



DEPARTMENT OF COMMERCE  
AND CONSUMER AFFAIRS

JAN 29 11 25 AM '97

HEARINGS OFFICE

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

In the Matter of	)	PCH-96-11
	)	
BROWNING FERRIS INDUSTRIES	)	<b>FINAL ORDER GRANTING</b>
OF HAWAII, INC., dba BFI,	)	<b>RESPONDENT'S MOTION</b>
	)	<b>TO DISMISS</b>
Petitioner,	)	
	)	
vs.	)	
	)	
COUNTY OF KAUAI,	)	
DEPARTMENT OF FINANCE,	)	
	)	
Respondent.	)	

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**FINAL ORDER GRANTING  
RESPONDENT'S MOTION TO DISMISS**

This matter having come before the undersigned Hearings Officer on January 17, 1997, for consideration of the Respondent's Motion to Dismiss; with the Petitioner represented by Patrick J. Childs, Esq.; and the Respondent represented by Galen T. Nakamura, Esq.; and after due consideration of the pleadings filed by the parties and their arguments 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. On July 12, 1996, the Respondent published a Notice of Solicitation ("Notice") inviting bidders to submit bids to operate the Kauai Recycles Program, an islandwide residential drop-off recycling program.

2. This solicitation was designated as Solicitation Document No. 2026 ("Solicitation").

3. The deadline for the submission of bids in response to the Solicitation was July 29, 1996.

4. The Respondent received a total of one bid by the July 29, 1996 deadline.

5. The lone bid was submitted by Garden Isle Disposal ("GID").

6. After the Respondent determined GID to be the lowest responsible, responsive bidder, and that its prices were fair and reasonable, the Respondent entered into a contract with GID.

7. The Petitioner, although aware of the Solicitation and present at the bid opening, did not submit a bid.

8. On August 6, 1996, the Petitioner filed a protest of the Solicitation. The protest was not filed in duplicate.

9. By letter dated August 6, 1996, the Respondent denied the protest.

10. On October 2, 1996, the Petitioner filed a request for reconsideration of the Respondent's decision. On December 11, 1996, the request for reconsideration was denied by the Respondent.

11. On December 17, 1996, the Petitioner submitted to the Respondent a Request for Administrative Review to the Department of Commerce and Consumer Affairs.

## II. CONCLUSIONS OF LAW

A motion for dismissal, or other summary disposition, may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. Brewer Environmental Industries, Inc. v. County of Kauai, PCH-96-9 (HOFO November 20, 1996).

The Respondent's motion was based on the theory that the Petitioner was not a "prospective bidder" under Hawaii Revised Statutes ("HRS") Chapter

103D and therefore lacked standing to pursue the instant protest. Alternatively, the Respondent asserts that this action should be dismissed because the Petitioner failed to file its protest in accordance with the requirements set forth in HAR 3-126-3(a).

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 the head of a purchasing agency. The protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.

Similarly, HAR §3-126-1, defines a "protestor" as:

. . . . any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.

According to the foregoing rule and statutory provisions, standing to file a protest under HRS Chapter 103D is conferred upon and limited to actual or prospective bidders, offerors, or contractors.

HAR §3-120-2 defines a "bidder" as a "business submitting a bid in response to an invitation for bids," while an "offeror" is "a business submitting a bid or proposal in response to an invitation for bids or a request for proposals, or an unpriced technical offer in response to an expression of interest." A "contractor" is defined in HRS §103D-104 as any person having a contract with a governmental body. (Emphasis added).

In this case, the Petitioner does not dispute the fact that it did not submit a bid and did not enter into a contract with the Respondent in response to or as a result of the Solicitation. As such, it is clear that the Petitioner was not an actual bidder, offeror or contractor under HRS Chapter 103D.

Instead, the Petitioner argues that it was a "prospective bidder" prior to the July 29, 1996 deadline and as such, HRS §103D-701 "merely requires a protest to be submitted in five working days after the aggrieved person knows or should have known of the facts giving rise thereto." The Petitioner asserts that once the status of "prospective bidder" was conferred upon it, it cannot be "de-conferred" of such bidderhood.

The Respondent, on the other hand, argues that although the Petitioner may have been a "prospective bidder", that status ended upon the expiration of July 29, 1996 deadline. The Respondent correctly points out that once the deadline for bid submittals passed, there was no longer any likelihood or prospect that the Petitioner would become a bidder with respect to the Solicitation.

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. The holding of MCI Telecommunications Corp. is persuasive.

In the case at hand, the Petitioner no longer had any realistic expectation of submitting a bid in response to the Solicitation once the deadline expired. As such, the Hearings Officer finds that the Petitioner was not a "prospective bidder" when it filed the instant protest. Thus, because the Petitioner neither filed a timely bid protest nor submitted a bid, it lacked standing to challenge the Respondent's solicitation of bids and award of the contract to GID.

The Respondent also argued that the initial protest was not properly filed under HAR §3-126-3(a) since the protest was not filed in duplicate. Because the Respondent has established a sufficient basis to prevail


in its motion under the above analysis of its first theory, it is unnecessary to address this alternative theory.

**III. FINAL ORDER**

Accordingly, based upon the above findings of fact and conclusions of law, the Respondent's Motion to Dismiss is granted and the above-entitled matter is hereby dismissed.

JAN 29 1997

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

  
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Craig H. Uyehara  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs