



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
JUL 2 10 55 AM '98
HEARINGS OFFICE

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

In the Matter of)	PCH-98-1
)	
ENVIRONMENTAL RECYCLING,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
COUNTY OF HAWAII,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent.)	

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

I. INTRODUCTION

By letter dated January 20, 1998, Environmental Recycling, Inc. ("Petitioner"), filed a request for an administrative hearing with the Department of Finance, County of Hawaii ("Respondent") to contest Respondent's decision to reject Petitioner's bid submitted in conjunction with Invitation for Bid No. 1731: Price Agreement for Furnishing and Delivering Cover Material to the Hilo Landfill, Department of Public Works, County of Hawaii. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709 and Hawaii Administrative Rules ("HAR") §3-126-42.

On January 21, 1998, Respondent transmitted Petitioner's request for hearing to the Office of Administrative Hearings. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On January 30, 1998, Respondent filed a Response to Petitioner's request for hearing. On March 6, 1998, Respondent filed a Motion to Quash Subpoena Duces Tecum for Donna Kiyosaki and a Motion in Limine to Preclude Introduction of Any Evidence Concerning Prior Cover Material Contracts.

The matter was heard by the undersigned Hearings Officer on March 10 and 11 and April 15, 1998, in accordance with the provisions of HRS Chapter 103D. Petitioner was represented by Alan H. Tuhy, Esq.; Respondent was represented by Ted H. S. Hong, Esq.

Prior to the commencement of the hearing on March 10, 1998, arguments were heard in connection with Respondent's motion in limine and motion to quash subpoena. After considering the argument of counsel, the Hearings Officer granted Respondent's motion to quash the subpoena duces tecum issued to Donna Kiyosaki. Respondent's motion in limine was granted as to evidence relating to any prior contracts involving Kiyosaki Tractor Works ("KTW"), and denied as to evidence of ownership of KTW and the performance of KTW respecting the contract involved in the instant proceeding.

At the conclusion of the hearing, the Hearings Officer requested that the parties submit Proposed Findings of Fact and Conclusions of Law by May 27, 1998. The parties subsequently requested and the Hearings Officer approved of an extension of time to June 1, 1998 for the filing of the proposed findings and conclusions. On June 1, 1998, both parties filed their Proposed Findings of Fact and Conclusions of Law.

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 or about November 25, 1997, Respondent caused to be published in the Hawaii Tribune Herald, a Notice to Bidders ("Notice") in connection with INVITATION FOR BID NO. 1731: PRICE AGREEMENT FOR FURNISHING AND DELIVERING COVER MATERIAL TO THE HILO LANDFILL, DEPARTMENT OF PUBLIC WORKS, COUNTY OF HAWAII ("IFB 1731").

2. The purpose of IFB 1731 was to solicit bids for the furnishing and delivering of "cover material" to the Hilo Landfill. By law, refuse dumped at the Hilo Landfill was required to be covered at the end of each day.

3. Petitioner became aware of IFB 1731 from the published Notice.

4. The Notice provided in pertinent part:

NOTICE TO BIDDERS

SEALED TENDERS will be received and publicly opened at 2:00 p.m., Tuesday, December 23, 1997, in the Office of the Purchasing Division, Department of Finance, County of Hawaii, Room 118, 25 Aupuni Street, Hilo Hawaii, for the following:

INVITATION FOR BID NO. 1731: PRICE AGREEMENT FOR FURNISHING AND DELIVERING COVER MATERIAL TO THE HILO LANDFILL, DEPARTMENT OF PUBLIC WORKS, COUNTY OF HAWAII.

Upon application, forms of proposal and specifications may be obtained from the above-named office on or before December 10, 1997.

5. IFB 1731 included a section entitled, "Specifications." Paragraph 1 of the Specifications states as follows:

Cover material shall have a maximum size of six (6") inches in its greatest dimension and at least 50% by volume shall pass through a 2" sieve; all material shall be free of organic material and other deleterious substances.

The material shall be well graded from coarse to fine so as to form a dense compacted layer. The amount passing a 200 mesh sieve shall be less than 15% but greater than 3% by volume. Filler may be added to obtain a well graded mixture.

Contractor shall provide, at contractor's expense, any tests which may be required by the County or State of Hawaii, Department of Health, to determine the suitability of the material and/or compliance with these specifications.

