



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

In the Matter of) PCH-2003-18
)
STARCOM BUILDERS, INC.,) ERRATA
)
Petitioner,)
)
vs.)
)
BOARD OF WATER SUPPLY,)
CITY & COUNTY OF HONOLULU,)
)
Respondent.)

ERRATA

The third sentence of the last paragraph under Part III, Conclusions of Law, of the Hearings Officer's Findings of Fact, Conclusions of Law and Decision filed on October 8, 2003 should be corrected to read as follows:

As such, the Hearings Officer fails to see how the failure to attend a prebid site visit, let alone a scheduled prebid site visit, would limit or otherwise affect that obligation (footnote in original).

Dated at Honolulu, Hawaii: OCT 13 2003

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



2003 OCT -8 A 11: 29

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

In the Matter of)	PCH-2003-18
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STARCOM BUILDERS, INC.,)	HEARINGS OFFICER'S
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Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
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BOARD OF WATER SUPPLY,)	
CITY & COUNTY OF HONOLULU,)	
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Respondent.)	
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HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On June 23, 2003, Starcom Builders, Inc. ("Petitioner"), filed a request for administrative review of the Board of Water Supply, City & County of Honolulu's ("Respondent") June 17, 2003 decision to reject Petitioner's protest concerning a project known as Beretania Service Building Interior Renovations – Third Floor: Painting, Ceiling Tiles, and Carpet Replacement – Job 03-077G. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 7, 2003, Respondent filed a motion for summary judgment. On August 14, 2003, an order was issued denying the motion.

The matter came on for hearing before the undersigned Hearings Officer on August 29, 2003 in accordance with the provisions of HRS Chapter 103D. Petitioner was represented by its president, Theodore K. Taketa; Respondent was represented by Reid M. Yamashiro, Esq.

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

II. FINDINGS OF FACT

1. In early 2003, Respondent issued an invitation for bids (“IFB”) to perform work on a project known as Job 03-077G, PSB Interior Renovations, Third Floor: Painting, Ceiling Tiles and Carpet Replacement (“Project”).

2. Pursuant to the IFB, bids for the Project were due on May 22, 2003.

3. The bids submitted in response to the IFB were opened on May 22, 2003.

Petitioner submitted the apparent low bid in the amount of \$100,999.00. Walter Arakaki General Contractor, Inc. (“Arakaki”) submitted the apparent second low bid in the amount of \$119,000.00.

4. Paragraph 5 of Section SP-1, *Instructions to Bidders*, of the IFB (“Paragraph 5”) states:

VISITING JOB SITE & QUESTIONS REGARDING

PROJECT: The actual job site will be shown to any prospective bidder by contracting the Owner’s Project Manager at 748-5742 no later than ten (10) calendar days prior to the date set for the opening of the bids. All prospective bidders are required to attend the scheduled site visitation. No bids will be accepted from bidders who have not visited the site. Any questions regarding the project may be addressed by contacting the Project Manager.

5. Prior to the opening of the bids, Respondent, through the Project Manager Felix Agraan (“Agraan”), scheduled a site visit for May 9, 2003.

6. Ten contractors attended the May 9, 2003 site visit.

7. A second site visit was scheduled for May 16, 2003 after Respondent received requests from other prospective bidders.

8. Three contractors attended the May 16, 2003 site visit of the Project.

9. Petitioner did not attend the May 9 or the May 16, 2003 site visits.

10. On May 21, 2003, a representative of Petitioner, Richard Lee (“Lee”), appeared at the Project site unannounced and requested to view the areas involved in the Project.

11. Agraan allowed Lee to view the site and to take photographs.

12. By letter dated May 23, 2003, Arakaki protested the award of the Project to Petitioner, alleging that because Petitioner had failed to attend one of the two scheduled site visits, Petitioner’s bid was nonresponsive.

13. By letter dated June 17, 2003, Respondent granted Arakaki's protest.¹ On June 23, 2003, Petitioner filed a request for administrative review of Respondent's June 17, 2003 decision.

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.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ., 85 Hawaii 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).

Petitioner argues that Paragraph 5 does not require bidders to attend one of the *scheduled* site visits. Rather, Petitioner contends that it is enough that the bidder visits the job site prior to bid opening. Respondent, on the other hand, alleges that Paragraph 5 requires bidders to contact the Project Manager no later than ten days prior to bid opening and attend one of the two scheduled site visits. According to Respondent, because Petitioner neither called Respondent within the specified period nor attended one of the two scheduled site visits, Petitioner's bid is nonresponsive.

