



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

In the Matter of	)	PCH-2006-4
	)	
GLOBAL MEDICAL & DENTAL,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER
vs.	)	GRANTING RESPONDENT'S
	)	MOTION TO DISMISS, OR IN
PROCUREMENT OFFICER, STATE	)	THE ALTERNATIVE, FOR
PROCUREMENT OFFICE, STATE	)	SUMMARY JUDGMENT
OF HAWAII,	)	
	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER GRANTING RESPONDENT'S MOTION  
TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. INTRODUCTION

On June 23, 2006, Global Medical & Dental ("Petitioner"), filed a request for administrative review to contest the Procurement Officer, State Procurement Office, State of Hawaii's ("Respondent") June 20, 2006 denial of a protest filed on June 8, 2006. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 12, 2006, Respondent filed the instant motion to dismiss, or in the alternative, for summary judgment. On July 19, 2006, Respondent filed a supplemental memorandum in support of the motion and Petitioner filed its memorandum in opposition to the motion. On July 28, 2006, Petitioner filed a reply memorandum to Respondent's

supplemental memorandum, and on August 1, 2006, Respondent filed its reply memorandum.

On August 2, 2006, Respondent's motion came on for hearing before the undersigned Hearings Officer; Patricia Ohara, Esq. appearing for Respondent and Blake K. Oshiro, Esq. appearing on behalf of Petitioner.

Having reviewed and considered the motion, memoranda and exhibits attached thereto and 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. In May 2006, Respondent issued a Notice to All Offerors, IFB-06-099-0, ("IFB") for the furnishing, delivering, installing and training of dental operatory units and panoramic x-ray unit and disposing of old units for the Department of Health, Dental Health Division.

2. The IFB was posted on Respondent's website on May 8, 2006.

3. A copy of the IFB was also faxed to a number of vendors including Petitioner. In faxing the IFB to Petitioner, Respondent used a fax number it found on a business card that had been provided by a representative of Petitioner. Petitioner denies receiving a copy of the faxed IFB.

4. According to the IFB, all bids were required to be submitted by June 6, 2006. The IFB also required that "products to be approved in advance."

5. SP-4 of the IFB provided in pertinent part:

**Pre-Approved Products Only.** For this solicitation all products offered require pre-approval by the State prior to bid opening date. The Technical Specifications are used as a measure of quality, style, appearance, and performance.

Any brand or manufacturer which meets all of the technical specifications stated will be considered for approval by the State Procurement Office, prior to bid opening, upon submission of two (2) copies of the written request for approval of the proposed product with two (2) sets of the manufacturer's literature and/or other pertinent specification information containing technical data on the proposed items being offered.

Request for advance product approval shall not be submitted unless the bidder has the proposed product items available for inspection by the State at the time of submittal of the request. Any requests for product approval shall be made at least FOURTEEN (14) calendar days prior to bid opening to permit inspection by the State, no later than May 23, 2006 or as amended.

The written request shall be submitted in the attached sample format "Request for Advance Approval of Proposed Product."

The statement of variances shall list all features of the proposed product which differ from the specifications and must further certify that the product proposed has no other variant features.

During the pre-approval process, an inspection by the State of equipment installed locally shall be requested. All equipment furnished and installed as a result of this bid solicitation must be fully equal to the products inspected and approved by the State.

The State may, at its discretion, reject or deny any product that it deems does not satisfy the technical specifications, and the findings in this regard shall be accepted by the bidders as final and binding.

A bid shall be considered only if the product has been approved in advance prior to bid opening by the State.

\* \* \* \*

(Emphasis in original).

6. On June 6, 2006, Respondent issued Addendum A to the IFB. Addendum A changed the bid opening date from June 6, 2006 to June 9, 2006.

7. On June 8, 2006, Petitioner filed the protest herein. The protest consisted of two claims: that the IFB failed to "ensure adequate public notice and improperly limits competition" and "[c]ontains unduly restrictive specifications."

8. On June 9, 2006, Respondent issued Addenda B and C. Addendum B changed the bid opening date from June 9, 2006 to "Until further notice" and Addendum C changed the bid opening date from "Until further notice" to June 23, 2006.

9. On June 20, 2006, Respondent denied the protest.

10. On June 23, 2006, Respondent issued Addendum D. Addendum D changed the bid opening date from June 23, 2006 to June 29, 2006.

11. No bid or request for advance product approval was submitted to Respondent by Petitioner.

12. On June 23, 2006, Petitioner filed the instant request for administrative review.

### III. CONCLUSIONS OF LAW

In bringing this motion, Respondent alleges, among other things, that Petitioner is not a prospective bidder and therefore lacks standing to pursue this matter.

Hawaii Revised Statutes (“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 protest or 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 Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2003-5 (Jan. 19, 2005); Browning Ferris Industries et al. v. County of Kauai, PCH-96-11 (January 29, 1997).* As previously noted, the rights and remedies created under HRS Chapter 103D were intended for and are available 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 in original).

*Milici* is equally applicable here. The IFB specifically required that all products be approved in advance and that all prospective bidders submit their request for product approval no later than May 23, 2006. The IFB also provided that bids would be considered only if the product was approved in advance. Notwithstanding these requirements, Petitioner did not submit such a request. Consequently, once the May 23, 2006 deadline passed, Petitioner could no longer be considered a prospective bidder since it no longer had any realistic expectation of submitting a bid under the terms of the IFB<sup>1</sup>.

Petitioner acknowledges that it did not submit a request for product approval. Instead, Petitioner contends that Respondent did not provide bidders with adequate public notice of the IFB and, consequently, Petitioner had no knowledge of the May 23, 2006 deadline.