6. Paragraph 2 of the Specifications provides in pertinent part:

Contractor shall quarry, crush, and load the material using Contractor's equipment at the site as shown on "Exhibit A" or may provide material meeting specifications from any off site location.

7. IFB 1731 also contained the following stipulation:

The Undersigned agrees to furnish and deliver approximately 120,000 cubic yards of 6" minus material (of which at least 50% by volume passes through a 2" sieve) to be quarried from County location as described on "Exhibit A" or such other location as indicated below, to be delivered to the working face of the Hilo Landfill between approximately February 1, 1998, and ending approximately January 31, 1999, complete as specified:

8. On December 21, 1997, Petitioner submitted its bid in response to IFB 1731 on a bid form provided by Respondent. Petitioner's bid consisted of a total bid price of \$442,800.00.

9. Petitioner's bid was accompanied by a separate document Petitioner had prepared and titled, "Variations and Exceptions," and which stated:

The material that is being proposed for use under this Invitation for Bid No. 1731 is bottom ash material from the boiler operations at Hilo Coast Power Company. As an additional material to be added to the bottom ash it is proposed that ground up tires be allowed as a suitable landfill cover.

Discussions with John Harder have already been conducted with respects to these alternative materials. Bottom ash and tire chips have been successfully used for cover material at landfills on the mainland and have met all standards of performance where utilized.

Adding tire chips to the ash will help resolve more fully the problem of tire disposal in a more thorough manner.

Mr. Harder has proposed as a condition to the use of these alternative cover materials a six month trial program that would define the performance of these materials here in Hawaii. It must be stated that Mr. Harder, by asking for this trial period, wants to gather specific information about the material [sic]use. What should not be construed is that these materials lack the

performance conditions that would make their use unviable for landfill cover. It is the belief that the proposed material will meet all standards for use as it has in other landfills and by using these materials for this particular bid it will open the door of acceptance at other landfills in Hawaii.

10. Prior to the submission of its bid, Petitioner contacted John Harder of the State of Hawaii, Department of Health ("DOH"), to determine the DOH's requirements regarding the use of "bottom ash" and tire chips as cover materials at the Hilo Landfill. Petitioner was informed that in order to obtain DOH approval for the permanent use of these materials, the operator of the landfill must demonstrate that the materials performed as well as traditional earthen-type materials¹ over a six-month period.

11. According to the DOH, during this six-month demonstration period, the operator would monitor the performance of the alternative materials and, at the end of the demonstration, submit an evaluation report to the DOH. The DOH would then decide whether to approve of the use of the alternative cover material for permanent use at the facility.

12. The DOH required the demonstration in order to evaluate the material's ability to control disease, vectors and odors and to minimize windblown litter at a specific site. Secondly, the demonstration was necessary to evaluate the ability of the material to minimize fires, shed water, and to provide a working surface for vehicles accessing the landfill.

13. On December 23, 1997, Bill Gray, the purchasing agent for Respondent, received and opened all of the bids submitted in response to IFB 1731. Petitioner's total bid price of \$442,800.00 was the lowest among the bids submitted.

14. On December 24, 1997, Gray transmitted the bids and a summary of those bids to the Department of Public Works ("DPW") for their review and recommendation.

15. Jiro Sumada, the Deputy Chief Engineer for the DPW, reviewed the summary and the bids. After reviewing Petitioner's bid, Sumada contacted Gray and

¹ According to the evidence, crushed rock has been accepted by the DOH for use as cover material at County of Hawaii landfills. Testimony of John Harder at page 161.

was informed that Petitioner had not submitted a substitution request by the December 10, 1997 date referred to in the Notice.

16. Sumada also contacted the DOH and was informed that Petitioner did not have DOH approval for the use of ash or tire chips as an alternative daily cover material at the Hilo Landfill. Sumada was also informed by the DOH that the performance of alternative daily cover materials may "vary greatly from site to site based on climate, local waste characterization, and other conditions," and that in order to insure that these materials met the requirements of the Hawaii Administrative Rules, "the Office of Solid Waste Management (OSWM) requires that the operator conduct a six month, site specific demonstration of the use of the material."

