



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

In the Matter of	)	PCX-2009-6
	)	
LUDWIG CONSTRUCTION, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND ORDER GRANTING
vs.	)	RESPONDENT'S MOTION
	)	TO DISMISS
COUNTY OF HAWAI'I,	)	
DEPARTMENT OF PUBLIC WORKS,	)	
	)	
Respondent.	)	
_____	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On November 13, 2009, Ludwig Construction, Inc. ("Petitioner"), filed a request for administrative review of the Department of Public Works, County of Hawai'i's ("Respondent") decision to deny Petitioner's protest in connection with a project designated as Lanikaula Street Sidewalk Improvements, Job No. E-3926 ("Project"). 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 November 24, 2009, Respondent filed the instant motion to dismiss. On November 30, 2009, Petitioner filed its memorandum in opposition to the motion.

The motion came on for hearing before the undersigned Hearings Officer on December 1, 2009. Petitioner was represented by Terry E. Thomason, Esq., Blake K. Oshiro, Esq., and Jessica Y.K. Wong, Esq. Respondent was represented by Julie K.L. Mecklenburg, Esq.

Having considered the argument of counsel, along with the memoranda, affidavit, and exhibits attached thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and order.

## II. FINDINGS OF FACT

1. On September 11, 2009, Respondent posted a notice to bidders for the Project (“IFB”).

2. The Special Notice to Bidders section of the IFB informed prospective bidders of the following:

Reminder Note: “A” general engineering contractors and “B” general building contractors are reminded that due to the Hawaii Supreme Court’s January 28, 2002 decision in Okada Trucking Co., Ltd. v. Board of Water Supply, et al., 97 Haw. 450 (2002), they are prohibited from undertaking any work, solely or as part of a larger project, which would require the general contractor to act as a specialty contractor in any area where the general contractor has no license. Although the “A” or “B” contractor may still bid on and act as the “prime” contractor on a “A” or “B” project (See, HRS § 444-7 for the definitions of an “A” and “B” project.), respectively, the “A” and “B” contractor may only perform work in the areas in which they have the appropriate contractor’s license (An “A” or “B” contractor obtains “C” specialty contractor’s licenses either on its own, or automatically under HAR § 16-77-32.). The remaining work must be performed by appropriately licensed entities. It is the sole responsibility of the contractor to review the requirements of this project and determine the appropriate licenses that are required to complete the project.

In addition to the “A” General Engineering license, *the following specialty licenses have been determined by the County to be required.*

- C-32 Ornamental, guardrail, signs and fencing
- C-37 Plumbing

Reinforcing steel, pavement saw cutting, water meter relocation and related work, shall be considered incidental. No other specialty licenses will be required unless noted otherwise in an addendum. *Anyone who disagrees with this determination shall submit written comments at least 10 days prior to bid opening.*

\* \* \* \*

*(Emphasis added).*

3. According to the IFB, bids were due by and would be opened on October 15, 2009.
4. On September 23, 2009, Petitioner submitted its Intent to Bid on the Project to Respondent.
5. By letter dated October 23, 2009 and after the bids were opened, Respondent notified Petitioner that:

your bid submitted for the subject project is hereby disqualified pursuant to Section 2.2-6 of the General Requirement and Covenants of the Department of Public Works, County of Hawai'i, dated July, 1972 and the Hawai'i Administrative Rules §3-12-33(d)(5). This project requires a C-37 – Plumbing specialty license, as noted in the Special Notice to Bidders section of the Proposal and Specifications. This license was not accounted for in your bid proposal.

\* \* \* \*

6. By letter dated October 27, 2009, Petitioner protested Respondent's October 23, 2009 decision to disqualify Petitioner's bid. Petitioner alleged in its protest letter that "[i]n the bid documents the county asked to use an improper license class on this project."
7. By letter dated November 6, 2009, Respondent denied Petitioner's protest.

8. On November 13, 2009, Petitioner filed the instant request for administrative review.

### III. CONCLUSIONS OF LAW

In bringing this motion, Respondent contends that Petitioner's protest was untimely and, therefore, the Hearings Officer lacks jurisdiction to hear this matter.

