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

In the Matter of	)	PCH-2003-5
	)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION UPON
vs.	)	REMAND FROM THE
	)	FIRST CIRCUIT COURT
DEPARTMENT OF BUDGET AND	)	
FISCAL SERVICES, CITY AND	)	
COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	
_____	)	

HEARINGS OFFICER'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND DECISION  
UPON REMAND FROM THE FIRST CIRCUIT COURT

I. INTRODUCTION

On March 25, 2003, Stoneridge Recoveries, LLC ("Petitioner"), filed a request for administrative review of the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") March 20, 2003 denial of Petitioner's protest dated January 27, 2003. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

The hearing commenced on August 24, 2004, reconvened for further hearing on September 21 and 22, 2004, October 12, 2004, and was concluded on October 19, 2004. Petitioner was represented by Mark S. Kawata, Esq. and Respondent was represented by Amy R. Kondo, Esq. and Reid M. Yamashiro, Esq.

At the conclusion of the hearing, the Hearings Officer directed the parties to file post-hearing memoranda. Petitioner filed its memorandum on November 19, 2004 and Respondent filed its memorandum on December 3, 2004. A rebuttal memorandum was filed by Petitioner on December 13, 2004.

On January 19, 2005, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision. On January 26, 2005, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's Decision in the First Circuit Court. Petitioner's appeal was designated as, *Stoneridge Recoveries, LLC v. City and County of Honolulu, Department of Budget and Fiscal Services, S.P. No. 05-1-0031 (EEH)*.

On December 22, 2005, the First Circuit Court entered an Order Reversing the Hearings Officer's January 19, 2005 Decision and Remanding for Hearing on the Merits.

Pursuant to the First Circuit Court's Order, the Hearings Officer heard arguments on September 8, 2006. Petitioner was represented by Mr. Kawata and Respondent was represented by Ms. Kondo. The Hearings Officer directed the parties to file proposed findings of fact and conclusions of law. The parties filed their proposed findings and conclusions on October 18, 2006. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

Having reviewed and considered the evidence and arguments presented by the respective parties, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision upon remand from the First Circuit Court.

## II. FINDINGS OF FACT

### A. THE SOLICITATION.

1. In or about May 2002, Respondent issued a Notice to Bidders and Proposal Document No. 13878 ("IFB") to solicit bids for the furnishing of motor vehicle towing services for zones designated as I-II, III-IV-V, VI, VII, VIII, and IX, for a 60-month period beginning August 1, 2002 and ending July 31, 2007.

2. Pursuant to the terms of the IFB, contracts to provide the towing services for the respective zones would be awarded to the "responsible bidder offering the highest monthly premium payable to the City, whose storage lot(s) is within the contracted zone and whose bid conforms to the invitation for bids and will be most advantageous to the City."

3. The deadline to submit bids in response to the IFB and the opening of those bids was scheduled for June 12, 2002.

4. On June 12, 2002, Petitioner submitted bids in connection with tow zones III-IV-V and VI. Petitioner was the high bidder for tow zone VI and as such, was awarded the contract to provide towing services in that tow zone.

5. Tow zones III-IV-V cover and consist of the area from downtown Honolulu to Makapuu.

6. Out of the three bids that had been submitted to Respondent in response to the IFB, Petitioner was the apparent high bidder for tow zones III-IV-V, having bid \$21,000.00 per month.

7. Section 2 of the Special Provisions of the IFB stated in part:

\* \* \* \*

All apparent successful bidders, however, shall have their business location, equipment and storage area (s) ready for inspection by the week beginning July 1, 2002, unless otherwise agreed for an earlier inspection. At the time of inspection, each bidder shall be required to submit documented evidence from the appropriate governmental agency certifying that the proposed storage lot areas are in compliance with the applications provisions of the Land Use Ordinance (LUO) for storing the type of vehicles as covered under the bid proposal document.

Further, all apparent successful bidder shall provide proof of ownership or lease agreement of all equipment.

Failure to have the necessary business location, equipment and storage area (s) by the established inspection date shall be sufficient cause for the rejection of the bid.

\* \* \* \*

8. By letter dated June 14, 2002, Respondent informed Petitioner that Petitioner “is being considered for the awards in Zones III-IV-V...” and that Petitioner was “required to have your principal place of businesses, tow vehicles and storage areas ready for inspection by the City’s inspectors beginning the week of July 1, 2002.”

9. Petitioner identified its lot located at 1830 Kapiolani Boulevard as its storage yard for tow zones III-IV-V.

10. The Kapiolani Boulevard lot was inspected but was not approved because the lot did not have proper zoning or a variance for use as a vehicle storage facility.

11. By letter dated July 11, 2002, Respondent notified Petitioner that its bid had been rejected. Prior to Respondent’s rejection of Petitioner’s bid, Petitioner had not identified the 611 Middle Street lot as its storage lot pursuant to Section 2 of the Special Provisions of the IFB, had not informed Respondent that it had a qualified storage lot at that location, and had not requested that Respondent inspect the lot.

**B. PETITIONER PROTESTS THE REJECTION OF ITS BID (PCH-2002-11).**

12. By letter dated July 16, 2002, Petitioner protested Respondent's rejection of Petitioner's bid (“First Protest”). There was no indication in Petitioner’s protest that Petitioner had another storage lot at 611 Middle Street<sup>1</sup>.

13. By letter dated July 31, 2002, Respondent upheld its decision to reject Petitioner’s bid and denied Petitioner's First Protest:

After reviewing the basis of your protest, we are upholding our previous decision by letter dated July 11, 2002 that Stoneridge Recoveries LLC did not meet the bid requirement of having a storage area complying with Land Use Ordinance (LUO) ready for inspection by the week beginning July 1, 2002.

\* \* \* \*

14. On August 12, 2002, Petitioner filed a request for administrative review with the Office of Administrative Hearings, Department of Commerce and Consumer

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<sup>1</sup> Instead, the protest referred to two other storage lots at 98-081 Kam Highway in Aiea and another on Waimanu Street in Honolulu, in addition to the Kapiolani Boulevard lot.

Affairs, of Respondent's July 31, 2002 denial of Petitioner's First Protest. This matter was designated as PCH-2002-11.

15. On August 15, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review in PCH-2002-11, alleging that Petitioner's appeal was untimely.

16. On September 23, 2002, the Hearings Officer granted Respondent's motion and ordered that the matter (PCH-2002-11) be dismissed.

17. On October 1, 2002, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's decision in PCH-2002-11 in the First Circuit Court. Petitioner's appeal was designated as *Stoneridge Recoveries, LLC v. Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, S.P. No. 02-1-0447*.

**C. SECOND PROTEST OF THE REJECTION OF PETITIONER'S BID (PCH-2002-14).**

18. On October 1, 2002, Petitioner lodged a second protest with Respondent over the rejection of its bid ("Second Protest"). Like the First Protest, the Second Protest did not mention or otherwise indicate that Petitioner had another storage lot at 611 Middle Street.

19. By letter dated October 31, 2002, Respondent informed Petitioner that because "the claims stated [in] your October 1, 2002 letter were previously raised in Stoneridge's earlier protest, it is precluded from attempting to relitigate the same issue by filing a new protest."