17. The DOH also required the operator to submit an evaluation report following the completion of the demonstration. The report was to address how the material met the requirements of daily cover material, describe its performance under various climate conditions, and indicate how long the material would perform before intermediate cover was required.

18. On or about December 26, 1997, Sumada returned the bids to Gray along with a cover letter recommending that Petitioner's bid be rejected and that the contract be awarded, instead, to the second lowest bidder, KTW. Sumada also wrote a separate memorandum dated December 26, 1997, detailing the reasons for his recommendation to reject Petitioner's bid.

19. On or about December 29, 1997, Gray sent Petitioner a letter informing Petitioner of the rejection of his bid. Among the reasons cited by Gray for the rejection were the following:

1. It is unresponsive, as the specification calls for "cinder cover material . . . free of organic material and other deleterious substances." Ash material and tire chips clearly do not comply with this requirement.

2. In order to be fair to all bidders or potential bidders, you should have submitted the proposed exception prior to the December 10, 1997, deadline for requests for exception to specifications so that we could have evaluated the material and, if found acceptable, issued an addendum informing any potential bidders that we would accept such material.

3. Your cover letter labeled "VARIATIONS AND EXCEPTIONS" states that the Department of Health would require a six month trial [sic] before approving this material. Specifications require such a test to be conducted at contractors [sic] expense.

20. Petitioner's bid did not include any evaluation reports, test results or standards of performance for the bottom ash or tire chips Petitioner was proposing to use at the Hilo Landfill.

21. None of the materials involved in Petitioner's bid, to wit, bottom ash or a mixture of bottom ash and tire chips, had received DOH approval for use as cover at the Hilo Landfill prior to bid opening.

22. On December 31, 1997, upon receiving notification that its bid had been rejected as "non-responsive", Petitioner filed a protest pursuant to HAR §3-126-3.

23. On January 2, 1998, Petitioner's protest was referred to the Office of the Corporation Counsel, County of Hawaii, by the Director of Finance, Harry A. Takahashi ("Takahashi").

24. On January 5, 1998, Respondent entered into an Agreement with KTW in connection with IFB 1731. On February 2, 1998, Respondent issued a Notice to Proceed, informing KTW that, "the bid for the subject proposal has been accepted. All terms and provisions of the proposal are still in effect. The term of this Agreement shall be for the period beginning February 1, 1998, and ending January 31, 1999."

25. KTW is a Hawaii corporation. KTW's 1,000 shares of stock are divided equally between Ken B. Kiyosaki, its president, and his wife, Donna Faye Kiyosaki ("Kiyosaki"). Kiyosaki is the Chief Engineer for the DPW.

26. In order to avoid the appearance of a conflict of interest, the DPW maintained a policy of referring all matters relating to any contracts between KTW and the County directly to its Deputy Chief Engineer rather than to Kiyosaki. This policy had been in effect since Kiyosaki's appointment as Chief Engineer.

27. No written determination of "substantial interest" pursuant to HRS §103D-701(f) was made by Respondent in connection with IFB 1731 prior to the award of the contract to KTW.

28. On January 9, 1998, the Office of the Corporation Counsel recommended that Petitioner's protest be denied.

29. By letter dated January 9, 1998 from Takahashi, Petitioner was informed that his protest had been denied.

30. Petitioner requested an administrative hearing pursuant to HAR §3-126-42 to contest the denial of his protest by letter dated January 20, 1998 to Respondent.

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.

A. Jurisdiction.

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 the instant case, the Hearings Officer must determine whether the rejection of Petitioner's bid as nonresponsive and the subsequent award of the contract to KTW were proper and in accordance with the State Procurement Code ("Procurement Code").

B. Responsiveness of Petitioner's Bid.

1. Cover Material Specified in IFB 1731.

Respondent first contends that IFB 1731 specified and therefore required bidders to use crushed gravel or rock as the cover material at the Hilo Landfill.

According to Respondent, Petitioner's bid was properly rejected as nonresponsive because it proposed the use of materials other than crushed rock.²

Respondent's argument is supported to some extent by the references in the solicitation to "quarry." For example, IFB 1731 required all bidders to complete the following form:

Will use County **Quarry** to provide material _____
yes no

Will provide material from **Quarry** located at _____
(Bidder to provide map with exact location of **Quarry**
and proposed route(s) to working face of landfill).

(Emphasis added).