Hawaii Revised Statutes §103D-701(a) provides:

§103D-701 Authority to resolve protested solicitations and awards. (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. *A 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; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of the award of the contract either under section 103D-302 or 103D-303, as applicable; provided further that no protest based on the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.*

(Emphasis added).

HRS §103D-701(a), expressly requires protests to be filed within five working days after the aggrieved party knew or should have known of the facts giving rise to the protest *and*, in any event, prior to the date set for the receipt of offers where the protest is based on the content of the solicitation. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)*. The requirement was designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services; PCH 2000-8*. Moreover, in construing HRS §103D-701(a), this Office has

consistently held that the accomplishment of the underlying objectives of HRS Chapter 103D (“Code”) requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc., v. County of Maui*, PCH 98-6 (December 9, 1998). See also, *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget and Fiscal Services*, PCH-2000-8 (October 17, 2000)(strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute’s underlying purpose); *CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. DOE, et al.*, PCH-2007-7 (December 12, 2007).

The facts giving rise to Petitioner’s protest were known or should have been known by Petitioner at least by September 23, 2009 when Petitioner submitted its Intent to Bid on the Project. Petitioner was therefore required to file its protest by September 30, 2009. Furthermore, because Petitioner’s protest was based entirely on the provision in the IFB which required a C-37 specialty contractor’s license, the protest was undoubtedly one based on the content of the solicitation. As such, the protest should have been filed, at the latest, prior to October 15, 2009 - the date set for the receipt of the bids, regardless of whether Petitioner knew or should have known of the basis for its protest<sup>1</sup>. Based on these considerations, the Hearings Officer concludes that Petitioner’s October 27, 2009 filing of its protest was untimely.

Petitioner attempts to characterize its protest as one based on Respondent’s determination that Petitioner is not qualified to perform the required work, rather than on one based on the content of the IFB. According to Petitioner, HRS Chapter 444 and its implementing rules do not require a C-37 specialty license to perform the work called for by the IFB. Notwithstanding this argument, however, the IFB unequivocally required a C-37 specialty contractor’s license. Thus, if Petitioner believed that that requirement was improper, it was obligated to protest within 5 working days and, in any event, prior to the submission of bids. Rather than submit such a protest, however, Petitioner apparently ignored that

---

<sup>1</sup> HRS §103D-701 requires that a protest based on the content of the solicitation be submitted prior to the date set for the receipt of offers. This presumes that the protestor will have sufficient knowledge of the contents of the bid documents soon after its issuance and provides governmental agencies with the opportunity to correct deficiencies in those documents early in the process in order to minimize disruption to procurements and contract performance. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH 2002-7 (August 2, 2002).

requirement and instead, indicated to Respondent its intent to bid. Having failed to file a timely protest, Petitioner is now barred from contesting the requirement in the solicitation calling for a C-37 specialty contractor's license<sup>2</sup>.

IV. DECISION

Based on the foregoing considerations, Respondent's motion to dismiss is granted and this matter is hereby dismissed. Each party shall bear its own attorney's fees and costs incurred in this matter.

Furthermore, because the Hearings Officer lacks jurisdiction to hear this matter, Petitioner's bond shall be returned to Petitioner upon the filing of an affidavit by Petitioner attesting that the time to appeal has lapsed and that no appeal has been timely filed. In the event a timely application for judicial review of this decision is filed, the disposition of the bond shall be subject to determination by the court.

DEC 21 2009

Dated at Honolulu, Hawaii: \_\_\_\_\_

**/s/ CRAIG H. UYEHARA**

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

---

<sup>2</sup> Petitioner also argues that "any failure to include a C-37 license in a bid is a matter of 'responsibility', to be determined at any time up to the award of the contract." The issue raised *by the motion* however, is not whether Petitioner is a responsible bidder. Rather, the issue here is whether the protest was timely filed pursuant to HRS §103D-701 and its implementing rules.