

SEP 17 11 22 AM '01
HEARINGS OFFICE



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

CONSTRUCTION MATERIAL AGENTS)	PCH-2000-11
AND SUPPLY LLC; ROOFTECH, INC.;)	
BUILDING ENVELOPE, INC.; HI-TEC)	HEARINGS OFFICER'S
ROOFING SERVICES, INC.; M&M)	FINDINGS OF FACT,
PACIFIC, INC.; ADVANCED ROOFING)	CONCLUSIONS OF LAW,
TECHNOLOGY, INC.; AND BUCK)	AND DECISION GRANTING
ROOFING,)	RESPONDENTS' MOTION
)	TO DISMISS PETITIONERS'
Petitioners,)	REQUEST FOR HEARING
)	
vs.)	
)	
STATE OF HAWAII; STATE)	
PROCUREMENT OFFICE, STATE OF)	
HAWAII; DEPARTMENT OF)	
ACCOUNTING AND GENERAL)	
SERVICES, STATE OF HAWAII,)	
)	
Respondents.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION GRANTING RESPONDENTS'
MOTION TO DISMISS PETITIONERS' REQUEST FOR HEARING

This matter having come on for hearing before the undersigned Hearings Officer on September 11, 2001; Patricia Ohara, Esq. appearing for Respondents State Procurement Office and Department of Accounting and General Services ("Respondents"); and Matt A. Tsukazaki, Esq. appearing for Petitioners Construction Material Agents and Supply LLC, Rooftech, Inc., Building Envelope, Inc., HI-TEC Roofing Services, Inc.; M&M Pacific, Inc.; Advanced Roofing Technology, Inc., and Buck Roofing; and after due consideration of the motion and memoranda 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 Decision.

I. FINDINGS OF FACT

1. In October 2000, Respondent Department of Accounting & General Services issued two Requests for Proposals ("RFP") in conjunction with eleven roofing repair projects for various public schools, designated as Projects A thru E and F thru K.

2. Proposals for Projects A thru E were due by November 14, 2000. Proposals for Projects F thru K were due by November 17, 2000.

3. Of the seven Petitioners, only two submitted proposals prior to the published deadlines. Petitioner HI-TEC Roofing Services, Inc. ("HI-TEC") submitted a timely proposal for Projects F thru K; Petitioner M&M Pacific Inc. ("M&M") submitted a timely proposal for Projects A thru E.

4. Following the opening of the bids, the proposals submitted by both HI-TEC and M&M were rejected. According to the records, the proposals were rejected after it was discovered that multiple pages were missing from both proposals.

5. Petitioners filed their protest on November 22, 2000. Neither HI-TEC nor M&M, however, protested the rejection of their proposals.

6. By letter dated December 4, 2000, Respondent Department of Accounting & General Services denied Petitioners' protest as untimely.

7. On December 13, 2000, Petitioners filed their request for administrative review with the Office of Administrative Hearings, 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 (November 20, 1996)*.

Respondents' motion is based in part on the theory that Petitioners are not actual or prospective bidders under Hawaii Revised Statutes ("HRS") Chapter 103D and therefore lack standing to pursue the instant protest.

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.

Similarly, Hawaii Administrative Rules §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 provision, standing to file a protest under HRS Chapter 103D is conferred upon and limited to actual or prospective bidders, offerors, or contractors. In this case, there is no dispute that Petitioners Construction Material Agents and Supply LLC, Rooftech, Inc., Building Envelope, Inc., Advanced Roofing Technology, Inc., and Buck Roofing did not submit proposals in response to or as a result of the solicitations. As such, these Petitioners were not actual bidders under HRS Chapter 103D. It is also clear that these Petitioners were not prospective bidders.

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, these five Petitioners no longer had any realistic expectation of submitting a bid in response to the solicitation once the deadline expired on November 14, 2000 and November 17, 2000. As such, the Hearings Officer finds that these Petitioners were not “prospective bidders” and consequently lack standing to maintain the instant protest. See also, *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation*, PCH 2000-4 (June 8, 2000); *Hawaiian Natural Water Co. v. City & County*

of Honolulu, PCH 99-14 (April 25, 2000) (A person or entity which has not submitted a bid in response to an invitation for bids or request for proposals prior to the deadline for such submissions is neither an actual nor a prospective bidder, offeror, nor contractor, and thus has no standing to file a request for administrative hearing under HRS Chapter 103D).

On the other hand, both HI-TEC and M&M submitted timely proposals. According to the undisputed evidence, however, both proposals were missing pages and were rejected. Furthermore, a careful review of the protest confirms that neither HI-TEC nor M&M protested the rejection of their proposals.

In Hawaii Newspaper Agency, et al. v. State of Hawaii, Department of Accounting & General Services, et al., PCH-99-2 and Milici Valenti Ng Pack v. State of Hawaii, Department of Accounting & General Services, PCH-99-3 (consolidated), Milici's bid was rejected because it was submitted after the deadline set forth in the solicitation. Notwithstanding that, Milici did not protest the rejection of its bid within the 5 working-day period required by HRS §103D-701(a). Instead, upon being notified more than a month later that the contract had been awarded to the low bidder, Milici protested, claiming that the low bid was nonresponsive to the solicitation and that its own bid had been improperly rejected. In concluding that Milici lacked standing to maintain the protest, the Hearings Officer stated:

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." 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 added).

Here, there is no dispute that both M&M's and HI-TEC's proposals were rejected and that the protest filed herein on November 22, 2000 did not contest or even address that rejection. Thus, even if the claims included in the protest are sustained, Petitioners would have no realistic expectation of submitting a proposal and being awarded the contract. Accordingly, the Hearings Officer must conclude that M&M and HI-TEC also lack standing to pursue the instant protest.

Respondents also argue that the protest was untimely. Because Respondents have established a sufficient basis to prevail in its motion under the above analysis of its first theory, it is unnecessary to address this alternative theory¹.

III. DECISION

Accordingly, based upon the above findings of fact and conclusions of law, Respondents' Motion to Dismiss Petitioners' Request for Hearing is granted and the above-entitled matter is hereby dismissed.

DATED at Honolulu, Hawaii: SEP 17 2001



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

¹ Neither does this ruling address the merits of the Protest itself to wit, whether the "Performance Information Procurement System" violates HRS Chapter 103D.