



2003 MAY 16 P 12:39

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

HAWAI'I SCHOOL BUS ASSOCIATION,)	PCH-2003-3
)	
Petitioner,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
vs.)	CONCLUSIONS OF LAW,
)	AND ORDER GRANTING
DEPARTMENT OF EDUCATION,)	RESPONDENT'S MOTION
STATE OF HAWAI'I,)	TO DISMISS
)	
Respondent.)	

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

This matter having come on for hearing before the undersigned Hearings Officer on April 24, 2003; Aaron H. Schulaner, Esq. appearing for Respondent Department of Education, State of Hawai'i ("Respondent"); and Kenneth W. Levasseur appearing as the authorized representative of the Hawai'i School Bus Association ("Petitioner"); 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 Order.

I. FINDINGS OF FACT

1. On or about February 5, 2003, Petitioner submitted a protest to Respondent in connection with Invitation for Bids Nos. E03-29, E03-30, E03-31, E03-32, E03-33, E03-34, and E03-35 ("IFB").
 2. On or about March 6, 2003, following Respondent's denial of its protest, Petitioner requested that Respondent reconsider its decision to deny the protest.
 3. On or about March 12, 2003, Respondent notified Petitioner in writing that it was denying Petitioner's request for reconsideration.
 4. By letter dated March 19, 2003, Petitioner filed the instant request for administrative review.
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5. Petitioner is an association whose members are comprised exclusively of school bus contractors.

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).*

Respondent's motion is based in part on the theory that Petitioner is not an actual or a prospective bidder under Hawaii Revised Statutes ("HRS") Chapter 103D ("Procurement Code") and therefore lacks standing to pursue the instant protest and appeal.

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.

(Emphasis added).

Similarly, HRS §103D-709(a) provides:

The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701 or 103D-702.

(Emphasis added).

And 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.¹

¹ HAR §3-120-2 defines a "bidder" as "any individual, partnership, firm, corporation, joint venture, or other entity submitting, directly or through a duly authorized representative or agent, a bid for the good, service, or construction contemplated," while an "offeror" is "any individual, partnership, firm, corporation, joint venture, or other entity submitting, directly or through a duly authorized representative or agent, an offer for the good, service, or construction contemplated." A "contractor" is defined in HRS §103D-104 as any person having a contract with a governmental body.

The foregoing statutory provisions and rule extend the ability to protest under HRS Chapter 103D only to actual or prospective bidders, offerors, or contractors. Moreover, the language of HRS §103D-701(a) clearly establishes, by the use of the word “prospective,” that, in order to be eligible to protest, one who has not actually submitted an offer must be expecting to submit an offer prior to the closing date of the solicitation. This office has previously held that a person or entity that has not submitted a bid or offer 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 or offeror, and thus has no standing to bring a protest under HRS Chapter 103D. *Browning Ferris Industries et.al., vs. County of Kauai, PCH 96-11 (January 29, 1997)*.

This office has also construed HRS §103D-701(a) to deny taxpayers standing to bring a protest under the Procurement Code. *Hawaii Newspaper Agency, et. al., v. State Of Hawaii, PCH-99-2; Milici Valenti Ng Pack v. State Of Hawaii, PCH-99-3 (consolidated)(April 16, 1999)*. In arriving at that conclusion, the Hearings Officer cited the Virginia Supreme Court’s opinion in *Concerned Taxpayers of Brunswick County, et al., v. County of Brunswick, 455 S.E.2d 712 (Va. 1995)* with approval. There, Concerned Taxpayers brought an action against the county in connection with the planned construction of a landfill. Concerned Taxpayers alleged that the county’s award of the contract for the construction work to a private company was void because the county did not comply with the state public procurement act. More specifically, Concerned Taxpayers alleged that the county negotiated and contracted with the private company even though the company’s proposal was not responsive to the request for proposals. In affirming the trial court’s ruling that Concerned Taxpayers lacked standing to bring suit for the enforcement of the procurement act, the court said:

[When] a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise (citations omitted). The Procurement Act “confers certain rights and obligations upon citizens of the Commonwealth, nongovernmental contractors, and governmental entities.” (citations omitted). These rights and obligations did not exist in the common law and were created through the statutory scheme of the Procurement Act.

The Procurement Act also provides remedies for individuals or entities who have been denied rights conferred by the Act. Remedies for the violations alleged by Concerned Taxpayers are contained in Code §§ 11-63 through -70. *These sections permit only bidders, offerors, and contractors, within the meaning of the Act, to invoke*

those remedies by protesting an award, initiating administrative procedures, or bringing an action to challenge a decision to award a contract. The Procurement Act does not provide a right of action to those not involved in the bidding and procurement process. Since Concerned Taxpayers are not among those afforded remedies under Code §§ 11-63 through -70, they do not have standing to challenge the Board's alleged violations of the Procurement Act.

Concerned Taxpayers at 717-18. (Emphasis added).

These decisions make clear that the rights and remedies created under HRS Chapter 103D were intended for and are available only to those who participated in or still have a realistic expectation of submitting a bid in response to the IFB.² In this case, Petitioner does not dispute that it did not and will not submit a bid in response to or as a result of the IFB. Instead, Petitioner argues that it has standing as a *person aggrieved* in connection with the solicitation pursuant to HRS §103D-704. That section provides in part:

The procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract . . .

In construing the various provisions of the Procurement Code, the foremost obligation is to ascertain and give effect to the intention of the legislature which is to be construed primarily from the language of the statute itself. The language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose. *See, Housing Finance & Development Corp. v. Castle, 898 P.2d 576 (Haw. 1995); State v. Ramela, 885 P.2d 1135 (Haw. 1994).* And unless there are clearly expressed legislative intentions to the contrary, the words of the statute are conclusive. *Thousand Friends, Life of the Land, Inc. v. City & County of Honolulu, 806 F.Supp. 225 (D. Haw. 1992).*

Here, Petitioner's reliance on and interpretation of HRS §103D-704 ignores and is inconsistent with the clear limitations to standing set forth in the sections cited above. Rather, construing the Procurement Code as a whole, the Hearings Officer concludes that standing to bring a protest pursuant to HRS Chapter 103D is conferred upon any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract. Under the

² This conclusion is also consistent with the underlying purpose of the Procurement Code of ensuring efficiency in the procurement process. *Standing Committee Report No. S8-93, 1993, Senate Journal at 39.*

