



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2012 APR 12 P 12: 01

HEARINGS OFFICE

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

| | | |
|--------------------------------|---|------------------------------|
| In the Matter of |) | PCY-2012-012 |
| |) | |
| WASATCH TRANSPORTATION, INC., |) | HEARINGS OFFICER'S |
| |) | FINDINGS OF FACT, |
| Petitioner, |) | CONCLUSIONS OF LAW, AND |
| |) | FINAL ORDER (1) GRANTING |
| vs. |) | RESPONDENT'S MOTION |
| |) | TO DISMISS OR IN THE |
| AMY S. KUNZ in her capacity as |) | ALTERNATIVE FOR SUMMARY |
| ASSISTANT SUPERINTENDENT/CHIEF |) | JUDGMENT AS TO ALL CLAIMS |
| FINANCIAL OFFICER, STATE OF |) | AND (2) DENYING PETITIONER'S |
| HAWAII DEPARTMENT OF |) | MOTION FOR SUMMARY |
| EDUCATION, |) | RELIEF OR JUDGMENT |
| |) | |
| Respondent. |) | |

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER (1) GRANTING RESPONDENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AS TO ALL CLAIMS, AND (2) DENYING PETITIONER'S MOTION FOR SUMMARY RELIEF OR JUDGMENT

I. INTRODUCTION

On March 22, 2012, Wasatch Transportation, Inc. ("Petitioner") filed a request for an administrative hearing to contest Respondent Amy S. Kunz in her capacity as Assistant Superintendent/Chief Financial Officer, State of Hawaii Department of Education's ("Respondent") March 20, 2012 denial of Petitioner's March 15, 2012 protest. The protest concerned a letter dated March 13, 2012 from Respondent partially "rescinding" a contract award made to Petitioner in connection with Respondent's Invitation for Bids to furnish student bus transportation, regular services on the Big Island (West Hawaii), No. IFB D12-055. ("IFB"). 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 April 3, 2012, Petitioner filed a motion for summary relief or judgment and Respondent filed a motion to dismiss or in the alternative for summary judgment as to all claims.

Both motions came on for hearing before the undersigned Hearings Officer on April 5, 2012. Petitioner was represented by its attorney, Thomas J. Wong, Esq. Respondent was represented by its attorney, James E. Raymond, Esq.

Having reviewed and considered the argument of counsel, together with the memoranda, declarations and exhibits attached thereto along 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 or about October 28, 2011, Respondent issued the IFB.
2. The IFB sought bids for 17 school bus routes on the Big Island. The routes were divided into two groups. Group 1 consisted of thirteen routes designated as K-01 to K-13. Group 2 consisted of four routes designated as K-20 to K-23.
3. On November 8, 2011, Respondent issued Addendum A to the IFB by publicly posting the addendum on the State Procurement Office’s (“SPO”) website.
4. Addendum A split the original thirteen Group 1 routes into two separate groups. Under Addendum A, Group 1 consisted of routes K-01 to K-08 and Group 2 consisted of routes K-09 to K-13. Group 3 consisted of all of the routes that had been included in the original Group 2, K-20 to K-23.
5. Because it had not been aware of the issuance of Addendum A, Robert’s submitted a bid for the original Group 1 consisting of routes K-01 to K-13, and another bid for the original Group 2 consisting of routes K-20 to K-23.
6. Petitioner submitted bids for the 8 routes designated as Group 1 (K-01 to K-08) and the 5 routes designated as Group 2 (K-09 to K-13) by Addendum A.

7. On December 21, 2011, Robert's filed a protest in connection with the IFB.
8. By letter dated February 6, 2012, Respondent denied Robert's protest:

This letter responds to your letter dated December 21, 2011, on behalf of Robert's Hawaii School Bus, Inc. (Robert's Hawaii). Your letter sets forth two bases for concern: (1) that Robert's Hawaii was not notified that an addendum to the original invitation for Bids (IFB) was issued despite Robert's Hawaii having registered as a bidder prior to the bid due date; and (2) that the apparent lowest bidder for one group of bus routes is precluded under HRS §84-15(b) from entering into a service contract with the Department of Education.

* * * *

In addition to the foregoing undisputed facts, on November 8, 2011, by email, the DOE Procurement and Contracting Branch(PCB), notified several entities that "An addendum to the above referenced IFB has been posted to the [the SPO's public website]."