20. On November 8, 2002, Petitioner filed a request for administrative review of Respondent's October 31, 2002 decision in connection with the Second Protest. This matter was designated as PCH-2002-14.

21. On November 29, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review in PCH-2002-14.

22. On December 18, 2002, the Hearings Officer granted Respondent's motion and ordered that the matter be dismissed.

23. On January 15, 2003, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's decision in PCH-2002-14 in the First Circuit Court. Petitioner's appeal was designated as *Stoneridge Recoveries, LLC v. Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, S.P. No. 03-1-0017*.

**D. DISMISSAL OF FIRST AND SECOND PROTESTS.**

24. On February 6, 2003, the parties stipulated to dismiss with prejudice Petitioner's agency appeals S.P. Nos. 02-1-0447 (PCH-2002-11) and 03-1-0017 (PCH-2002-14), both of which had been pending in the First Circuit Court.

25. The First Circuit Court approved the stipulations on February 10, 2003 and ordered the dismissal of both cases. As a result, Respondent's rejection of Petitioner's bid was left intact.

**E. REJECTION OF REMAINING BIDS AND CANCELLATION OF IFB.**

26. By a memorandum dated January 23, 2003 to Ivan Lui-Kwan, Respondent's acting director, Charles Katsuyoshi, Respondent's purchasing administrator, informed Lui-Kwan that none of the three bids that had been submitted in response to the IFB met the bid requirements "on providing a qualified storage lot to store towed vehicles" and therefore recommended that the IFB be cancelled and the contract resolicited:

I recommend you approve canceling Bid #13878 for towing service for Tow Zones III, IV, V and approve re-soliciting bids under revised bid requirements, in the best interest of the City<sup>2</sup>.

We received a total of three bids for Bid #13878 for towing service for Tow Zones III, IV, V, that covers the tow zone area from Makapuu to Alakea street in downtown Honolulu. However, we have determined that all three bids do not meet the bid requirements on providing a qualified storage lot to store towed vehicles.

The bidders were:

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<sup>2</sup> Although Katsuyoshi characterized the basis for the cancellation and resolicitation as being "in the best interest of the City", it was clear from the memorandum that his recommendation followed from the City's determination that all three bids did not meet the requirements of the IFB "on providing a qualified storage lot to store towed vehicles" and were therefore nonresponsive to the IFB.

1. Stoneridge Recoveries, LLC – It did not meet the bid requirement that it provide a storage lot for use that meets zoning regulations (Industrial use property must be used).
2. Oahu Auto Service, Inc. – It does not have a storage lot that meets zoning regulations.
3. RSD, Inc. dba Tow Jams – It does not have a storage lot adequate in size to store all of the vehicles to be towed under the contract.

We plan to revise the bid requirements, including the requirements for a storage lot (s), for the new bid to permit obtaining the services of a towing contractor.

27. On January 23, 2003, Chris Diebling, Respondent's Deputy Director, approved the recommendation by Katsuyoshi to cancel the IFB and resolicit bids for towing services for tow zones III-IV-V under revised bid requirements.

28. By letter dated January 24, 2003 to Petitioner's attorney, Respondent informed Petitioner that Respondent intended to resolicit bids for towing services for tow zones III-IV-V because "all of the bids received do not meet the bid requirements for providing a qualified storage lot to store vehicles."

#### **F. PETITIONER'S PROTEST OVER CANCELLATION OF IFB (PCH-2003-5).**

29. By letter dated January 27, 2003, Petitioner protested Respondent's cancellation of the IFB. The letter informed Respondent, for the first time, of Petitioner's storage lot at 611 Middle Street.

30. By letter dated March 20, 2003, Respondent denied Petitioner's January 27, 2003 protest. Although the letter characterized the basis for the denial as "deficient" specifications, this was secondary to the reason cited in Katsuyoshi's January 23, 2003 recommendation to Lui-Kwan that the IFB be cancelled because none of the bids were responsive to the IFB.

31. On March 25, 2003, Petitioner initiated the present action by filing a request for administrative review of Respondent's March 20, 2003 denial. This matter was designated as PCH-2003-5.

32. On April 30, 2003, Respondent filed a motion for summary judgment in the present action.

33. Respondent's motion for summary judgment came on for hearing on May 30, 2003. Prior to the commencement of the hearing, the Hearings Officer raised the issue of the Hearings Officer's jurisdiction over this matter. The parties were provided with an opportunity to submit legal memoranda on that issue and present oral argument. On June 9, 2003, the Hearings Officer heard argument on both the jurisdictional issue and the issues raised in Respondent's motion.

34. On June 26, 2003, the Hearings Officer issued his findings of fact, conclusions of law, and final order dismissing Petitioner's request for review. The Hearings Officer concluded that the IFB was not subject to Hawaii Revised Statutes ("HRS") Chapter 103D and that therefore the Hearings Officer lacked jurisdiction over the matter. In view of his conclusion, the Hearings Officer also determined that Respondent's motion for summary judgment was moot.

35. Both parties sought judicial review of the Hearings Officer's decision. By order dated January 29, 2004, the First Circuit Court determined, among other things, that the Hearings Officer had jurisdiction over the matter pursuant to HRS Chapter 103D and as such, remanded the matter to the Hearings Officer for further proceedings.

36. On February 23, 2004, the Hearings Officer entered an order denying Respondent's motion for summary judgment and issued a notice setting the matter for hearing.

37. The hearing commenced on August 24, 2004, reconvened for further hearing on September 21 and 22, 2004, October 12, 2004, and was concluded on October 19, 2004. At the conclusion of the hearing, the parties were directed to file post-hearing memoranda addressing the issues raised by the parties. The Hearings Officer also raised and the parties were directed to address the question of Petitioner's standing to pursue this action inasmuch as Petitioner was no longer a bidder or prospective bidder by virtue of the fact that Petitioner's bid had been rejected and Petitioner's appeals of the rejection had been dismissed with prejudice. On November 19 and December 3, 2004, Petitioner and



Respondent, respectively, filed their closing briefs. Petitioner filed a reply brief on December 13, 2004.

38. On January 19, 2005, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision. The Hearings Officer concluded that because standing to protest under HRS §103D-701 is limited to bidders and prospective bidders, and because Petitioner no longer could be considered as a bidder or prospective bidder by virtue of Respondent's rejection of its bid, Petitioner no longer had standing to challenge Respondent's cancellation of the solicitation:

[O]n February 10, 2003, the parties stipulated to dismiss with prejudice the appeals of both PCH-2002-11 and PCH-2002-14. As a result of the dismissals, Respondent's earlier rejection of Petitioner's bid remained intact and Petitioner's involvement in the solicitation was effectively terminated. (footnote omitted). Consequently, Petitioner could no longer be considered an actual bidder. Nor could Petitioner qualify as a prospective bidder as the time to submit bids had long expired. And, because Petitioner no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party. (citation omitted). For these reasons, the Hearings Officer must conclude that Petitioner lacks standing to maintain the present action challenging Respondent's cancellation of the solicitation (footnote omitted). Moreover, even if the Hearings Officer found the cancellation of the solicitation to be improper, Petitioner would not be entitled to the remedy it seeks to wit, award of the contract. As the court in *Concerned Taxpayers of Brunswick County* explained:

The Procurement Act also provides remedies for individuals or entities who have been denied rights conferred by the Act . . . *These sections permit only bidders, offerors, and contractors, within the meaning of the Act, to invoke those remedies by protesting an award, initiating administrative procedures, or bringing an action to challenge a decision to award a contract.* (Emphasis in added).

In light of the Hearings Officer's decision, a determination of the propriety of the cancellation of the IFB is unnecessary.

39. On January 26, 2005, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's Decision in the First Circuit Court.

**G. FIRST CIRCUIT COURT'S REMAND ORDER.**

40. On December 22, 2005, the First Circuit Court entered an Order Reversing the Hearings Officer's January 19, 2005 Decision and Remanding For Hearing on the Merits ("Order of Remand"). In remanding the matter back to the Hearings Officer, Judge Hifo held:

On January 19, 2005, the Hearings Officer held that based on the stipulation to dismiss with prejudice the earlier circuit court appeals of what had been PCH-2002-11 and PCH-2002-14, Respondent's 2002 rejection of Petitioner's bid remained intact and Petitioner's involvement in the solicitation was effectively terminated. The Hearings Officer further concluded that Petitioner could no longer be considered an actual or potential bidder with any realistic expectation of being awarded the contract under the contingency specifications, and thus could not be considered an "aggrieved" party. Consequently, the Hearings Officer held that Petitioner lacked standing to maintain the present action pursuant to HRS sections 103D-701(a) and 103D-709(a) and dismissed the third and last protest for lack of jurisdiction.

\* \* \* \*

This Court disagrees with the Hearings Officer's decision in PCH-2003-5, and finds that Petitioner did have standing. The issue presented in the PCH-2003-5, whether Respondent properly canceled the Proposal Document 13878 on January 24, 2003 by refusing to follow Section 7 of the Special Provisions of the Specifications, was not addressed and therefore not affected by the February 10, 2003, stipulation to dismiss administrative appeals designated as SP 02-1-0447 and SP 03-1-0017 with prejudice. The issue presented in SP 02-1-0447 and SP 03-1-0017 concerned Petitioner's bid rejection on July 11, 2002, and the alleged bias on the part of the Respondent. As these issues are separate and apart from the legality of the later cancellation of the contingency proposed, the February 10, 2003, stipulation to dismiss had no effect upon Petitioner's standing in the present case.

As to the res judicata effect of the circuit court dismissals, the Court notes as follows: By analogy to Rule 41(b) of the Hawaii Rules of civil Procedure, the Hearings Officer(s) dismissal(s) for lack of jurisdiction of the untimely filed appeal(s) is not an adjudication on the merits. The later voluntary dismissals with prejudice of the circuit court appeals could not empower the agency with jurisdiction, but in any event did not operate to foreclose litigation of an event (the cancellation on 1/24/03 of the remaining Section 7 proposal) that occurred after the bid rejection on July 11, 2002.

Therefore, the January 19, 2005 decision of the Hearings Officer is reversed and remanded for consideration on the merits of the Respondent's cancellation of Proposal Document 13878 in connection with Section 7 of the Special Provisions of the Specifications.

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41. While the First Circuit Court found that Petitioner had standing to pursue this action, it apparently stopped short of addressing the status of Petitioner's bid rejection, presumably because that issue was "separate and apart" from the issue in the present proceeding. There was no indication in the First Circuit Court's Order of Remand as to whether it had found the rejection of Petitioner's bid to have been improper or otherwise contrary to the Procurement Code<sup>3</sup>. The status of Petitioner as a bidder or prospective bidder in the solicitation is not only determinative of the standing issue but also, of Respondent's ability to award the contract to a party whose bid has been previously rejected and therefore has no valid bid in place as well as to the Hearings Officer's authority to order any such relief under HRS Chapter 103D.

### III. CONCLUSIONS OF LAW

Hawaii Revised Statutes ("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-

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<sup>3</sup> Moreover, during the September 8, 2006 hearing, neither Mr. Kawata nor Ms. Kondo was able to state with any degree of certainty whether the rejection of Petitioner's bid had been affected by the First Circuit Court's Order of Remand or, if the rejection remained intact, explain how Petitioner could legally be entitled to an award of the contract or any other relief under HRS Chapter 103D, even if the cancellation of the solicitation was found to be improper.

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). In the instant case, the Hearings Officer must determine, pursuant to the Order of Remand, "the legality of the later cancellation of the contingency proposed."

**A. THE LACK OF ANY RESPONSIVE BIDS JUSTIFIED THE CANCELLATION.**

In addressing the propriety of the cancellation, both Petitioner and Respondent apply the "best interest" standard set forth in HRS §103D-308 and Hawaii Administrative Rules ("HAR") §§3-122-95 and 96:

**HRS §103D-308. Cancellation of invitations for bids or requests for proposals.**

An invitation for bids, a request for proposals, or other solicitation *may be canceled*, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the governmental body which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefore shall be made part of the contract file.

(Emphasis added).

§3-122-95 Cancellation of solicitations and rejection of offers. *A solicitation may be cancelled*, or an offer rejected in whole or in part pursuant to section 103D-308, HRS.

(Emphasis added).

§3-122-96 Cancellation of solicitation. (a) *A solicitation may be cancelled* for reasons including but not limited to the following:

\* \* \* \*

(2) Cancellation after opening but prior to award:

- (A) The goods, services, or construction being procured are no longer required;
- (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
- (C) The solicitation did not provide for consideration of all factors of significance to the agency;
- (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) All otherwise acceptable offers received are at clearly unreasonable prices;
- (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or
- (G) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.

\* \* \* \*

(Emphasis added).

The foregoing provisions provide the procuring agency with the discretion to cancel a solicitation, notwithstanding the receipt of bids that meet the requirements of and are otherwise responsive to the solicitation. Under those circumstances, the solicitation may still be cancelled where, for instance, the agency determines that cancellation would be in its or the public's best interest. On the other hand, HAR §3-122-97 *mandates* that:

- (a) A bid *shall be rejected* for reasons including but not limited to:

\* \* \* \*

- (2) The bid is not responsive, that is, it does not conform in all material respects to the solicitation by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the solicitation, pursuant to section 3-122-33.

(Emphasis added).

And where *all* of the bids received in response to a solicitation are rejected as nonresponsive, the procuring agency may cancel the solicitation and rebid the contract<sup>4</sup>, unless the agency “determine[s] that it is neither practicable, nor advantageous to the State to issue a new solicitation.” HAR §3-122-35(b).

The application of the best interest standard was previously discussed in connection with the rejection of a nonresponsive bid in *Southern Foods Group, L.P. v. State, Dept. of Education, 89 Hawaii 443 (1999)*. There, Meadow Gold contended, among other things, that the DOE was obligated to provide cogent and compelling reasons why the rejection of its offer was in the DOE’s best interest. Based upon the mandatory language of HAR §3-122-97, the Court held:

Meadow Gold places misguided reliance upon the permissive language of HAR §3-122-95 and, apparently, ignores the mandatory language of HAR §3-122-97, which provides, in pertinent part:

(a) Bids *shall be rejected for reasons including but not limited to:*

(1) The bidder that submitted the bid is nonresponsive . . .

