



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 APR -9 A 9:44

HEARINGS OFFICE

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

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|------------------------------------|---|---------------------|
| In the Matter of |) | PCH-2008-22 |
| |) | |
| DELTA CONSTRUCTION |) | [Consolidated] |
| CORPORATION, a Hawaii corporation, |) | |
| |) | |
| Petitioner, |) | HEARINGS OFFICER'S |
| vs. |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| |) | AND DECISION |
| DEPARTMENT OF HAWAIIAN HOME |) | |
| LANDS, STATE OF HAWAII, |) | |
| |) | |
| Respondent, |) | |
| and |) | |
| |) | |
| PARADIGM CONSTRUCTION LLC, |) | |
| |) | |
| Intervenor. |) | |
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| In the Matter of |) | PCH-2009-7 |
| |) | |
| DELTA CONSTRUCTION |) | |
| CORPORATION, a Hawaii corporation, |) | |
| |) | |
| Petitioner, |) | |
| vs. |) | |
| |) | |
| DEPARTMENT OF HAWAIIAN HOME |) | |
| LANDS, STATE OF HAWAII, |) | |
| |) | |
| Respondent, |) | |
| and |) | |
| |) | |
| PARADIGM CONSTRUCTION LLC, |) | |
| |) | |
| Intervenor. |) | |
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HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On December 17, 2008, Delta Construction Corporation ("Petitioner"), filed a request for administrative review of the Department of Hawaiian Home Lands, State of Hawaii's ("Respondent") decision to deny Petitioner's protest in connection with a project designated as DHHL East Kapolei II Development, East-West Road and Road "E", Honouliuli Oahu, Hawaii, Tax Map Key: 9-1-17; Por. 71 and 88 ("Project"). Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter, which was designated as PCH-2008-22, was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the December 29, 2008 pre-hearing conference, Petitioner and Respondent agreed to have this matter removed from the hearings calendar in order to pursue efforts to resolve the dispute. Accordingly, the hearing was removed from the calendar and a status conference was scheduled for January 6, 2009.

At the January 6, 2009 status conference, Petitioner and Respondent indicated that settlement efforts were continuing.

On or about February 19, 2009, Petitioner and Respondent, together with Paradigm Construction LLC ("Intervenor"), requested that the matter be reviewed and adjudicated by the Hearings Officer.

On February 19, 2009, Respondent filed its response to Petitioner's request for administrative hearing. On March 2, 2009, Intervenor filed its memorandum in opposition to Petitioner's request for administrative hearing and, on March 9, 2009, Petitioner filed its memorandum in support of its request for administrative hearing.

On March 9, 2009, Petitioner filed a request for administrative hearing in connection with Respondent's denial of a protest filed by Petitioner by letter dated December 9, 2008. This matter was designated as PCH-2009-7. By agreement of the parties, PCH-2008-22 and PCH-2009-7 were consolidated for hearing. Intervenor was allowed to intervene in both cases.

On March 20, 2009, these matters came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Michael D. Tom, Esq. appeared for Petitioner; Diane K. Taira, Esq. appeared for Respondent; and David B. Rosen, Esq. appeared for Intervenor.

Having reviewed and considered the evidence and arguments presented by the respective parties, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On or about October 1, 2008, Respondent issued a Notice to Bidders, IFB No. 09-HHL-005 (“IFB”) for the purpose of soliciting bids for the construction of the Project.

2. The IFB included an “In-State Contractor Preference” provision (“Preference”) which provided in relevant part:

IN-STATE CONTRACTOR PREFERENCE

A 7 percent preference shall be given to qualified In-State Contractors when awarding a contract for Public Works projects to promote use of In-State Contractors pursuant to Act 352, SLH 1997. To qualify for the preference, Contractors must provide proof that they have filed State of Hawaii Unemployment, General Excise, and Income Tax returns and have paid all amounts owing on such returns for the two successive years immediately prior to submitting the bid when the amount of their bid is \$5,000,000 or less, and for the four successive years immediately prior to submitting the bid when the amount of their bid is more than \$5,000,000.