This email was "blind copied" to three prospective bidders who had registered with PCB prior to the date Addendum A was posted. This email was not "blind copied" to two prospective bidders – one of whom was Robert's Hawaii – who submitted their respective registration form after Addendum A was posted on the public web site.

Robert's Hawaii asserts that PCB had an affirmative duty to send individual notices of a prior publicly-posted addendum to bidders who registered with PCB after the addendum was publicly available.

It is the Department's position that it has no affirmative duty to send a targeted e-mail notification of an addendum to a bidder who registers with the Department after the addendum has been issued but prior to the registration where that addendum is publicly available at the site where the original IFB and notices are posted. Rather, the duty falls on the bidder at all times prior to the submission of its bid to check the public site for the original solicitation and for all notices, updates, conferences, and addendum, if any.

In this case, Robert's Hawaii could have and should have easily checked the public website at any time during the approximately 30-day period between the positing of Addendum A and the submission of Robert's Hawaii bid.

* * * *

In addition, we find that to the extent your letter protests a possible award of a contract to the specific bidder who you assert is disqualified from contracting with the Department, your letter of protest is premature. There has been no award of a contract and no notice of an award.

* * * *

9. On February 13, 2012, Robert's filed a request for administrative review of Respondent's February 6, 2012 denial of its protest. The matter was designated as PCY-2012-006.

10. At no time did Petitioner attempt to intervene in PCY-2012-006.

11. On February 17, 2012, Respondent awarded the contract(s) for Groups 1, 2, and 3 to Petitioner as the lowest responsive and responsible bidder.

12. On February 19, 2012, Robert's and Respondent filed cross-motions for summary judgment in PCY-2012-006. The motions were heard on March 9, 2012.

13. On March 14, 2012, the Hearings Officer issued his findings of fact, conclusions of law, and final order (1) granting in part and denying in part Robert's motion for summary judgment and (2) granting in part and denying in part Respondent's motion for summary judgment in PCY-2012-006 ("Decision").

14. In his Decision, the Hearings Officer concluded that:

a. Robert's mistake in failing to categorize routes K-01 to K-13 into the two groups specified in Addendum A was obvious and should have been corrected pursuant to HAR §3-122-31;

b. Respondent's practice and failure to provide Robert's with Addendum A after it submitted its Registration Form on December 8, 2011 was inconsistent with HAR §3-122-16.06;

c. Unless the contract to Petitioner was terminated, Robert's would be denied any meaningful relief, including the opportunity to have its bid properly evaluated by Respondent; and

d. Ratification of the contract would seriously undermine the public's confidence in the integrity of the procurement system and, in the long run, discourage competition. Ratification of the contract would therefore not be in the State's best interest.

The Hearings Officer ordered, in relevant part, that "the contract(s) awarded to Wasatch for routes K-01 to K-08 and K-09 to K-13 are hereby terminated pursuant to HRS §103D-707(1)(B) and Wasatch shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination".

15. By letter dated March 13, 2012, Respondent informed Petitioner that the award made to Petitioner dated February 17, 2012 "must be partially rescinded, based on the oral ruling of a Hearings Officer (Officer) of the Department of Commerce and Consumer Affairs (DCCA), Office of Administrative Hearings (OAH)."

16. By letter dated March 15, 2012, Petitioner filed a protest of Respondent's March 13, 2012 letter "partially rescinding the award made to Wasatch Transportation, Inc. dated February 17, 2012." According to Petitioner's protest:

Wasatch Transportation, Inc. is protesting the rescinding of the award on the following grounds:

1. As stated, the notice of award made on February 17, 2012 did not state nor condition that the award of the contract was contingent on the outcome of any pending administrative hearing.
2. Wasatch Transportation has performed in good faith.

3. Robert's Hawaii cannot be awarded Groups 1 and 2 since Robert's bid should be disqualified for not complying with the DOE's bid requirements. As stated in the special conditions, specifically Special Condition 20(f), due to Robert's noncompliance and the incomplete bid offer that was submitted, Robert's bid cannot be considered and must be rejected.

4. Even if the DOE is basing this rescission on the "hearings officer's" verbal decision, the DOE has a burden of appealing this for judicial review and seeking a determination that the hearings officer was in error.