(2) *The bid is not responsive, that is, it does not conform in all material respects to the invitation for bids under the provisions of subchapter 13 (footnote omitted) . . .*

Therefore, if Meadow Gold’s bid was nonresponsive, the DOE should have rejected the bid and was *not* compelled, under HAR §3-122-97, to provide cogent or compelling reasons why it was in the DOE’s best interests to reject the bid.

(Emphasis in original).

A total of three bids were submitted in response to the IFB. Petitioner was the apparent high bidder. Notwithstanding that, on July 1, 2002, Petitioner’s bid was rejected as nonresponsive. Petitioner thereafter protested the rejection in two separate cases, requested

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<sup>4</sup> HAR §3-122-35(a)(3) provides that where there is only one responsive bidder, the procurement officer may, among other things, cancel the proposed procurement. It therefore stands to reason that the cancellation of a solicitation is also proper where *no* responsive bids are received.

an administrative review of Respondent's denials of those protests, and subsequently appealed the Hearings Officers' decisions to the First Circuit Court. On February 6, 2003, however, the parties stipulated to dismiss both appeals with prejudice. The stipulations were approved by the First Circuit Court on February 10, 2003. As a result of the dismissals, Respondent's rejection of Petitioner's bid was left "intact." Moreover, nothing in the First Circuit Court's Order of Remand affected those dismissals. Indeed, the Order of Remand made clear that the present case, unlike the prior two actions, did *not* involve the bid rejection issue<sup>5</sup>. As to the remaining two bids, Respondent determined in January 2003 that those bids were also nonresponsive to the solicitation and, on that basis, rejected those bids<sup>6</sup>, leaving Respondent with no qualified bids. Respondent's cancellation of the IFB was therefore justified by the lack of any qualified bids. Consequently, Respondent was not compelled to undertake a best interest determination.

Petitioner also complains that the cancellation of the IFB was the result of Respondent's bias in favor of another bidder and, as such, made in bad faith. Therefore, according to Petitioner, the cancellation was not in the City's or the public's best interest and accordingly, did not meet the criteria required for the cancellation of the IFB as set forth in HRS §103D-308 and HAR §3-122-96. Again, the cancellation of the IFB followed from Respondent's rejection of the 3 bids rather than on a best interest determination. Hence, Petitioner's claim of bad faith was only relevant in its First and Second Protests<sup>7</sup>, both of which challenged the *rejection of Petitioner's bid*<sup>8</sup>. In other words, unless the rejection of Petitioner's bid was found to be improper by reason of Respondent's bad faith (or any other

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<sup>5</sup> According to the Order of Remand, the "issue presented in [the First and Second Protests] concerned Petitioner's bid rejection on July 1, 2002, and the alleged bias on the part of the Respondent", and that "these issues are separate and apart from the legality of the later cancellation of the contingency proposed . . ."

<sup>6</sup> Neither bidder challenged the rejection of their bids.

<sup>7</sup> As the First Circuit Court's Order of Remand noted, "[t]he issue presented in [the First and Second Protests] concerned . . . the alleged bias on the part of the Respondent" and that "these issues are separate and apart from the legality of the later cancellation of the contingency proposed."

<sup>8</sup> Petitioner's bad faith claim, which is essentially the same claim raised in the First and Second Protests, may have been relevant to a best interest determination. For the reasons stated in this decision, however, such a determination is unnecessary.

reason for that matter), and assuming that the rejection of the other two bids was left unchallenged, Respondent was entitled to cancel the IFB.

**B. PETITIONER IS NOT ENTITLED TO RELIEF UNDER HRS CHAPTER 103D.**

Petitioner contends that the cancellation of the IFB was improper for the additional reason that Respondent's Deputy Director was not authorized to approve of the cancellation. According to Petitioner, HAR §3-121-16 requires that chief procurement officer's delegation of authority be in writing; that instead, Respondent's Deputy Director approved of the cancellation of the IFB without any such written delegation from the Director<sup>9</sup>; and that therefore, the cancellation is void. However, even if the cancellation is void or found to have been improper for any of the reasons advanced by Petitioner, the Hearings Officer is powerless to grant Petitioner the relief it seeks. Petitioner is not entitled to any relief under HRS Chapter 103D because it no longer was a bidder or prospective bidder in this solicitation. As the court in *Concerned Taxpayers of Brunswick County* explained:

The Procurement Act also provides remedies for individuals or entities who have been denied rights conferred by the Act . . . *These sections permit only bidders, offerors, and contractors, within the meaning of the Act, to invoke those remedies by protesting an award, initiating administrative procedures, or bringing an action to challenge a decision to award a contract.*

(Emphasis added).

Furthermore, the Hearings Officer lacks the authority to remand the matter back to Respondent to reconsider Petitioner's bid where its bid had previously been rejected and its appeals of that rejection dismissed with prejudice. Such action would be tantamount to overturning the rejection of Petitioner's bid long after the time to challenge the rejection has passed and after the First Circuit Court made clear in its Order of Remand that, "[t]he issue presented in SP 02-1-0447 and SP 03-1-0017 concerned Petitioner's bid rejection on July 11, 2002, and the alleged bias on the part of the Respondent" and that those issues were "separate and apart" from the present action. Thus, absent a valid bid or the opportunity to

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<sup>9</sup> Under HRS §103D-203, the City's finance director shall act as the chief procurement officer for the executive branch.



submit a bid, Petitioner is not entitled to the relief it seeks in this action even if it proves that the cancellation was void or otherwise improper. HRS §103D-704 clearly states that the “procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for *persons aggrieved in connection with the solicitation or award of a contract . . .*” (emphasis added). For the reasons stated previously, Petitioner is no longer an aggrieved party<sup>10</sup> and as such, has no claim for relief under HRS Chapter 103D.

**C. PETITIONER IS NOT ENTITLED TO THE CONTRACT UNDER SECTION 7.**

Notwithstanding the foregoing findings and conclusions, the Hearings Officer further concludes that Petitioner is, in any event, not entitled to the award of the contract under Section 7 (Award of Contract) of the Special Provisions of the IFB (“Section 7”)<sup>11</sup>. According to Petitioner, it informed Respondent that it had another storage lot in the adjoining zone located at 611 Middle Street, and that the lot met the requirements of the IFB and was ready for Respondent’s inspection in early July 2002 as required by the IFB. Therefore, according to Petitioner, it was entitled to the award of the contract pursuant to Section 7. That section provides in relevant part:

\* \* \* \*

c. In the event there are bidder(s) in any zone, all of whom have principal places of business, including a storage lot, located and qualified in another zone, award shall be made in the following order of priorities:

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<sup>10</sup> The Hearings Officer also notes that the First Circuit Court, in reversing the Hearings Officer’s determination that Petitioner lacked standing, did not directly address or revise the Hearings Officer’s conclusion that Petitioner was neither an aggrieved party nor a bidder or prospective bidder. The First Circuit Court concluded that Petitioner had standing in this action because the issues in the prior two cases were different from the issue here: “As these issues are separate and apart from the legality of the later cancellation of the contingency proposed, the February 10, 2003, stipulation to dismiss had no effect upon Petitioner’s standing in the present case”.