There was also evidence that crushed rock obtained from various quarries has been the only type of cover material used at the landfill since the mid-1980's. Thus, the past practice of using crushed rock at the Hilo Landfill coupled with the use of the term "Quarry"³ in IFB 1731 suggest an intention to limit bidders to the use of crushed rock.

On the other hand, IFB 1731 contains no specific reference to "crushed rock." Instead, the solicitation employs the more generic terms, "cover material" and "cinder cover material" to describe the material required by the solicitation. Furthermore, although Paragraph 2 of the Specifications provides that the "Contractor shall **quarry**, crush and load the material using Contractor's equipment at the site shown on 'Exhibit A'," Petitioner correctly points out that Paragraph 2 also allows the contractor the option of providing the "material meeting specifications **from any off site location.**" (emphasis added).

Consequently, a reading of IFB 1731 in its entirety, leads the Hearings Officer to conclude that the solicitation is ambiguous as to the type of material(s) permitted under IFB 1731. The solicitation is therefore properly interpreted against

² The parties disagree as to whether Petitioner's bid called for the use of pure (100%) bottom ash or a mixture of bottom ash and tire chips. Petitioner maintains that its proposal involving the use of a mixture of bottom ash and tire chips was offered as an alternative only, and that its bid was actually based on using pure bottom ash. The resolution of this dispute, however, is unnecessary for a full disposition of this matter.

³ One dictionary defines "quarry" as, "an open excavation or pit from which stone is obtained." **Webster's II Dictionary (1995).**

the party drafting the solicitation. See **Appeal of Colt Insulation, Inc., Nos. 1426 and 1446 (MSBCA Dec. 5, 1989)**. In construing the solicitation against Respondent, the Hearings Officer finds and concludes that IFB 1731 does not require or otherwise limit bidders to use crushed rock provided, of course, the material meets the specifications and other requirements set forth in the solicitation.⁴

2. Compliance With Department of Health Requirements.

Respondent's rejection of Petitioner's bid was also based on the fact that the proposed material had not received final approval from the DOH at the time the bids were opened. The Specifications state in relevant part:

Contractor shall provide at contractor's expense, any tests which may be required by the County or State of Hawaii, Department of Health, to determine the suitability of the material and/or compliance with these specifications.

See Respondent's Exhibit R-1, Page 1 (Emphasis added).

* * * *

Contractor shall follow at all times all safety rules and any and all other laws, rules and regulations, including particularly those of OSHA, State Department of Health and Department of commerce and Consumer Affairs [sic].

See Respondent's Exhibit R-1, Page 3 (Emphasis added).

Additionally, DOH regulations define "cover material" as "soil or other suitable material that has been **approved by the department** as cover for wastes." HAR §11-58.1-03 (Emphasis added).

⁴ The Specifications require, among other things, that the:

[c]over material shall have a maximum size of six (6") inches in its greatest dimension and at least 50% by volume shall pass through a 2" sieve; all material shall be free of organic material and other deleterious substances.

The material shall be well graded from coarse to fine so as to form a dense compacted layer. The amounts passing a 200 mesh sieve shall be less than 15% but greater than 3% by volume. Filler may be added to obtain a well graded mixture.

Respondent's Exhibit R-1.

Here, Petitioner does not dispute that the DOH's approval of its proposed cover material was required under the terms of IFB 1731. Moreover, according to the evidence, a site-specific test⁵ or demonstration and evaluation was required before the DOH would consider issuing approval of the material for permanent use at a particular location.

Petitioner nevertheless argues that preliminary approval from the DOH allowing Respondent to undertake the required demonstration of the proposed material at the Hilo Landfill could have been obtained by Respondent, and that the materials, once tested, would have received final approval. Petitioner's position appears to be based on the evidence presented that suggested that preliminary approval for the testing of alternative cover materials was routinely given by the DOH, and that the use of bottom ash as cover material by the County of Maui had already proved to be successful - a contention that Respondent disputes.

In determining whether Petitioner's bid was responsive to IFB 1731's requirement for DOH approval, the Hearings Officer is mindful of HRS §103D-302 which provides in pertinent part:

(e) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter or by rules adopted by the policy office.

(f) Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(Emphasis added).