According to Agraan, the Project Manager, the only purpose for the mandatory site visit was to provide prospective bidders with the opportunity to tour the work site and to ask questions about the Project's requirements. In this way, Respondent presumably sought to warn bidders that site conditions could affect the cost of performance of the contract and, in the event a bidder failed to visit the site, Respondent would be protected against having to permit the withdrawal of such a bid after opening.² In other words, Paragraph 5 effectively required bidders who submit bids to assume the risk of any unanticipated increased costs due to observable site conditions.

¹ In its June 17, 2003 letter to Petitioner, Respondent informed Petitioner that "[s]hould you wish to appeal this decision, you may request an administrative review by the Office of Administrative Hearings of the Department of Commerce & Consumer Affairs, pursuant to Hawaii Revised Statutes Section 103D-712(a)(Supp. 2002), within seven calendar days of issuance of this written determination."

² Additionally, Respondent would be provided with a defense should, during the course of performance, claims be presented for adjustments where the matter in issue could have readily been ascertained through a prebid visit.

The standard to be applied in determining the “responsiveness” of a bid, however, is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999)*; *Environmental Recycling vs. County of Hawaii, PCH-98-1 (July 2, 1998)*. As such, the Hearings Officer fails to see how the failure to attend a prebid meeting, let alone a scheduled prebid meeting, would limit or otherwise affect that obligation.³ Regardless of its nonattendance at a site visit, a bidder who submits a bid after having been offered the opportunity to visit the job site, knowingly commits itself to perform the work at its bid price and assumes the risk of any unanticipated increased costs due to observable site conditions. Based on these considerations, the Hearings Officer concludes that the prebid site visit requirement provides no basis for disqualifying Petitioner from the solicitation.

IV. DECISION

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

1. That Respondent’s June 17, 2003 determination that Petitioner’s bid was nonresponsive because it failed to attend either of the scheduled site visits and did not call Respondent to schedule a site visit, is hereby vacated; and
2. That this matter is remanded to Respondent for reevaluation of Petitioner’s bid consistent with this decision.

OCT - 8 2003

Dated at Honolulu, Hawaii: _____.



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

³ To the extent Respondent argues that a site visit affects the bidder’s price, it does so only in the context of that price’s reflection of the bidder’s judgment as to its performance costs. It does not affect the obligation to perform at the bid price.



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2003 OCT 13 A 11: 02

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

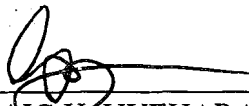
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 Department of Commerce
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LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR



MARK E. RECKTENWALD
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

STATE OF HAWAII
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P.O. BOX 3469
HONOLULU, HAWAII 96801
www.state.hi.us/dcca/pvl

October 13, 2003

MEMORANDUM

TO: All Division Administrators

FROM: Noe Noe Tom, Licensing Administrator *nt*

SUBJECT: **EXEMPT VACANCY
STAFF ATTORNEY, POSITION NO. 101310**

Your assistance is requested in locating interested and qualified applicants for an Exempt Staff Attorney position in the Administration Branch of the Professional and Vocational Licensing Division.

The position is solely responsible for preparing the department's or boards and commissions case for a license denial administrative hearing and declaratory relief hearing including interviewing of witnesses, issuing subpoenas, and adequately and competently representing the boards, commissions, and the department at the administrative hearing; correspond to the extent possible with the Regulated Industries Complaints Office and adequately present settlement agreement proposals to boards and commissions; and is legal counsel to staff in responding to subpoenas.

Requirements for the position include licensure to practice law in the State of Hawaii and possess at least two (2) years of professional legal experience.

All interested applicants should submit their resumes or applications to the Professional and Vocational Licensing Division, attention Ms. Noe Noe Tom, Licensing Administrator, no later than **4:30 p.m. on Wednesday, October 22, 2003.**

Should there be any questions, interested applicants may call Ms. Noe Noe Tom at 586-2690.

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS
2003 OCT 13 P 2:55
REGULATED INDUSTRIES
COMPLAINTS OFFICE



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2003 OCT 13 A 11:02

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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