<sup>11</sup> The Order of Remand provided that, “the January 19, 2005 decision of the Hearings Officer is reversed and remanded for consideration on the merits of the Respondent’s cancellation of Proposed Document 13878 in connection with Section 7 of the Special Provisions of the Specifications.”. The Hearings Officer finds and concludes that in consideration of the merits of Respondent’s cancellation of the IFB in connection with Section 7 of the Special Provisions of the Specifications, and for the reasons stated in this decision, Petitioner has failed to prove by a preponderance of the evidence that the cancellation was improper.

(1) To the responsible bidder offering the highest monthly premium payable to the City whose principal place of business, including a storage lot, is qualified and located in either adjoining zones involved.

\* \* \* \*

Petitioner's argument relies on the assumption that Petitioner had informed Respondent of the 611 Middle Street lot by the first week of July 2002 as required by the IFB. That assumption, however, belies the evidence. First, there was no indication in the record that Petitioner had informed Respondent or that Respondent otherwise knew of the 611 Middle Street storage lot prior to the filing of Petitioner's first protest on July 16, 2002. Secondly, that protest does not even mention the existence of any storage lot at 611 Middle Street<sup>12</sup>. And while Petitioner offered the testimonies of Deyton Stone, a principal of Petitioner, and an associate, Georgette Silva, to establish that Respondent was aware of the lot, the Hearings Officer found their testimonies to be both self-serving and lacking in credibility. Moreover, their testimonies were contradicted by Gary Tashima, the supervising motor vehicle inspector, whose testimony the Hearings Officer found to be credible :

Q. What lots of Stoneridge's were actually inspected?

A. The Kam Highway and then that 1830 Kapiolani.

Q. Kapiolani. All right. Did Stoneridge request an inspection of any other lots?

A. Yes, they did.

Q. They did it orally, yeah, they called you up?

A. Right. A female called me up.

Q. And what was the response to that? Yes, no?

A. It was depending, because that female did not give me a specific location. All she told me was in Waikiki, and I told her to give me a call back with the location.

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<sup>12</sup> If Petitioner had identified and asked Respondent to inspect the 611 Middle Street storage lot by early July 2002 in order to qualify under Section 7 as Petitioner claims, it stands to reason that the First Protest, which was filed on July 16, 2002, would have referenced that important "fact" in conjunction with Section 7. It did not.

Q. And you didn't hear anything else?

A. Then I did talk to Gary Nishioka from purchasing, and I was - - and at that time, too, the lot in Waikiki really stuck to my mind, because I couldn't think of any place in Waikiki that would, you know, be able to operate as a tow wagon storage lot. And Gary Nishioka told me that Stoneridge was going to be disqualified so there was no need to inspect.


After careful consideration of the evidence, the Hearings Officer concludes that Petitioner did not prove by a preponderance of the evidence that it had identified and informed Respondent of its 611 Middle Street storage lot by the first week of July 2002. Indeed, based on the credible evidence, the Hearings Officer concludes that Petitioner did not identify and inform Respondent that it had a storage lot at 611 Middle Street until January 27, 2003 when Petitioner, for the first time, raised Section 7 as a basis for the contract<sup>13</sup>. This conclusion is buttressed by the fact that while Petitioner's attorney's January 27, 2003 letter to Respondent refers to the 611 Middle Street lot, there is no indication in the letter that Respondent had been made aware of the lot prior to the letter. Indeed, the letter, read in its entirety, appears to be informing Respondent, for the first time, of the Middle Street lot as a storage lot. Thus, to the extent that Petitioner argues that the cancellation was improper because it was entitled to the award of the contract under Section 7, the Hearings Officer finds that argument to be unsupported by the evidence.

#### IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that this matter be and is hereby dismissed and that each party bear its own attorney's fees, costs, and expenses.

MAR - 6 2007

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

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

<sup>13</sup> Until Petitioner raised the Section 7 issue, the 611 Middle Street storage lot was irrelevant. This supports the conclusion that Petitioner did not identify the 611 Middle Street lot until it raised the Section 7 issue in its January 27, 2003 letter.



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2005 JAN 19 A 9:46

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

In the Matter of	)	PCH-2003-5
	)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
DEPARTMENT OF BUDGET AND	)	
FISCAL SERVICES, CITY AND	)	
COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	
	)	

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

I. INTRODUCTION

On March 25, 2003, Stoneridge Recoveries, LLC ("Petitioner"), filed a request for administrative review of the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") March 20, 2003 denial of Petitioner's protest dated January 27, 2003. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

The hearing commenced on August 24, 2004 and was concluded on October 19, 2004. Petitioner was represented by Mark S. Kawata, Esq. Respondent was represented by Amy R. Kondo, Esq. and Reid M. Yamashiro, Esq.

Prior to the conclusion of the hearing, the Hearings Officer directed the parties to file post-hearing memoranda. Petitioner filed its memorandum on November 19, 2004 and

Respondent filed its memorandum on December 3, 2004. A rebuttal memorandum was filed by Petitioner on December 13, 2004.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

1. In or about May 2002, Respondent issued a Notice to Bidders and Proposal Document No. 13878 ("IFB") to solicit bids for the furnishing of motor vehicle towing services for zones designated as I-II, III-IV-V, VI, VII, VIII, and IX, for a 60-month period beginning August 1, 2002 and ending July 31, 2007.

2. Pursuant to the terms of the IFB, contracts to provide the towing services for the respective zones would be awarded to the "responsible bidder offering the highest monthly premium payable to the City, whose storage lot(s) is within the contracted zone and whose bid conforms to the invitation for bids and will be most advantageous to the City."

3. The deadline to submit bids in response to the IFB and the opening of those bids was scheduled for June 12, 2002.

4. On June 12, 2002, Petitioner submitted bids in connection with tow zones III-IV-V and VI. Petitioner was the high bidder for tow zone VI and as such, was awarded the contract to provide towing services in that tow zone.

5. Tow zones III-IV-V cover and consist of the area from downtown Honolulu to Makapuu.

6. Petitioner was the apparent high bidder for tow zones III-IV-V, having bid \$21,000.00 per month.

7. By letter dated June 14, 2002, Respondent informed Petitioner that Petitioner "is being considered for the awards in Zones III-IV-V..." and that Petitioner was "required to have your principal place of businesses, tow vehicles and storage areas ready for inspection by the City's inspectors beginning the week of July 1, 2002."

8. Petitioner identified the lot located at 1830 Kapiolani Boulevard as its storage yard for tow zones III-IV-V.

9. The Kapiolani Boulevard lot was inspected but was not approved because the lot did not have proper zoning or a variance for use as a vehicle storage facility.

10. By letter dated July 11, 2002, Respondent notified Petitioner that its bid had been rejected.

11. By letter dated July 16, 2002, Petitioner protested Respondent's rejection of Petitioner's bid.

12. By letter dated July 31, 2002, Respondent upheld its decision to reject Petitioner's bid and denied Petitioner's protest.

13. On August 12, 2002, Petitioner filed a request for administrative review with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs of Respondent's July 31, 2002 denial of Petitioner's protest. This matter was designated as PCH-2002-11.

14. On August 15, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review in PCH-2002-11, alleging that Petitioner's appeal was untimely.

15. On September 23, 2002, the Hearings Officer granted Respondent's motion and ordered that the matter (PCH-2002-11) be dismissed.

16. On October 1, 2002, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's decision in PCH-2002-11 in the First Circuit Court. Petitioner's appeal was designated as *Stoneridge Recoveries, LLC v. Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, S.P. No. 02-1-0447*.

17. On October 1, 2002, Petitioner lodged a second protest with Respondent over the rejection of its bid.

18. By letter dated October 31, 2002, Respondent informed Petitioner that because "the claims stated [in] your October 1, 2002 letter were previously raised in Stoneridge's earlier protest, it is precluded from attempting to relitigate the same issue by filing a new protest."

19. On November 8, 2002, Petitioner filed a request for administrative review of Respondent's October 31, 2002 decision in connection with the October 1, 2002 protest. This matter was designated as PCH-2002-14.

20. On November 29, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review in PCH-2002-14.

21. On December 18, 2002, the Hearings Officer granted Respondent's motion and ordered that the matter be dismissed.

22. On January 15, 2003, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's decision in PCH-2002-14 in the First Circuit Court. Petitioner's appeal was designated as *Stoneridge Recoveries, LLC v. Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, S.P. No. 03-1-0017*.

23. On January 23, 2003, Ivan Lui-Kwan, the then acting director of Respondent, approved a recommendation by Charles Katsuyoshi, Respondent's purchasing administrator, to cancel the IFB and resolicit bids for towing services for tow zones III-IV-V under revised bid requirements.

24. By letter dated January 24, 2003 to Petitioner's attorney, Respondent informed Petitioner that Respondent intended to resolicit bids for towing services for tow zones III-IV-V because "all of the bids received do not meet the bid requirements for providing a qualified storage lot to store vehicles."

25. By letter dated January 27, 2003, Petitioner protested Respondent's cancellation of the IFB.

26. On February 10, 2003, the parties stipulated to dismiss with prejudice Petitioner's administrative appeals designated as S.P. Nos. 02-1-0447 and 03-1-0017, both of which were pending in the First Circuit Court.

27. By letter dated March 20, 2003, Respondent denied Petitioner's January 27, 2003 protest.

28. On March 25, 2003, Petitioner initiated the present action by filing a request for administrative review of Respondent's March 20, 2003 denial.

29. On April 30, 2003, Respondent filed a motion for summary judgment in the present action.

30. Respondent's motion for summary judgment came on for hearing on May 30, 2003. Prior to the commencement of the hearing, the Hearings Officer raised the issue of the Hearings Officer's jurisdiction over this matter.<sup>1</sup> The parties were provided with an opportunity to submit legal memoranda on that issue and present oral argument. On June 9, 2003, the Hearings Officer heard argument on both the jurisdictional issue and the issues raised in Respondent's motion.

31. On June 26, 2003, the Hearings Officer issued his findings of fact, conclusions of law, and final order dismissing Petitioner's request for administrative review. The Hearings Officer concluded that the solicitation was not subject to Hawaii Revised Statutes ("HRS") Chapter 103D and that therefore the Hearings Officer lacked jurisdiction over the matter. In view of his conclusion, the Hearings Officer also determined that Respondent's motion for summary judgment was moot.

32. Both parties sought judicial review of the Hearings Officer's decision. By order dated January 29, 2004, the Circuit Court determined, among other things, that the Hearings Officer had jurisdiction over the matter pursuant to HRS Chapter 103D and as such, remanded the matter to the Hearings Officer for further proceedings.

33. On February 23, 2004, the Hearings Officer issued an order denying Respondent's motion for summary judgment. A notice setting the matter for hearing was also issued.

34. The hearing commenced on August 24, 2004 and was concluded on October 19, 2004. At the conclusion of the hearing, the parties were directed to file post-hearing memoranda addressing the issues raised by the parties. The Hearings Officer also raised and the parties were directed to address the question of Petitioner's standing to pursue this action.

### III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

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<sup>1</sup> The Hearings Officer questioned the applicability of HRS Chapter 103D to this case.



At the outset, the Hearings Officer must determine whether or not Petitioner has standing to litigate the cancellation of the solicitation under HRS Chapter 103D. It is well-settled that every court must determine as a threshold matter whether it has jurisdiction to decide the issue presented. *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P.2d 1246 (1995). In that regard, because standing is a jurisdictional requirement, it cannot be waived and may be brought up at any time during a proceeding. Moreover, the Hearings Officer is obligated<sup>2</sup> to *sua sponte* address the issue of standing even when the parties fail to raise the issue. See *Akinaka v. Disciplinary Board of the Hawaii Supreme Court*, 979 P.2d 1077 (1999); *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et. al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al*, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999). Parties cannot confer jurisdiction on the Hearings Officer directly or indirectly where it is otherwise lacking. See generally, *State of West Virginia v. Thomas A. Bedell*, 602 S.E.2d 542 (2004).

HRS §103D-701(a) states in relevant part:

*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.*

And HRS §103D-709(a) provides the Hearings Officers with jurisdiction to: review and determine de novo any request from any *bidder, offeror, contractor or governmental body aggrieved* by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701 or 103D-702.

(Emphasis added).

Thus, in order to qualify as a party with standing to file a request for an administrative hearing under HRS Chapter 103D, Petitioner must be an “actual or prospective bidder, offeror, or contractor” as set forth in HRS §103D-701(a). See *Browning Ferris Industries et al. v. County of Kauai*, PCH-96-11 (January 29, 1997). Indeed, the rights and remedies created under HRS Chapter 103D were intended for and are available

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<sup>2</sup> Like courts, Hearings Officers are under an independent obligation to police his or her own jurisdiction.

only to those who participated in or still have a realistic expectation of submitting a bid in response to the IFB. See *Hawaii School Bus Assn v. DOE; PCH-2003-3 (May 16, 2003)*.

In *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et. al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, supra*, Milici protested the rejection of its proposal. The rejection was based on the fact that the proposal had been submitted after the deadline set forth in the solicitation. The Hearings Officer held that Milici's proposal had been properly rejected as late and that the resulting protest, brought approximately two months after the rejection of its proposal, was untimely. In addressing the issue of Milici's standing, the Hearings Officer concluded that:

Milici could no longer be considered an "offeror" for purposes of HRS §103D-701(a) after its proposal was rejected and returned and once the deadline for the submission of proposals passed. Nor could Milici qualify as a "prospective offeror".

In *MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed Cir. 1989)*, it was stated that in order to qualify as a prospective bidder, one who has not actually submitted an offer must be expecting to submit an offer prior to the closing date of the solicitation; and that once the date for submission passed, the would-be protestor can no longer realistically expect to submit a bid on the proposed contract and therefore, cannot achieve prospective bidderhood with regard to the original solicitation. (citation omitted). The holding of *MCI Telecommunications Corp.* is persuasive.