The foregoing makes clear that a responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing

⁵ According to John Harder of the DOH, the site-specific test was necessary because "what may work at one site may not work at another site." **Testimony of John Harder at page 158.**

called for in the solicitation. **Bean Dredging Corp. v. U.S.**, 2 Cl. Ct. 519 (1991). Therefore, a bid which contains a material nonconformity must be rejected as nonresponsive. In this regard, material terms and conditions of a solicitation involve price, quality, quantity, and delivery. **Blount, supra**. "The rule is designed to prevent bidders from taking exception to material provisions of the contract in order to gain an unfair advantage over competitors and to assure that the government evaluates bids on an equal basis." **Blount, supra, citing Cibinic and Nash, Formation of Government Contracts (2nd Ed., 1986), p. 394**. Thus, in a competitive sealed bid procurement, bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening.

Here, IFB 1731 required, among other things, that the successful bidder provide DOH-approved cover material for the twelve-month period from February 1, 1998 to January 31, 1999. Petitioner's bid as submitted, did not entitle Respondent to an unqualified and unconditional right to full performance upon its acceptance. On the contrary, Petitioner's full performance was necessarily conditioned on receiving final DOH approval of the material for permanent use at the Hilo Landfill some six months later. In effect, the acceptance of Petitioner's bid would require Respondent to apply to the DOH for preliminary approval to conduct the required six-month demonstration, carry out the demonstration,⁶ prepare a detailed evaluation report of the performance of the material following the demonstration, and ultimately assume the risk that the proposed material would or would not receive final approval by the DOH at the end of the six-month test period.⁷ Nothing in the Procurement Code, its implementing rules or IFB 1731 requires such a result. Indeed, consideration of such a non-conforming bid would undermine the integrity of the very process which the Procurement Code was

⁶ Paragraph 1 of the Specifications requires the Contractor to provide, at the Contractor's expense, any required tests. There was nothing in Petitioner's bid to indicate a willingness to pay for any costs resulting from these tests.

⁷ Petitioner also presented testimony that in the event it did not receive DOH approval for the ash, it stood ready "to provide other material compliant with IFB 1731 to complete the contract." See **Petitioner's Proposed Findings of Fact No. 29 at Page 12**. Michael J. Allen, president and general manager of Petitioner, testified that as a backup plan, he stood ready to provide cinder and/or rock material from "any of the quarries." See **Testimony of Michael J. Allen, Volume III at page 595**. Petitioner's bid, however, makes no mention of any intention to use such materials in the event Petitioner was unable to obtain DOH approval. As such, this claim is irrelevant in determining whether Petitioner's bid was responsive to IFB 1731.

intended to protect. For these reasons, the Hearings Officer concludes that Petitioner's bid was not responsive to IFB 1731.⁸

C. Awarding of the Contract to KTW.

In addition to claiming that its bid was responsive and improperly rejected, Petitioner asserts that the contract was awarded to KTW in violation of HRS §103D-701(f). Petitioner also contends that KTW's signing of the bid documents in light of the "non-collusion" provision included in the solicitation rendered its bid nonresponsive.

HRS § 103D-701(f) states:

In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer, after consultation with the head of the using agency, or the head of the purchasing agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.

The significance of the stay required by HRS § 103D-701(f) was explained in **In re Carl**. There, the court noted that "because the award of the contract so severely limits the relief available," HRS §103D-701(f) requires that a timely protest halts solicitation and contracting activities until the protest is resolved. **In re Carl, 85 Hawaii at 450:**

By maintaining the status quo during the pendency of a protest, violations of the procurement code can be rectified before the work on the contract has proceeded so far that effective remedies, for the protestor and the public, are precluded by expense and impracticality.

In re Carl, 85 Hawaii at 453.

The court went on to explain that:

[b]ecause the Code both shortens deadlines for filing protests and applications for review and expedites the administrative hearings process, the delay contemplated is minimal, generally a few months

⁸ During the hearing, Respondent also argued that Petitioner's bid was unresponsive because (1) contrary to the terms of the Specifications, the proposed ash material contained organic material or other deleterious substances; and ((2) Petitioner failed to submit a timely substitution request. These arguments, however, were determined to be without merit or irrelevant to a full disposition of this matter.

