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

In the Matter of	)	PCH-2007-2
	)	
NAN, INC.,	)	HEARINGS OFFICER'S FINAL ORDER
	)	GRANTING RESPONDENT'S MOTION
Petitioner,	)	TO DISMISS
	)	
vs.	)	
	)	
DEPARTMENT OF ACCOUNTING AND	)	
GENERAL SERVICES, STATE OF	)	
HAWAII,	)	
	)	
Respondent.	)	
_____		)

HEARINGS OFFICER'S FINAL ORDER  
GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On April 10, 2007, Nan, Inc. ("Petitioner") by and through its attorney David B. Rosen, Esq. filed a request for an administrative hearing to contest the Department of Accounting and General Services, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the pre-hearing conference held on April 16, 2007, the parties agreed to waive the statutory requirement that the hearing begin within 21 days from receipt of the request for hearing and to stipulate to rescheduling the hearing set for April 24, 2007 to May 14, 2007. The parties also agreed to have a second pre-hearing conference on April 24, 2007.

On April 19, 2007, Patricia Ohara, Esq., attorney for Respondent, notified the Hearings Officer that a pre-hearing conference was necessary because Respondent now wanted to go forward with the hearing on April 24, 2007. A second pre-hearing conference was held on April 19, 2007. Respondent indicated that it would be filing a motion to dismiss by April 20, 2007. The parties agreed to have a hearing on Respondent's motion on April 25, 2007, and that the hearing on the merits would be held on May 14, 2007 if Respondent's motion was denied. Respondent filed its Motion to Dismiss or in the Alternative for Summary Judgment ("Motion") on April 20, 2007. Petitioner filed its Memorandum in Opposition to the Motion on April 24, 2007.

A hearing on the Motion was conducted on April 25, 2007. Petitioner was represented by Mr. Rosen and Respondent was represented by Ms. Ohara. The matter was taken under advisement. By a letter dated May 3, 2007, the Hearings Officer notified the parties that she intended to issue a final order granting Respondent's Motion and accordingly, that the hearing set for May 14, 2007 had been taken off the calendar.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order.

## II. FINDINGS OF FACT

1. Respondent issued a solicitation for D.A.G.S. Job No. 12-21-7043, Kapolei Judiciary Complex. Bid opening was on March 1, 2007, and Petitioner was the lowest bidder. Unlimited Construction Services ("Unlimited") was the second lowest bidder and Dick Pacific Construction Co. was the third lowest bidder.

2. By a letter dated March 7, 2007 to Petitioner's President Fooney Freestone, Respondent informed Petitioner that it was rejecting Petitioner's offer as non-responsive because Petitioner failed to list required subcontractors for ventilating and air conditioning, acoustical and insulation and mechanical insulation. This letter also noted that Petitioner's offer included alterations to the Solicitation, Offer and Contract Form, rendering Petitioner's offer non-responsive and not comparable to other offers. Lastly, Respondent noted that Petitioner had listed Norment Security for the C-25 scope of work and that Norment Security did not have a Hawaii contractor's license.

3. By a letter dated March 16, 2007, Petitioner informed Respondent that it understood that its bid was rejected as non-responsive and that as a result of Petitioner's disqualification, the award was being designated to the second lowest bidder, Unlimited, but that Petitioner believed that Unlimited's bid was also non-responsive. Petitioner stated that it also believed that Dick Pacific Construction Co.'s bid was non-responsive so "in fairness to all involved, the project should be re-bid as soon as possible, to allow for an award in the remaining time allotted."

4. By a letter dated April 3, 2007, Respondent responded to Petitioner's March 16, 2007 letter. Respondent treated Petitioner's March 16, 2007 letter as a protest and denied Petitioner's protest against Unlimited and sustained Petitioner's protest against Dick Pacific Construction Co.

5. On April 10, 2007, Petitioner appealed Respondent's decision to deny Petitioner's protest against Unlimited. Petitioner requested that the Office of Administrative Hearings conduct a *de novo* review and that the following relief be granted: (1) a determination that the bid submittal by Unlimited is non-responsive and (2) a directive to Respondent to re-solicit/re-bid the project as there were no remaining responsive bidders. Petitioner also requested that Respondent refrain from taking further action on the solicitation or award of the contract in accordance with Hawaii Revised Statutes ("HRS") § 103D-709(e).

6. Petitioner does not contest Respondent's finding that its bid was non-responsive.

### III. 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 v. County of Kauai*, PCH-96-9 (November 20, 1996).

Respondent's Motion is based on the assertion that Petitioner lacks standing, as it is neither an actual nor prospective bidder aggrieved in connection with the solicitation or award of a contract. Petitioner contends that it has standing to protest Respondent's stated

decision to proceed with an award to Unlimited, a similarly non-responsive bidder, because rejection of Unlimited's bid would require Respondent to re-solicit/cancel the procurement.

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.

In addition, Hawaii Administrative Rules ("HAR") § 3-126-1 defines a "protestor" as  
any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract and who files a protest.

The issue to be resolved is whether Petitioner is "aggrieved" in connection with the award of the contract. In *Hawaii Newspaper Agency, et al. v. State Dept. of Accounting and General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting and General Services, et al.*, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999) and *Kidde Fire Trainers, Inc. v. Department of Finance, County of Hawaii*, PCH 2005-9 (January 9, 2006) the Hearings Officers found that a petitioner did not have standing to contest an agency's award of a contract if the petitioner's bid was rejected as non-responsive because the petitioner had no realistic expectation of being awarded the contract and was therefore, not "aggrieved in connection with the solicitation or award of the contract." However, Petitioner has cited cases decided by the Comptroller General where parties similarly situated to Petitioner were found to have standing pursuant to the definition of "interested party" contained in 31 U.S.C.A. § 3551. This section provides:

**§ 3551. Definitions**

...

**(2)(A)** The term 'interested party', with respect to a contract or a solicitation or other request for offers described in paragraph (1) means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