In the case at hand, Milici no longer had any realistic expectation of submitting a proposal in response to the RFP once the submission deadline expired and the time for protesting the rejection of its proposal passed. At that point, Milici could no longer be considered an "offeror" or "prospective offeror." Moreover, under HRS §103D-701(a), standing to protest is conferred upon any "actual or prospective bidder, offeror, or contractor *who is aggrieved in connection with the solicitation or award of a contract.*" (emphasis in original). Because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party when the contract was subsequently awarded to RFD. *Thus, having failed to file a timely protest to the rejection of its*

*proposal, Milici lacked standing to challenge Respondent's subsequent award of the contract.*

(Emphasis added).

In the present case, the bids submitted in response to the IFB were opened on June 12, 2002 and Petitioner was determined to be the apparent high bidder. Nevertheless, on July 11, 2002, Respondent notified Petitioner that its bid had been rejected. Petitioner responded by protesting Respondent's rejection of Petitioner's bid and on July 31, 2002, Respondent denied the protest. Thereafter, Petitioner filed for an administrative review of Respondent's denial (PCH-2002-11) and on August 15, 2002, Respondent moved the Hearings Officer to dismiss Petitioner's request for review as untimely. Respondent's motion was granted on September 23, 2002 and the matter (PCH-2002-11) was ordered dismissed. Petitioner then sought judicial review of the Hearings Officer's dismissal in PCH-2002-11.

While judicial review of the Hearings Officer's dismissal was pending, Petitioner submitted a second protest to Respondent on October 1, 2002 over the rejection of its bid. That protest was denied by Respondent on October 31, 2002. According to Respondent, because "the claims stated [in Petitioner's] October 1, 2002 letter were previously raised in Stoneridge's earlier protest, [Petitioner] is precluded from attempting to relitigate the same issue by filing a new protest." On November 8, 2002, Petitioner filed a request for administrative review of Respondent's October 31, 2002 decision (PCH-2002-14) and on November 29, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review. Respondent's motion was granted on December 18, 2002 and the matter (PCH-2002-14) was ordered dismissed. On January 15, 2003, Petitioner sought judicial review of the Hearings Officer's decision.

Thereafter, on February 10, 2003, the parties stipulated to dismiss with prejudice the appeals of both PCH-2002-11 and PCH-2002-14. As a result of the dismissals, Respondent's earlier rejection of Petitioner's bid remained intact and Petitioner's involvement in the solicitation was effectively terminated.<sup>3</sup> Consequently,

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<sup>3</sup> The procurement code does not provide a right of action to those not involved in the bidding and procurement process. *Concerned Taxpayers of Brunswick County, et al., v. County of Brunswick*, 455 S.E.2d 712 (Va. 1995).

Petitioner could no longer be considered an actual bidder. Nor could Petitioner qualify as a prospective bidder as the time to submit bids had long expired. And, because Petitioner no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party. *See generally, In the Appeal of Branch Office Supply, No. 2372 (MSBCA November 25, 2003) (third lowest bidder who would not be eligible for award if award to winning bidder was overturned, lacks standing).* For these reasons, the Hearings Officer must conclude that Petitioner lacks standing to maintain the present action challenging Respondent's cancellation of the solicitation.<sup>4</sup> Moreover, even if the Hearings Officer found the cancellation of the solicitation to be improper, Petitioner would not be entitled to the remedy it seeks to wit, award of the contract. As the court in *Concerned Taxpayers of Brunswick County* explained:

The Procurement Act also provides remedies for individuals or entities who have been denied rights conferred by the Act . . . *These sections permit only bidders, offerors, and contractors, within the meaning of the Act, to invoke those remedies by protesting an award, initiating administrative procedures, or bringing an action to challenge a decision to award a contract.*

(Emphasis added).

In light of the Hearings Officer's decision, a determination of the propriety of the cancellation of the IFB is unnecessary.

#### IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that this matter be and is hereby dismissed and that each party bear its own attorney's fees, costs, and expenses.

Dated at Honolulu, Hawaii: JAN 19 2005

  
\_\_\_\_\_  
CRAIG H. UYEHARA  
Administrative Hearings Officer  
Dept. of Commerce and Consumer Affairs

<sup>4</sup> Any other conclusion would effectively resurrect Petitioner's untimely protest in PCH-2002-11.



2003 JUN 26 P 3:28

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

In the Matter of	)	PCH-2003-5
	)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER
vs.	)	DISMISSING PETITIONER'S
	)	REQUEST FOR REVIEW
DEPARTMENT OF BUDGET AND	)	
FISCAL SERVICES, CITY AND	)	
COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	

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HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND FINAL ORDER DISMISSING PETITIONER'S REQUEST FOR REVIEW

The Hearings Officer having *sua sponte*, raised the issue of his jurisdiction over this matter, and Respondent City & County of Honolulu, Department of Budget and Fiscal Services ("Respondent") having filed a motion for summary judgment on April 30, 2003; and these matters having come on for hearing before the undersigned Hearings Officer on June 9, 2003; Amy R. Kondo, Esq. appearing for Respondent; and Mark S. Kawata, Esq. appearing for Petitioner Stoneridge Recoveries, LLC ("Petitioner"); and after due consideration of the motion and memoranda filed by the parties and the argument of counsel in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law, and Final Order.

I. FINDINGS OF FACT

1. Respondent issued a Notice to Bidders and Proposal Document No. 13878 (“Proposal”) to solicit bid proposals to the City & County of Honolulu for the furnishing of motor vehicle towing services for various zones for a sixty-month period from August 1, 2002 to July 31, 2007.

2. The Proposal provided in pertinent part:

By submitting an offer, the undersigned bidder fully understands, agrees and accepts to provide all tow services, as requested by the Honolulu Police Department or any City and County Agencies, excluding Oahu Transit Service of the Department of Transportation Services, and that all such tow requests shall be considered a “contract tow” and shall be covered by the requirements of this bid, including the towing rates, whether the vehicle is towed to the tow Contractor’s storage lot or to a location as directed by the owner/driver of the vehicle.

The undersigned bidder proposes and agrees to pay to the City a premium, on a monthly basis payable in advance on or before the first working day of each and every month, for the exclusive right to provide towing services in each respective zone, as set forth below.

3. By letter dated July 11, 2002, Respondent notified Petitioner of Respondent’s rejection of Petitioner’s bid.

4. By letter dated July 16, 2002, Petitioner protested the rejection of its bid.

5. By letter dated July 31, 2002, Respondent notified Petitioner that Respondent was upholding its decision rejecting Petitioner’s bid.

6. On August 12, 2002, Petitioner filed a request for review. Petitioner’s request was designated as PCH-2002-11.

7. On August 15, 2002, Respondent filed a motion to dismiss Petitioner’s request for review.

8. On September 23, 2002, the Hearings Officer issued a decision granting Respondent’s motion to dismiss in PCH-2002-11.

9. By letter dated October 1, 2002, Petitioner submitted another protest to Respondent. By letter dated October 31, 2002, Respondent denied the protest.