(footnote omitted). There are, however, situations where a delay of several months before a contract may be awarded would have serious repercussions on the continuation of essential State functions. It is in these situations that the solicitation or award is allowed to proceed, upon a written determination that "the award of the contract without delay is necessary to protect the substantial interests of the State." HRS § 103D-701(f).

In re Carl, 85 Hawaii at 453 (emphasis added).

In this case, the relevant facts are not in dispute. On December 29, 1997, Respondent notified Petitioner that its bid had been rejected. On December 31, 1997, Petitioner submitted a letter to Respondent protesting the rejection of its bid. Petitioner's protest was received by Respondent on or before January 2, 1998 at which time it was transmitted to corporation counsel. On January 5, 1998, while Petitioner's protest was pending with Respondent, a contract in conjunction with IFB 1731 ("KTW contract") was executed by Respondent and KTW. Thereafter, Respondent notified Petitioner of the denial of its protest by a letter dated January 9, 1998.

According to the evidence, the contract was awarded to KTW notwithstanding the fact that a timely protest had been received and no written determination had been made by Respondent that the award of the contract without delay was necessary to protect the substantial interests of the State. In this regard, the court in **In re Carl** held that such a "substantial interest" determination must specifically identify the State's interests involved and articulate why it is necessary for the protection of those interests that the contract be awarded without delay. **In re Carl, 85 Hawaii at 454**. The record is completely devoid of any such "substantial interest" determination that would arguably meet the requirements of HRS §103D-701(f). Accordingly, the Hearings Officer finds that the award of the contract to KTW violated the stay mandated by HRS §103D-701(f).

Petitioner also argues that KTW's bid contained a "false certification" that "no official or employee of the government is directly or indirectly interested in the proposal or in any portion of the profits thereof", and as such, renders KTW's bid nonresponsive and in violation of the law. Because Petitioner has established that the

award of the contract to KTW was in violation of HRS §103D-701(f), it is unnecessary to address this alternative claim.

D. Remedies.

The remedies available to an aggrieved party following the award of the contract are set forth in HRS §103D-707:

Remedies after an award.

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination;

(2) If the person awarded the contract has acted fraudulently or in bad faith:

(A) The contract may be declared null and void;
or

(B) The contract may be ratified and affirmed if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be appropriate.

As a preliminary matter, although Petitioner has suggested that KTW's submission of an allegedly false certification may evidence bad faith, the record is insufficient to support such a finding. HAR §3-126-36(c) provides that a finding of bad faith must be supported by specific findings showing reckless disregard of clearly applicable laws or rules. Here, the evidence did show that KTW completed and signed Respondent's bid form which contained, among other things, a provision stating that no government employee was directly or indirectly interested in the proposal or in the profits from the proposal. The form was signed and submitted even though Kiyosaki,

the DPW's Chief Engineer, was the spouse of the president of the company and held half of the shares of KTW.

On the other hand, the undisputed evidence established that Kiyosaki performed no work and received no compensation from KTW. Moreover, according to the evidence, the DPW had in place a policy of referring all contract-related matters involving KTW directly to the department's deputy director as a means of avoiding any appearance of a conflict of interest. These considerations belie a finding of recklessness and bad faith by KTW.

1. Ratification of the KTW Contract.

Absent a finding of bad faith by KTW, HRS §103D-7 (1) authorizes the Hearings Officer to ratify the KTW contract, provided that a determination is made that doing so is in the best interests of the State, or terminate the contract and award KTW compensation for actual expenses reasonably incurred under the contract, plus a reasonable profit. In determining whether ratification of the contract would be in the State's best interest, the following factors may be relevant: the costs to the State in terminating and resoliciting; the possibility of returning goods delivered under the contract and thus decreasing the costs of termination; the progress made toward performing the whole contract; and the possibility of obtaining a more advantageous contract by resoliciting. HAR §3-126-38(a)(4).

In addition to these factors, the *In re Carl* opinion made clear that consideration must also be given to the State's interest in achieving the purposes of the Procurement Code:

The purpose of the bill is to revise, strengthen, and clarify Hawaii's laws governing procurement of goods and services and construction of public works.

Specifically, the bill establishes a new comprehensive code that will:

- (1) Provide for fair and equitable treatment of all persons dealing with the government procurement system;
- (2) Foster broad-based competition among vendors while ensuring, accountability, fiscal responsibility, and efficiency in the procurement process; and

(3) Increase public confidence in the integrity of the system. Sen. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39.

