in Grace Pacific’s bid.

**D. AMBIGUITY OF GRACE PACIFIC’S PREFERENCE PRICES**

Grace Pacific submitted preference prices for both asphalt and concrete. It is undisputed that the sum of the line item prices for asphalt work and concrete work in Grace Pacific’s bid form equals the total price for asphalt concrete, respectively, on Grace Pacific’s preference form.

Road Builders argues that this situation makes Grace Pacific’s preference prices ambiguous. The Hearings Officer disagrees with this contention. Grace Pacific intended to charge the City a total of \$8,310,050 for asphalt work, including installation, because all of the line item prices making up that total included installation. Grace Pacific also intended to claim a 10% preference of \$831,005 based on that \$8,310,050 total. There is nothing ambiguous about that preference claim. For the same reason, there is nothing ambiguous about Grace Pacific’s preference claim for concrete.

The real question is whether that 10% preference claims are acceptable because installation costs were used as part of the basis of those 10% figures. Road Builders and the City agree that installation costs should not be included in those 10% preference calculations. However, that is not a question of ambiguity.

The question then becomes whether this error renders Grace Pacific’s entire bid non-responsive or whether it only renders the preference claims invalid. The parties have not brought to the Hearings Officer’s attention any authorities on this issue. In the absence of

such authority, the Hearings Officer must look for guidance again to the purposes behind the Procurement Code.

Analyzing a bid for responsiveness insures that the bidder is supplying the procuring agency with the goods and/or services that the procuring agency wants to purchase and not something else. In addition, it levels the playing field for all other bidders who have met the requirements of the solicitation because it does not allow the low bidder to supply something different, or on different terms, than what the other bidders have offered to supply.

In this case, as noted above, Grace Pacific's core bid was responsive because it provided everything the City wanted to purchase and Grace Pacific obtained no advantage over other bidders by supplying something different than they bid to supply. This would be the case whether Grace Pacific claimed one preference (as Road Builders did), two preferences (as Glover did) or no preferences at all.

The Hearings Officer considers as well the possibility that a low bidder claiming no preferences could still have submitted the low bid after preferences for the other bidders are considered. That low bidder then receives the contract award. The statutory preferences for Hawaii products are designed to encourage use of Hawaii products but are not designed to require selection of a user of Hawaii products in every situation.

These circumstances lead the Hearings Officer to conclude that a non-responsive or otherwise erroneous or unacceptable preference claim does not require rejection of an otherwise acceptable bid as non-responsive. Instead, the Hearings Officer agrees that the remedy is what the City eventually did in this case—the bid should be evaluated without the benefit of any improperly claimed preferences.

In the standard case, the City might not be able to use post-bid opening communications to evaluate the responsiveness of a bid. In this case, however, there is a different situation. The City does not rely on any clarification of Grace Pacific's bid.

Instead, it was clarifying the calculation of the proposed evaluation preferences. This clarification had nothing to do with the contract price. Road Builders has cited no authority that would preclude this practice, nor was it injured by this practice since the only possible change in the claimed preferences could be the reduction or elimination of the preferences. In either case, that would be advantageous to Road Builders.

**E. ELIMINATION OF THE ASPHALT PREFERENCE FROM EVALUATION OF ALLBIDS**

Grace Pacific and Glover claimed a concrete products preference but Road Builders did not claim such a preference. As a result of Road Builders' protest, the City eliminated Grace Pacific claimed preference for concrete products. Thus, only Glover received a concrete products preference for evaluation purposes. Road Builders does not complain about the elimination of Grace Pacific's preference for concrete products because that was all to the advantage of Road Builders.

What Road Builders does complain about is the City's elimination of the asphalt products preference for all three bidders pursuant to the provisions of HAR §3-124-5(b) stating that no preference shall be used when all bidders claim a preference. For asphalt, all three bidders had claimed a preference. Road Builders claims that elimination of the Grace Pacific asphalt preference means that Road Builders and Glover should still receive the benefits of their asphalt products preference amount under HRS 1003D-1002(d). If Road Builders receives an asphalt products preference of \$610,000 and Grace Pacific receives no such preference for asphalt, and since Grace Pacific also lost the concrete preference, the evaluation price for Road Builders would be approximately \$85,000 less than the evaluation price for Grace Pacific. See Exhibit "B" for an illustration of Road Builders' calculations.

The City's decision relied on HAR §3-124-5(b), which states in relevant part: [f]or evaluations purposes, no preference shall be considered when only Hawaii registered products are offered." The City reasoned that all three bidders offered a Hawaii product,

asphalt, even though Grace Pacific's offer was determined to be noncompliant. On this issue, Grace Pacific submitted a short argument concurring in the City's position. Grace Pacific Memorandum in support of its Motion at pages 18-19.

As stated earlier, the purpose of the preference system for Hawaii products is to encourage the use of Hawaii products by all bidders. If all bidders offer Hawaii products, that purpose is fulfilled. In that situation, the amount of the offered preferences becomes completely irrelevant. Thus, if Grace Pacific offered the preference amount of \$1 while Road Builders and Glover offered the preferences contained in their bids, no preference would be considered in the bid evaluation. The same would hold true if Grace Pacific offered a preference amount of \$0 as long as it offered to use Hawaii registered products.