10. Petitioner filed a request for review on November 8, 2002. Petitioner's request was designated as PCH-2002-14.

11. On November 29, 2002, Respondent filed a motion to dismiss Petitioner's request for review.

12. On December 18, 2002, the Hearings Officer issued an order granting Respondent's motion to dismiss in PCH-2002-14.

13. Thereafter, Respondent decided to cancel the bid solicitation and re-solicit the contract.

14. By letter dated January 27, 2003, Petitioner protested Respondent's cancellation of the solicitation.

15. By letter dated March 20, 2003, Respondent denied Petitioner's protest. On March 25, 2003, Petitioner filed a request for review in the instant case.

16. On April 30, 2003, Respondent filed a motion for summary judgment in this proceeding.

17. Prior to the commencement of the hearing on Respondent's motion for summary judgment on May 30, 2003, the Hearings Officer raised the issue of his jurisdiction over this matter. The parties were provided with an opportunity to submit legal memoranda on the issue. On June 9, 2003, the Hearings Officer heard oral argument on both the jurisdictional issue and Respondent's motion for summary judgment.

## II. CONCLUSIONS OF LAW

Administrative agencies are tribunals of limited jurisdiction. Generally, they only have adjudicatory jurisdiction conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statute reposing power in them. 2 *Am Jur 2d Administrative Law*, §275 (2<sup>nd</sup> Edition).

In this case, both Petitioner and Respondent assert that Hawaii Revised Statutes ("HRS") Chapter 103D is applicable to and governs the solicitation involved here and that therefore the Hearings Officer has jurisdiction over this matter pursuant to HRS §103D-709.

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In *Waikiki Windriders/Hawaiian Ocean's Waikiki v. Department of Budget and Fiscal Services, City & County of Honolulu, PCH-2002-9 (July 26, 2002)*, the Hearings Officer had the opportunity to consider the applicability of HRS Chapter 103D to concession contracts. There, the respondent contended that because the dispute involved the solicitation of bids for *concession contracts*, the Hearings Officer lacked jurisdiction over the matter. The petitioner, on the other hand, argued that while the solicitation involved concession contracts, those contracts also constituted "procurement contracts", and were therefore subject to the provisions of HRS Chapter 103D. HRS §103D-102(a) provides in part:

This chapter shall apply to all *procurement contracts* made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance . . . .

"Procurement" is defined as "buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction." HRS §103D-104.

The Hearings Officer in *Waikiki Windriders/Hawaiian Ocean's Waikiki* noted that:

In 1993, the Legislature enacted HRS Chapter 103D ("Code"). To a large extent, the Code was based upon the American Bar Association's Model Procurement Code for State and Local Governments ("Model Code"). *Standing Committee Report No. S8-93, 1993 Senate Journal, at 39*. Not surprisingly, HRS §103D-102(a) incorporated most of the language used in §1-104(2) of the Model Code. Like §1-104(2), HRS §103D-102(a) provided that the Code would "apply to every expenditure of public funds irrespective of their source" . . . "under any contract".

In 1995, HRS §103D-102(a) was amended to its present version. Although the amendment deleted "every expenditure of public funds irrespective of their source", the underlying legislative history gives no indication that the Legislature sought to expand the application of the Code to cases other than those involving the expenditure of public funds. Rather, it suggests that the purpose of the Bill (H.B. 1834) was merely to "clarify and streamline the



provisions [of the Code] to achieve the objectives of cost-effectiveness and accountability which prompted its adoption.” *Standing Committee Report No. 811, 1995; House Journal.*

These considerations lead the Hearings Officer to conclude that the Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that *involve the expenditure of public funds* as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts, or earnings, “any of which the State receives or is owed; in-kind benefits; or forbearance”. According to this interpretation, the language in HRS §103D-102(a) upon which Petitioner relies (“consideration for the contract . . . which the State receives or is owed”), was intended to clarify the *source of the funds* used by the procuring agency as consideration for the contract rather than to expand the application of the Code to include concession contracts.

(Emphasis in original).<sup>1</sup>

A plain reading of the bid documents leads the Hearings Officer to conclude that the consideration for the contract involved in this solicitation is the payment to the City of a premium by the high bidder<sup>2</sup> in exchange for the exclusive right to provide towing services in specified zones. Indeed, the contract does not contemplate the expenditure of public funds by Respondent as consideration for the “buying, purchasing, renting, leasing, or . . . acquiring [of] any good, service, or construction”.

Petitioner argues that the contract resulting from the solicitation has a “component” that will involve the expenditure of public funds. According to Petitioner, the contract will, among other things, require Respondent to pay the contractor the sum of \$55.00 for each vehicle towed that is unclaimed and not purchased at a City-authorized auction. The towing charge that Petitioner refers to, however, is a charge that is fixed in the contract and

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<sup>1</sup> In affirming the Hearings Officer’s decision, the Circuit Court found that “the Hawaii Procurement Code, set forth in Chapter 103D of the Hawaii Revised Statutes (“HRS”), *which applies to procurement contracts involving the expenditure of public funds by a government agency*, does not apply to the solicitation and award of concessions of public property.” (emphasis added).

<sup>2</sup> According to HRS §103D-302(h), “the contract shall be awarded . . . to the *lowest* responsible . . . bidder . . .” (emphasis added). This evidences the Legislature’s intent to limit the application of HRS Chapter 103D to solicitations involving the expenditure of public funds based upon lowest bid.

not subject to bidding. Thus, while payment of the towing charge would amount to an expenditure of public funds, it clearly would not constitute the consideration for the contract.

Respondent attempts to distinguish *Waikiki Windriders/Hawaiian Ocean's Waikiki* from this case by pointing out that *Waikiki Windriders/Hawaiian Ocean's Waikiki* involved a concession on City property that was governed by HRS Chapter 102. This, however, is a distinction without significance here because the Hearings Officer's conclusion in the *Waikiki Windriders/Hawaiian Ocean's Waikiki* case was ultimately based on the finding that the contract did not involve the expenditure of public funds. As such, the Hearings Officer's conclusion in that case was not limited to concession contracts.<sup>3</sup>


Based on these considerations, the Hearings Officer must conclude that the solicitation involved here is not subject to the requirements of HRS Chapter 103D and accordingly, the Hearings Officer lacks jurisdiction over this appeal. Under the circumstances, the Hearings Officer further concludes that Respondent's motion for summary judgment is moot.

III. FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED that this matter be and is hereby dismissed; each party to bear its own attorney's fees and costs.

DATED at Honolulu, Hawaii: \_\_\_\_\_

JUN 26 2003



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

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<sup>3</sup> Respondent also argues that the Hearings Officer has jurisdiction over this case because the solicitation incorporated the procedures set forth in HRS Chapter 103D, and because Petitioner has not contested the applicability of HRS Chapter 103D here. It is, however, axiomatic that jurisdiction cannot be conferred upon an administrative agency by the parties before it. *2 Am Jur 2d Administrative Law*, §276 (2<sup>nd</sup> Edition).