The public interest in the integrity of the procurement code cannot be ignored when determining whether it is in the best interest of the State to ratify an unlawfully awarded contract (footnote omitted).

In re Carl, 85 Hawaii at 455-56 (emphasis added).

In this case, KTW has been performing under the contract since approximately February 1998. Termination of the contract and resolicitation of the project may also subject Respondent to additional expenses.

On the other hand, **In re Carl** made clear that the immediate halting of all solicitation and contract activities pursuant to HRS §103D-701(f) is critical “[b]ecause the award of the contract so severely limits the relief available” **In re Carl, 85 Hawaii at 450.** This is particularly true because, unlike the American Bar Association’s Model Procurement Code for State and Local Governments, the remedies provided for in the State’s Procurement Code are exclusive. HRS §103D-704. Consequently, once the contract is awarded, the only remedy available is ratification or termination of the contract pursuant to HRS §103D-707. Moreover, as the court in **In re Carl** observed:

the further performance on the contract has proceeded, the more likely it is, given the applicable factors, that ratification of the contract is “in the best interests of the State,” effectively eliminating any remedy, either to the public or the protestor, from an illegally entered contract.

In re Carl, 85 Hawaii at 449.

These considerations underscore the importance of the stay required under HRS §103D-701(f) in achieving the goals for which the Procurement Code was enacted. For this reason, Respondent’s award of the KTW contract in violation of HRS §103D-701(f) cannot be overlooked even though Petitioner was unable to prove that its bid had been improperly rejected. Ratification of an illegally awarded contract can only

undermine the public's confidence in the integrity of the procurement system and, in the long run, discourage competition. Any concerns Respondent may have in avoiding the additional expenses and inconvenience that may result in having to engage in a second solicitation must give way to the State's interest in promoting and achieving the purposes of the Procurement Code.⁹ Based on these considerations, the Hearings Officer finds and concludes that ratification of the KTW contract would not be in the best interests of the State.

2. Award of Contract to Petitioner.

In addition to having the KTW contract terminated, Petitioner seeks the balance of the contract. This request, however, assumes that Petitioner's bid was improperly rejected by Respondent. Even if Petitioner's bid had been found to be responsive to IFB 1731, Petitioner does not cite¹⁰ and the Hearings Officer can find no authority to support an award of the contract to Petitioner. *In re Carl* recognized as much. In that case, the court stated:

⁹ *In Planning & Design Solutions v. City of Santa Fe*, 118 N.M.707, 710, 885 P.2d 628, 631 (1994), the New Mexico Supreme Court explained:

The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. **Of all the interests involved in competitive bidding, the public interest is the most important.**

Cited with approval in *In re Carl*, 85 Hawaii at 456 (emphasis added).

¹⁰ Petitioner cites *PRC Public Sector, Inc. v. County of Hawaii*, PHC 96-3 (May 31, 1996), in support of its requested relief. There, the Hearings Officer stated that:

a fair and equitable resolution of this matter would appear to include, as a minimum; 1) immediate cessation of all work currently being performed by HFSI/Wang Federal under the existing RFP No. 1541 contract, 2) pro-rata compensation and profit to HFSI/Wang Federal for work already performed under the contract, 3) reimbursement to PRC Public Sector, Inc., HFSI/Wang Federal, and Tiberon for their costs incurred by good faith participation in the selection process, and 4) reasonable attorney's fees and costs to PRC Public Sector, Inc. as the prevailing party which was, in effect, also acting in the capacity of a private attorney general to enforce the procurement laws.

In re PRC Public Sector, Inc., at page 35.

On the other hand, the Hearings Officer recognized that "a comprehensive reading of HRS Chapter 103D does not appear to reveal any authority for the imposition of an order which includes such relief (footnote omitted)," and ordered, as the "least undesirable" decision, that the contract with Respondent be terminated and the contracting party be awarded compensation from the Respondent for its actual expenses reasonably incurred under that contract as well as a reasonable profit. *In re PRC Public Sector, Inc. at pages 35-36.*

Because the contract had already been executed, however, even if the Hearings Officer or this court agreed that Ameritech's proposal should not have been considered, **the only remedy available is ratification or termination of the contract pursuant to HRS §103D-707, not the award of the contract to CARL as the only responsive, qualified offeror.**

In re Carl, 85 Hawaii at 450 (emphasis added).

