



2005 SEP 23 A 11: 36

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

In the Matter of)	PCH-2005-5
)	
DICK PACIFIC CONSTRUCTION CO.,)	HEARINGS OFFICER'S
LTD.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
)	
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
HAWAIIAN DREDGING)	
CONSTRUCTION COMPANY, INC.,)	
)	
Intervenor.)	
_____)	

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

I. INTRODUCTION

On July 15, 2005, Dick Pacific Construction Co., Ltd. ("Petitioner"), filed a request for administrative review of the Department of Transportation, State of Hawaii's ("Respondent") July 12, 2005 decision to deny Petitioner's June 21, 2005 protest in connection with a project designated as *Honoapiilani Highway Realignment, Phase IA, Future Keawe Street Extension to Lahainaluna Road, Federal-Aid Project No. NH-030-1(35), District of Lahaina, Island of Maui, FY 2005*. Petitioner's request for administrative

review 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 29, 2005, the parties filed a stipulation permitting Hawaiian Dredging Construction Company, Inc. (“HDCC”) to intervene in this matter.

The hearing commenced on August 2, 2005. Petitioner was represented by Erik D. Eike, Esq.; Respondent was represented by Wayne A. Matsuura, Esq.; and HDCC was represented by Daniel T. Kim, Esq. At the conclusion of the hearing, the Hearings Officer directed the parties to submit their closing arguments in writing. Closing briefs were filed by each of the parties on August 5, 2005.

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. On November 22, 2004, Respondent issued a request for proposals in connection with a “design-build” project designated as *Honoapiilani Highway Realignment, Phase IA, Future Keawe Street Extension to Lahainaluna Road, Federal-Aid Project No. NH-030-1(35), District of Lahaina, Island of Maui, FY 2005* (“Project”).

2. Five prospective offerors submitted design-build qualifications proposals to Respondent. The top three prospective offerors determined to be qualified to submit proposals on the Project were HDCC, Petitioner and Kiewit Pacific Co. (“Kiewit”).

3. Addendum No. 3 to the solicitation required the top three prospective offerors to submit proposals to Respondent no later than March 15, 2005 at 4:00 p.m.

4. HDCC, Petitioner, and Kiewit submitted proposals by the March 15, 2005 deadline.

5. The proposals included the following prices: HDCC - \$33,150,000.00; Petitioner - \$56,958,000.00; and Kiewit - \$65,611,951.00.

6. Respondent’s cost estimate for the Project was between \$30,000,000.00 and \$45,000,000.00.

7. The proposals were ranked in the following order: HDCC (192 points total score), Petitioner (135.2 points total score), and Kiewit (121.5 points total score). Based on the total scores, HDCC was determined to be the first-ranked offeror.

8. Respondent subsequently requested approval from the U.S. Department of Transportation, Federal Highways Administration (“FHWA”) to award the Project contract to HDCC. FHWA approved the awarding of the contract to HDCC.

9. By letter dated March 31, 2005, Respondent awarded the Project contract to HDCC.

10. Upon the awarding of the contract to HDCC, the proposals were made available for public inspection by Respondent.

11. By letter to Respondent dated April 14, 2005, HDCC requested that it be allowed to withdraw without penalty its proposal "due to four errors discovered after a comprehensive check of our estimate."

12. After initially deciding to allow HDCC to withdraw its proposal without penalty and award the Project to Petitioner as the offeror with the next highest total score, Respondent determined that such a withdrawal was not permitted under the applicable procurement rule.¹ By letter dated June 15, 2005, Respondent informed HDCC that “we hereby deny your request [to withdraw the offer] because §3-122-16.08 of the Hawaii Administrative Rules (“HAR”) does not allow the withdrawal of an offer once the deadline for the receipt of such offers has passed.”

13. The June 15, 2005 letter also informed HDCC that Respondent was rescinding the award of the contract to HDCC “because the award of the contract was clearly erroneous in that award was made without sufficient consideration of the disparity in prices among the competing offerors”, and that Respondent would be “issuing an addendum to the Request for Proposals requesting Best and Final Offers because of a reduction in Project scope. After the issuance of the addendum requesting Best and Final Offers your firm will be allowed to either 1) submit a Best and Final Offer or if we do not receive a Best and Final Offer, your previous offer will be considered as your Best and Final Offer; or 2) you may ask

¹ Respondent concluded that HAR §3-122-16.08 did not allow the withdrawal of an offer once the deadline for the receipt of offers had passed.

to withdraw your proposal, so long as that request is made prior to the deadline for the receipt of Best and Final Offers set forth in the addendum.”

14. Respondent subsequently issued Addenda Nos. 7 and 8 to the solicitation which reduced the scope of the Project and required that best and final offers be submitted by July 22, 2005.

15. As announced in Addendum No. 7, Respondent conducted a meeting with the offerors on June 17, 2005. According to Respondent, HDCC, as well as the other two offerors, would be permitted to increase their proposal price as part of the best and final offer process.

16. By letter dated June 21, 2005 to Respondent, Petitioner protested Respondent’s refusal to award the contract to Petitioner and “the unauthorized and highly irregular procedure for submission of ‘Best and Final Offers’ announced by the DOT on June 16, 2005, and of the DOT's intention to allow Hawaiian Dredging Construction Company, Inc. ("HDCC") to continue participating in that process after failing to honor its original proposal, as announced by DOT at the meeting with offerors conducted on June 17, 2005.”

17. By letter dated July 12, 2005, Respondent denied Petitioner's protest.

18. On July 15, 2005, Petitioner filed the instant request for administrative review.

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).

In this appeal, the Hearings Officer is called upon to determine the propriety of Respondent's decisions (1) to rescind the award of the contract to HDCC; and (2) to accept best and final offers after disclosing the offers that had been submitted by the competing offerors.

The award to HDCC was rescinded by Respondent pursuant to HAR §3-122-57. That rule states in part:

§3-122-57 Award of Contract. (a) The award shall be issued in writing to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals and posted pursuant to section 103D-701, HRS, for five working days. Other criteria may not be used in the evaluation. The contract file shall include the basis for selecting the successful offeror.

* * * *

(c) The determinations required by this section shall be final and conclusive unless they are *clearly erroneous*, arbitrary, capricious, or contrary to law.

(Emphasis added).

At the outset, Respondent and HDCC contend that Petitioner lacks standing to contest Respondent's rescission of the award to HDCC because it is not an aggrieved party.

HRS §103D-701 provides in pertinent part:

(a) Any actual or prospective bidder, offeror, or contractor who is *aggrieved* in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation.

* * * *

(Emphasis added).

Similarly, HRS §103D-709(a) states in part:

The several hearings officers . . . shall have 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 . . . under sections 103D-310, 103D-701 or 103D-702.

(Emphasis added).

These statutory provisions clearly limit standing to aggrieved parties. *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14 and PCH-2003-20 (June 24, 2004)*. Thus, in order to have standing a protestor must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. *Id. See also, 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(April 16, 1999)*.

Respondent and HDCC argue that the rescission of the award to HDCC did not and will not cause Petitioner to suffer any economic injury. On the contrary, Respondent and HDCC point out that the rescission may benefit Petitioner if it is ultimately awarded the contract. These contentions are supported by and are consistent with the record before the Hearings Officer. Accordingly, on this record, the Hearings Officer must conclude that Petitioner lacks standing to challenge Respondent's rescission of the award to HDCC.²

Petitioner also complains that Respondent's decision to accept best and final offers from all three offerors *after* the details of each offer had been publicly disclosed is not authorized by and is contrary to HRS Chapter 103D and its underlying legislative intent.

HRS §103D-303, *Competitive sealed proposals*, provides in relevant part:

(d) *Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared in accordance with rules adopted by the policy board and shall be open for public inspection after contract award.*

² Petitioner alleges that under HRS §103D-318 and HAR §3-122-57(c), the procuring agency's determination to award the contract is final and conclusive unless the determination is found by the reviewing *court* to be clearly erroneous. Petitioner also contends that Respondent's alleged failure to confirm and verify the prices in the offers prior to the awarding of the contract to HDCC does not constitute grounds for overturning the award as clearly erroneous. Having concluded that Petitioner lacks standing to challenge the rescission of the award, the Hearings Officer need not address these issues. As such, the Hearings Officer expresses no opinion as to whether HAR §3-122-57 authorizes the agency to rescind an award.

