



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2004 SEP 17 A 11:14

HEARINGS OFFICE

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

In the Matter of	)	PCH-2004-11
	)	
GMP ASSOCIATES, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER
vs.	)	GRANTING RESPONDENT'S
	)	MOTION TO DISMISS
BOARD OF WATER SUPPLY,	)	PETITIONER'S REQUEST
CITY AND COUNTY OF	)	FOR ADMINISTRATIVE
HONOLULU,	)	HEARING
	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER GRANTING RESPONDENT'S MOTION  
TO DISMISS PETITIONER'S REQUEST FOR ADMINISTRATIVE HEARING

I. INTRODUCTION

On July 19, 2004, GMP Associates, Inc., now known as Ohio Pacific Tech, Inc. ("Petitioner"), filed a request for administrative review to contest the Board of Water Supply, City and County of Honolulu's ("Respondent") denial of a protest filed by GMP Hawaii, Inc. ("GMP Hawaii") on June 9, 2004. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On August 10, 2004, Respondent filed the instant motion to dismiss. On September 9, 2004, Petitioner submitted a memorandum in opposition to Respondent's motion.

*Handwritten initials*

On September 10, 2004, Respondent's motion came on for hearing before the undersigned Hearings Officer. Reid M. Yamashiro, Esq. appeared for Respondent and Richard C. Sutton, Jr., Esq. appeared on behalf of Petitioner.

Having reviewed the motion, memoranda, and exhibits attached thereto together with the files herein, and after hearing the argument of counsel, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order.

II. FINDINGS OF FACT

1. By letter dated June 1, 2004, Petitioner, through its attorneys, complained that:

[c]ertain conflicts of interests exist between the head of BWS, Clifford Jamile ("Jamile"), BWS employee Gayson Ching, and numerous other BWS employees and Ohio Pacific that destroy any semblance of impartiality and independence in the procurement process if protective measures are not taken. In particular, there is pending litigation between Ohio Pacific and Clifford Jamile, wherein Ohio Pacific has sued Jamile in his individual capacity for, among other things, bad faith. Ohio Pacific has also sought to amend its Complaint to name BWS employee Gayson Ching, individually, as a defendant. (Collectively the "Litigation"). A number of other BWS employees are involved in the Litigation and have given testimony against Ohio Pacific. Ohio Pacific is concerned that Jamile, or persons under the direct control of Jamile, Ching and other BWS employees cannot impartially and independently evaluate Ohio Pacific's qualifications and statement of interest submitted for professional services that the BWS anticipates needing in the 2004-2005 fiscal year or negotiate any contract for which Ohio Pacific may be selected as the top ranked applicant. Irrespective of whether or not Jamile, Ching or other BWS employees can actually act with impartiality and independence, Jamile's Ching's and the other BWS employees' involvement in the procurement of professional services during the pendency of the Litigation creates the appearance that the Procurement Code is being violated.

\* \* \* \*

For these reasons, Ohio Pacific seeks assurances that (1) Jamile recuse himself from appointing any review or selection committees relating to professional services during the pendency of the Litigation and that all such review or selection committees relating to professional services be designated by the members of the BWS; (2) Jamile and other BWS employees recuse themselves from negotiating any contract with respect to the provision of professional services for which Ohio Pacific (or its subsidiaries or related entities) has been selected by a selection committee; and (3) BWS will take the necessary steps to have all review committee members and all selection committee members be non-governmental body employees or non-BWS employees during the pendency of the Litigation.

\* \* \* \*

2. The litigation referred to in Petitioner's June 1, 2004 letter refers to a civil matter currently pending in the circuit court and designated as *Ohio Pacific Tech., Inc., fka GMP Associates, Inc. v. Clifford S. Jamile, et al., Civil No. 02-1-3017-12 (EEH)*. Clifford S. Jamile ("Jamile"), is Respondent's Manager and Chief Engineer.