We agree with the Library and Ameritech that CARL is not entitled to the remedy it seeks-recission of the contract with Ameritech and award of the contract to CARL.

In re Carl, 85 Hawaii at 456.

All of these considerations lead the Hearings Officer to find and conclude that Petitioner is not entitled to an award of the balance of the contract.

3. Bid Preparation Costs.

Where the contract has been awarded before the resolution of a protest, HRS §103D-701(g) entitles the protestor to recover its bid preparation costs provided (1) the protest is sustained; (2) **the protestor should have been awarded the contract**; and (3) the protestor is not awarded the contract. (emphasis added). See also, **In re Carl, 85 Hawaii at 456-58**. In this case, Petitioner's bid has been found to be unresponsive to IFB 1731 by virtue of the fact that the proposed materials were never approved by the DOH. Petitioner has therefore failed to show that it should have been awarded the contract and, as such, is not entitled to recover its bid preparation costs.

4. Attorneys' Fees.

Petitioner also requests its attorneys' fees in prosecuting this matter. Generally, "no attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation, or agreement." **Food Pantry, Ltd. v. Waikiki Business Plaza, Inc. 58 Haw. 606, 618, 575 P.2d 869, 878 (1978)**. In **In re Carl**, however, the court carved out a limited exception to the general rule. There, the court held that a protestor is entitled to recover its attorneys' fees incurred in prosecuting its protest if: (1) the protestor has proven that the solicitation was in violation of the Code; (2) the

contract was awarded in violation of HRS §103D-701(f); and (3) the award of the contract was in bad faith. **In re Carl, 85 Hawaii at 460.** The court's conclusion that head librarian Bartholomew Kane's ("Kane"), conduct in awarding the contract prior to the resolution of the protest amounted to bad faith, was apparently based on Kane's disregard of both HRS §103D-701(f) and the specific instructions of the administrator of the procurement office:

Once CARL's timely protest was filed, and during its pendency, Kane was prohibited by the Code and its implementing regulations from executing the contract until the chief procurement officer made a written "substantial interest" determination. Kane was certainly aware of HRS § 103D-701(f) and was specifically informed by Unebasami that, pursuant to HAR § 3-126-6, the Library was not to award the contract during the pendency of the protest. Kane's disregard of the mandate of clearly applicable law, as well as the specific directions of Unebasami, was, at best, reckless. In his zeal to have the project completed before the end of the legislative session, Kane prematurely awarded the contract in violation of law, effectively restricting CARL's opportunity to participate in a fair solicitation should it prevail on its protest. We therefore hold that Kane's conduct was in bad faith.

In re Carl, 85 Hawaii at 451-52 (emphasis added).

Based on the foregoing, it appears that a finding of bad faith requires more than a violation of HRS §103D-701(f). Indeed, the court in **In re Carl** required not only a violation of HRS §103D-701(f), but also, a separate finding of bad faith before a protestor is entitled to recover its attorneys' fees.

No evidence was presented in this case to show that Respondent's conduct in awarding the contract to KTW amounted to anything more than a violation of HRS §103D-701(f). Unlike the circumstances in **In re Carl**, the record in this case does not contain any evidence that Respondent had actual knowledge of the stay requirement at the time the contract was awarded to KTW. Consequently, the Hearings Officer finds that Petitioner has not proven by a preponderance of the evidence that Respondent's award of the contract to KTW was reckless, and as such, is not entitled to an award of attorneys' fees.

IV. DECISION

Based on the foregoing considerations, the Hearings Officer hereby orders as follows:

1. The contract awarded to KTW in conjunction with IFB 1731 shall be terminated on August 31, 1998;¹¹


2. KTW shall be paid its actual expenses reasonably incurred under the contract up to the time of its termination;

3. KTW shall be paid a reasonable profit for the work performed under the contract up to the time of its termination; and

4. Each party to bear its own attorneys' fees and costs incurred in pursuing this matter.

JUL -2 1998

Dated at Honolulu, Hawaii: _____



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

¹¹The KTW contract shall remain in effect until August 31, 1998 in order to provide Respondent with sufficient time to complete a second solicitation process and to avoid a disruption of services to the public.