HRS §103D-302(c) provides that:

[a]dequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids. *The policy board shall adopt rules which specify:*

\* \* \* \*

(3) How notice may be published, including publication in a newspaper of general circulation, notice by mail to all persons on any applicable mailing list, *publication by any public or private telecommunication information network*, or any other method of publication it deems to be effective.

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<sup>1</sup> Moreover, any protest based upon the content of the solicitation was required to be filed within 5 working days after Petitioner knew or should have known of the IFB and prior to the bid opening date. See *Clinical Laboratories of Hawaii v. City & County of Honolulu*, PCH-2000-8 (Oct. 17, 2000); HRS §103D-701(a). See also, *Frank Coluccio Construction Co. v. City & County of Honolulu*, PCH-2002-18 (Feb. 13, 2003). As is discussed below, Petitioner is charged with constructive notice of the IFB as of May 8, 2006. Consequently, any protest over the IFB's requirement for advance product approval or the May 23, 2006 deadline for the submission of product approval requests was required to be filed by May 15, 2006.

Hawaii Administrative Rules (“HAR”) §3-122-16.03(d) provides:

The public notice under subsections (b) and (c) shall be publicized as follows:

(1) *At a minimum, statewide and countywide public notices shall be publicized on a purchasing agency or provider internet site;*

(2) *Optionally*, and in addition to paragraph (1), the following may be used:

(A) Newspaper publication:

(i) For statewide publication, a daily or weekly publication of statewide circulation; or separate daily or weekly publications whose combined circulation is statewide;

(ii) For countywide publication, a daily or weekly publication in the pertinent county;

(B) Notice by mail or facsimile transmission to persons on any applicable bidders mailing list, if any; and

(C) Any other method the procurement officer deems effective for publicizing the solicitation.

(Emphasis added).

HRS §103D-302(c) authorizes and directs the state procurement policy board to promulgate rules governing the method by which notices may be published, including publication by a telecommunication information network. According to HAR §3-122-16.03(d), the posting of statewide or countywide notices on the procuring agency’s website is the only required method of publication. All other methods referenced in HAR §3-122-16.03 are optional and in addition to publicizing the notice via the agency’s internet website.

The undisputed evidence here established that Respondent publicized notice of the IFB on its website commencing on May 8, 2006. As such, Respondent satisfied its obligation to provide adequate public notice of the solicitation notwithstanding the possibility that Petitioner, for whatever reason, may not have received the copy of the IFB faxed to it by

Respondent<sup>2</sup>. Under these circumstances, Petitioner is deemed as a matter of law to have had constructive notice of the IFB (and the May 23, 2006 deadline) as of the May 8, 2006 posting.

Petitioner also points to the language of the provision set forth on SP-4 of the IFB that “requests for product approval shall be made at least FOURTEEN (14) calendar days prior to bid opening . . .”, and contends that because the bid opening date was ultimately changed to June 29, 2006, the deadline to submit product approval requests correspondingly changed to June 15, 2006. Petitioner’s argument, however, ignores the additional language of that provision that all such requests shall be made “no later than May 23, 2006 or as amended.” Read in its entirety, the provision establishes a deadline for the submission of product approval requests that falls fourteen days prior to the bid opening date *but no later than May 23, 2006*<sup>3</sup>. Thus, under the uncontroverted facts presented here, the deadline remained on May 23, 2006. And because no addendum was issued to amend that date<sup>4</sup>, this argument is without merit. The Hearings Officer also notes that at the time Petitioner filed its protest<sup>5</sup> on June 8, 2006, the bid opening date had been changed to June 9, 2006<sup>6</sup>. Thus, even under Petitioner’s interpretation of the provision, the deadline to submit requests for product approval would have fallen on May 26, 2006<sup>7</sup>, well before Petitioner filed its protest.

#### IV. FINAL ORDER

Based on the foregoing considerations, the Hearings Officer finds and concludes that there are no genuine issues of material fact as to the standing determination and that Petitioner lacks standing to pursue the instant action as a matter of law.

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<sup>2</sup> HAR §3-122-16.03 does not require that bidders receive actual notice of the solicitation.

<sup>3</sup> Thus, if the bid opening date had been advanced to a date prior to June 6, 2006, the deadline would have fallen 14 days prior to the bid opening date. On the other hand, if the bid opening date remained on June 6, 2006 or, as in this case, was changed to a later date, the applicable deadline was May 23, 2006 unless amended.

<sup>4</sup> HAR §3-122-16.06(a) generally requires the issuance of an addendum for amendments to the solicitation prior to the submission of offers and that amendments include any material changes to the solicitation.

<sup>5</sup> Standing to file a protest is determined as of the time the protest is filed.

<sup>6</sup> The original bid opening date of June 6, 2006 was changed to June 9, 2006 by Addendum A which was issued on June 6, 2006. The other three addenda were issued after Petitioner’s June 8, 2006 protest.

<sup>7</sup> May 26, 2006 is 14 calendar days prior to June 9, 2006.

Accordingly, Respondent's motion to dismiss, or in the alternative, for summary judgment is granted and this matter is hereby dismissed.

Dated at Honolulu, Hawaii: **[ August 14, 2006 ]** \_\_\_\_\_.

**/s/ CRAIG H. UYEHARA**

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

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Hearings Officer's Findings of Fact, Conclusions of Law, and Final Order Granting Respondent's Motion to Dismiss, or In the Alternative, for Summary Judgment; *Global Medical & Dental v. Procurement Officer, State Procurement Office, State of Hawaii*; PCH-2006-4.