* * * *

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. *Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.*

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factor or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

(Emphasis added).

The foregoing provisions establish the procedure by which proposals may be revised after opening and prior to award: once the proposals are opened and evaluated, and a priority list generated³, the procuring agency is authorized to engage in discussions with the qualified offerors. Thereafter, the agency may accept best and final offers, provided that in “conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.”⁴ Only after this process has been completed and the contract has been awarded is the agency allowed (and directed) to make the proposals “open for public inspection . . .” HRS §103D-303(d), HAR §3-122-58. Thus, a plain reading of HRS §103D-303 leads to the conclusion that the Legislature, as a matter of policy,

³ HAR §§3-122-52 and 53.

⁴ In addition, HAR §3-122-51(a)(1) requires that proposals shall *not* be opened publicly, and HAR §3-122-52(c)(2) requires that the written ranking evaluations or explanations shall be available for public inspection *after the award* of the contract is posted.

intended that any discussions and revisions of proposals occur *prior to the disclosure of the proposals* - no doubt to maintain the integrity of the procurement system and to ensure that offerors are provided fair and equitable treatment. *See generally, Wheelabrator Clean Water Systems, Inc. v. City & County of Honolulu, PCH-94-1 (November 4, 1994)*(to permit a substantial change in a proposal after bids have been opened and made public, would be contrary to public policy and would tend to open the door to fraudulent and corrupt practices).⁵ It therefore follows that once the proposals have been made public, the acceptance of best and final offers is no longer authorized⁶.

In this case, Respondent awarded the contract to HDCC and made the offers available for public inspection as required by HRS §103D-303(d) and HAR §3-122-58. Notwithstanding the subsequent rescission of the award to HDCC, Respondent, having already disclosed the offers, was no longer authorized to solicit and accept best and final offers. Any other result would violate the legislative intent of HRS Chapter 103D. *See 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(April 16, 1999)*(*In construing the various provisions of the Code, the foremost obligation is to ascertain and give effect to the intention of the Legislature which is to be construed primarily from the language of the statute itself. The language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose*). Accordingly, the Hearings Officer concludes that Respondent's solicitation of best and final offers under the circumstances presented here violates HRS §103D-303.

⁵ Respondent contends that because HRS §103D-318 authorizes an agency to rescind an award if clearly erroneous, and HRS §103D-303(d) requires the agency to make the proposals available for public inspection upon the awarding of a contract, the process "clearly contemplates situations in which it would be necessary to issue requests for best and final offers after rescinding an award . . . even if information on proposals has been disclosed." Even assuming *arguendo* that the rescission was proper under HRS §103D-318, it does not follow that the Legislature intended to permit the acceptance of best and final offers once the proposals have been made public. On the contrary, the plain language of HRS §103D-303 makes clear the importance the Legislature placed on avoiding disclosure of the proposals to competing offerors until *after* discussions are completed, best and final offers are received, and the contract has been awarded.

⁶ Among other things, HRS §103D-303 reflects the Legislature's concern with protecting the integrity of the competitive bidding system by requiring that any discussion and revision of proposals occur *prior* to the disclosure of the proposals following the contract award. If, as a matter of policy, the Legislature prefers a rule that allows public agencies to accept best and final offers *after* the proposals have been made public, they can so provide. They have not done so and the Hearings Officer has no inclination to establish a policy contrary to that previously established by the Legislature.

IV. DECISION

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

1. Respondent's July 12, 2005 denial of Petitioner's June 21, 2005 protest is hereby vacated;
2. This matter is remanded to Respondent for evaluation of the offers from HDCC, Petitioner and Kiewit consistent with this decision.⁷ Upon remand, Respondent may consider the disparity in prices among the three offers *provided that*, such action is otherwise authorized by law. Respondent shall thereafter award the contract pursuant to HRS §103D-303(g); and
3. Each party shall bear its own attorney's fees, costs, and expenses.

Dated at Honolulu, Hawaii: _____ SEP 23 2005



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

⁷ Because this decision does not disturb Respondent's rescission of the award to HDCC, the Hearings Officer's authority to fashion an appropriate remedy is based upon HRS §103D-706 (Remedies prior to award).