3. By letter dated June 4, 2004, Respondent declined the requests made in Petitioner's June 1, 2004 letter.

4. By letter dated June 9, 2004, GMP Hawaii, a wholly-owned subsidiary of Petitioner, filed a protest with Respondent. The protest stated:

GMP Hawaii, Inc. submits this letter as a formal protest to the appointment by Clifford Jamile, as head of the purchasing agency, of any members of a review committee or appointment of any members of a selection committee or the appointment of any employees of the Honolulu Board of Water Supply to such committees for failure to follow the Procurement Code, specifically, amended Section 103D-304 of the Hawaii Revised Statutes. This is also a formal protest of Clifford Jamile acting as head of the agency to negotiate any contract with respect to the provision of professional services for which GMP Hawaii, Inc. has submitted letters of interest for failure to follow the Procurement Code, specifically, amended Section 103D-304 of the Hawaii Revised Statutes. This formal protest is made pursuant to amended Section 103D-701 of the Hawaii Revised Statutes, Section 3-126-3 of the Hawaii

Administrative Rules and other applicable statutes and rules.

\* \* \* \*

5. By letter dated and issued on July 13, 2004, Respondent denied GMP Hawaii's June 9, 2004 protest:

GMP Hawaii's protest is denied because GMP Hawaii has not been aggrieved. The Manager and Chief Engineer: (1) has not appointed anyone to a review or selection committee for the selection of a consultant to provide professional services for fiscal year 2004-2005; and (2) has not entered into contract negotiations with respect to the provision of professional services for which GMP Hawaii has submitted letters of interest for fiscal year 2004-2005.

\* \* \* \*

6. On July 19, 2004, Petitioner filed the instant request for administrative review of Respondent's July 13, 2004 denial of GMP Hawaii's protest.

7. GMP Hawaii has submitted letters of interest to Respondent with respect to 7 project categories.

### 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.

In bringing this motion, Respondent alleges that Petitioner lacks standing to protest because it is not an "aggrieved" party. Respondent also contends that Petitioner lacks standing "to request administrative review of the BWS' denial of GMP Hawaii's bid protest."

Hawaii Revised Statutes ("HRS") §103D-701(a) states in 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.

(Emphasis added).

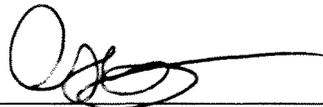
According to the foregoing statutory provision, standing to protest is conferred upon and limited to actual or prospective bidders, offerors or contractors who are “aggrieved”. A party is “aggrieved” when it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. On the other hand, a party is not aggrieved until official action, adverse to it, has been taken. *See Eckard Brandes, Inc. v. County of Hawaii, et al., PCH-2003-14; PCH-2003-20 (Consolidated)(June 24, 2004).*

Petitioner argues that it has been aggrieved by Respondent’s denial of GMP Hawaii’s protest, its refusal “to designate persons outside of the BWS to sit on the review and the selection committees”, and as such, the appearance of impropriety. According to the record, however, Respondent’s denial was based on the fact that Jamile has *not* undertaken any of the acts complained of: Jamile has not appointed a review or selection committee for the selection of a consultant to provide professional services for fiscal year 2004-2005; has not entered into any contract negotiations with respect to the procurement of professional services for the 7 project categories involved here, and has not awarded any contracts in that regard. For these reasons, Respondent’s denial was not adverse to Petitioner. Rather, on this record, the Hearings Officer must conclude that Petitioner has not been “aggrieved” in connection with the solicitation or award of the contract and therefore lacks standing to bring this action. At the very least, this action is premature under the present circumstances. In view of this conclusion, the Hearings Officer need not address the alternative argument raised by Respondent that Petitioner lacks standing to request an administrative review of Respondent’s denial of *GMP Hawaii’s* protest.

IV. DECISION

Based on the foregoing considerations, Respondent’s motion to dismiss is granted and this matter is hereby dismissed.

Dated at Honolulu, Hawaii: SEP 17 2004



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