The terms of the Hawaii Product Preference form that is part of the bid package state that bidders desiring to claim a preference state the product and price of the Hawaii product "to be supplied" and a "designation of Hawaii products to be used." This is in line with the requirement of HRS §103D-1002(c) that "all persons submitting bids or proposal to claim a Hawaii products preference shall designate in their bids which individual product and its price is to be supplied as a Hawaii product." If all bidders so submit so that no preference is used in bid evaluation, those bidders have still committed to use Hawaii products if awarded the contract.

This requirement is enhanced by HRS 103D-1002(g) governing post-award contract performance:

Solicitations shall contain a provision notifying offerors who request application of the preference that in the event of any change that materially alters the offeror's ability to supply Hawaii products, the offeror shall immediately notify the chief procurement officer in writing and the parties shall enter into discussions for the purposes of revising the contract or terminating the contract for convenience. (Emphasis supplied)

It is important to note here that this provision applies to any successful bidder who "requests" a preference, and not to just a successful bidder who "receives" a preference.

The Hearings Officer therefore agrees with the City's conclusion on this issue. As long as registered Hawaii products are offered by all three bidders, the purposes of the preference law are satisfied and no preferences are used in evaluating the bids. Here, Grace Pacific offered to use Hawaii registered asphalt products. Whether it offered \$0 in a preference amount or whether the City deemed the offered preference amount to be \$0 because the amount claimed was too high and unallowable makes no difference. In the latter case, only the preference amount claimed is "thrown out," but not the "request" for "application" of the preference or the offer to use Hawaii registered products at a price designated in the bid. The deciding factor is that Grace Pacific has offered, and is bound to use, Hawaii registered products at the prices stated in its bid if it ultimately obtains the award of the contract.

**F. ADDITIONAL ARGUMENTS BY GRACE PACIFIC**

In its Motion, Grace Pacific takes the position that the full price of the asphalt work and concrete work can be used in calculation of the Hawaii Product preferences. This is directly contrary to the City's decision in its March 21, 2012 letter. In addition, it argued that it should be allowed to correct any mistake it might have made in calculating those preference amounts. Similar arguments were made in Grace Pacific's opposition to the City's Motion and to some extent in Grace Pacific's opposition to Road Builders' Motion.

These arguments bring up potentially significant procedural issues. Can an intervenor argue against a portion of the procuring agency's decision when it did not itself file an administrative protest? Did Grace Pacific appropriately request the City to allow correction of any mistake in its preference claims, and did the City make a decision on such a request such that the issue can be raised in this proceeding.

In view of the decision herein that Grace Pacific is still the apparent low bidder, there is no need for the Hearings Officer to provide advisory opinions on these issues.

#### **IV. DECISION**

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

a. The City's Motion is partially granted and partially denied. Road Builders' protest was timely, and Road Builders exhausted its administrative remedies. Those portions of the City's Motion asserting otherwise are denied. The Hearings Officer grants those portions of the City's Motion asserting that (a) Grace Pacific's bid was responsive; (b) Grace Pacific's bid was not imbalanced; (c) any problem with Grace Pacific's preference claims did not require rejection of Grace Pacific's bid; and (d) while Grace Pacific may not be entitled to any preference amounts in the evaluation of its bid, Grace Pacific is still the apparent low bidder. In view of these decisions, that portion of the City's Motion asserting that Grace Pacific was not entitled to any preference amounts in the evaluation of its bid was moot and is denied on that basis.

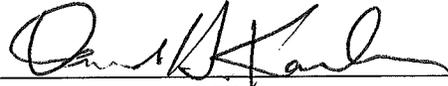
b. Road Builders' Motion is denied.

c. Grace Pacific's Motion is partially granted and partially denied. Those portions asserting that Road Builders has failed to show Grace Pacific's bid was nonresponsive or imbalanced are granted. Those portions asserting that GPC's preference claims were correctly calculated or that the City should allow Grace Pacific to correct its preference claims are moot and are denied on that basis.

d. The City's denial of Road Builders' procurement protest on the basis of untimeliness is vacated. The City's alternative basis for denial of Road Builders' procurement protest on the ground that Grace Pacific is still the apparent low bidder is affirmed for the reasons stated herein. Road Builders' Request for Administrative Hearing herein is dismissed.

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

DATED: Honolulu, Hawai'i, April 27, 2012



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

**EXHIBIT "A"**

**CITY'S EVALUATION OF BIDS AND PREFERENCES**

	Grace Pacific Corp.	Jas. W. Glover, Ltd.	Road Builders Corp.
TOTAL SUM BID	14,251,834.00	15,547,890.00	14,767,598.60
Less Apprenticeship Preference	(710,791.70)		(738,379.93)
Less HI Product Preference-Concrete	Not compliant with HAR §3-124-4(d)(2)	(7,315.00)	
TOTAL LESS PREFERENCES	\$13,505,042.30	\$15,540,575.00	\$14,029,218.67

**EXHIBIT "B"**

**ROAD BUILDERS' PROPOSED EVALUATION OF BIDS AND PREFERENCES**

	Grace Pacific Corp.	Jas. W. Glover, Ltd.	Road Builders Corp.
TOTAL SUM BID	14,251,834.00	15,547,890.00	14,767,598.60
Less Apprenticeship Preference	(710,791.70)	0	(738,379.93)
Less HI Product Preference-Asphalt	0	(647,840)	(610,000)
Less HI Product Preference-Concrete	0	(7,315.00)	0
TOTAL LESS PREFERENCES	13,505,042.30	14,892,735	13,419,218.67