In conclusion, and for the reasons stated, this letter is to protest the DOE's letter of March 13, 2012, and it is respectfully submitted and request that the DOE retract the letter of March 13, 2012, and proceed as stated in the notice of award, dated February 17, 2012, to Wasatch Transportation, Inc.

17. By letter dated March 20, 2012, Petitioner's protest was denied by Respondent. The letter stated in part, "[b]ased on the Officer's ruling, and in compliance therewith, this protest submitted by Wasatch is hereby denied.

18. By letter dated March 22, 2012, Petitioner filed the instant request for administrative review of Respondent's March 20, 2012 denial of its protest.

19. On or about March 27, 2012, Respondent appealed the Hearings Officer's Decision in PCY-2012-006 to the State of Hawaii First Circuit Court.

III. CONCLUSIONS OF LAW

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 Haw. 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 pursuing this action, Petitioner directly challenges the Hearings Officer's Decision in PCY-2012-006. Petitioner is seeking an order compelling Respondent to "retract" its March 13, 2012 letter which informed Petitioner that Respondent was rescinding the award of the contracts for Groups 1 and 2 in compliance with the Hearings Officer's Decision in PCY-2012-006 and, instead, "proceed as stated in the notice of award . . . to Wasatch Transportation, Inc", notwithstanding the Hearings Officer's Decision. Petitioner, like Respondent in PCY-2012-006, alleges that Robert's bid was nonresponsive because it failed to comply with Addendum A and that "since [Wasatch's] bid was in response to Addendum A it is the only bid that can be accepted."¹ Petitioner also contends that consideration must be given to "having the contract issued to Wasatch ratified or modified" rather than terminated as ordered by the prior Decision.

In enacting HRS Chapter 103D ("Code"), the Legislature sought to establish a comprehensive code that would provide for fair and equitable treatment of all persons dealing with the procurement system, foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and *efficiency in the procurement process*; and increase confidence in the integrity of the system. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH-99-6 (August 9, 1999)*. Toward those ends, the Code provides a comprehensive and expeditious process for the resolution of protests. Under HRS §103D-701, protests may be filed by a bidder or prospective bidder who is "aggrieved in connection with the solicitation or award of the contract", while HRS §103D-709(a) bestows upon the Hearings Officer jurisdiction to review and determine any request from any bidder *aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or an authorized designee of either officer. (emphasis added)*.

The record presented here clearly established that Petitioner's protest was not based on any determination by Respondent's chief procurement officer but rather, exclusively

¹ During the hearing on its motion, Petitioner's counsel acknowledged that the relief Petitioner seeks is based entirely on the contention that Robert's bid was nonresponsive because it did not comply with Addendum A.

on the Hearings Officer's Decision in PCY-2012-006 which, among other things, ordered that the contract awarded to Petitioner for Groups 1 and 2 be terminated. HRS §103D-709(a), however, limits the Hearings Officer's jurisdiction to review and determine requests from bidders who were aggrieved *by a determination of the chief procurement officer*. Nowhere in the Code is a bidder authorized to bring an action under either HRS §103D-701 or HRS §103D-709 to challenge the Hearings Officer's determination. Rather, any such challenge must be instituted in the circuit court pursuant to HRS §103D-710(a). The Hearings Officer therefore lacks jurisdiction over this matter. To hold otherwise would result in endless litigation, render HRS §103D-709(b) meaningless², and fly in the face of the Code's intent³.

IV. ORDER

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

1. Respondent's motion to dismiss or in the alternative for summary judgment as to all claims is GRANTED and this matter is DISMISSED;
2. Petitioner's motion for summary relief or judgment is DENIED; and
3. The parties shall bear their own attorneys' fees and costs incurred in this matter.

This is a Final Order. No other issues remain for hearing.

DATED at Honolulu, Hawaii: APR 12 2012.



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

² HRS §103D-709(b) provides that the Hearings Officer's decision "shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court . . ."

³ At the hearing on its motion, Petitioner's counsel withdrew its claim that Respondent had a legal duty to appeal the Decision in PCY-2012-006. As to its "claim" that the February 17, 2012 notice of award failed to state or condition the award on the outcome of the administrative hearing in PCY-2012-006, the Hearings Officer lacks jurisdiction over such contractual controversies. HRS §103D-703.