Therefore, any Contractor desiring an In-State Contractor’s preference shall submit a tax clearance certificate from the State of Hawaii Department of Taxation (DOTAX) with his Bid Proposal. Additionally, he must indicate in the following section that he wishes to be considered for the preference.

The tax clearance certificate required as a part of the bid proposal package described in the DHHL Interim General Conditions is acceptable for this purpose. However, the Bidder is cautioned that the “special letter” is not acceptable for this purpose. Failure to submit the tax

clearance certificate automatically voids the selection of the In-State Contractor's preference.

Whenever any Bidder selects and qualifies for an In-State Contractor's preference, all original bid prices from bidders who do not select or qualify for the In-State Contractor's preference shall be increased by 7 percent for evaluation purposes.

* * * *

The Bidder agrees that the preference for In-State Contractor shall be taken into consideration to determine the low Bidder in accordance with said section and the rules promulgated. However, the award of contract will be in the amount of the bid offered exclusive of any preference.

* * * *

3. Both Intervenor and Petitioner indicated in their respective bids that they wished to be considered for the In-State Contractor Preference.

4. Bids in response to the IFB were due and scheduled to be opened on October 31, 2008.

5. Five bids were submitted and opened on October 31, 2008.

6. Intervenor was the apparent low bidder (\$18,036,405.00) followed by Petitioner (\$18,041,776.75)¹.

7. Intervenor is a limited liability company and was registered in the State of Hawaii on June 14, 2005.

8. At the October 31, 2008 bid opening, Petitioner was informed of the total amount of Intervenor's bid and that Intervenor was the apparent low bidder.

9. On October 31, 2008, Petitioner requested a copy of Intervenor's bid.

10. By letter dated November 4, 2008 to Respondent, Petitioner again requested a copy of Intervenor's bid documents:

Pursuant to Hawaii Administrative Rule 3-126-6, Delta Construction Corporation ("Delta") respectfully requests a complete photocopy of the proposal and bid security

¹ These prices were the prices read at bid opening. Intervenor's and Petitioner's adjusted bids were \$18,037,605.00 and \$18,243,376.75, respectively.

documents (including, but not limited to cover sheets, exceptions to RFP and all bond documentation) submitted by Paradigm Construction LLC (“Paradigm”) in response to the Department of Hawaiian Home Lands’ “Proposal, Specifications, Contract and Bond” for the East Kapolei II Development; East-West Road and Road “E”; Honouliuli, Oahu, Hawaii, IFB-09-HHL-005 (“RFP”).

* * * *

11. Notwithstanding its earlier requests, Petitioner was not provided with a copy of Intervenor’s bid documents prior to November 12, 2008.

12. By letter dated November 12, 2008 to Respondent, Petitioner again requested a copy of Intervenor’s bid documents:

* * * *

Delta has good reason to believe that there are discrepancies in the proposal submitted by Paradigm Construction, LLC. In particular, Delta believes that Paradigm has not complied with Sections 103D-323 and 103D-324, Hawaii Revised Statutes, the Bid Security requirements, SP-01 and the In-State Contractor’s Preference requirements set forth in the RFP.

Delta, by letter dated November 4, 2008, has requested from the Department, a copy of Paradigm’s proposal to evaluate whether Delta’s belief is borne out and evident in Paradigm’s proposal. Delta’s request has not been honored, and Delta has not been provided with a copy of Paradigm’s proposal.

* * * *

13. On November 12, 2008, Petitioner submitted a Request for Access to Government Records to Respondent in order to obtain a copy of Intervenor’s bid documents. On the same date, Respondent provided Petitioner with a copy of Intervenor’s bid documents.

14. Intervenor’s bid did not include a State Tax Clearance Certificate. Instead, a Certificate of Vendor Compliance was included in the bid. Intervenor’s bid also indicated that Intervenor had requested that it be considered for the Preference.

15. Petitioner did not learn that Intervenor had requested that Intervenor be considered for the Preference until Petitioner was provided with Intervenor’s bid documents.

16. By letter dated November 18, 2008², Petitioner protested the award of the contract to Intervenor (“First Protest”).

17. The First Protest was faxed to and received by Respondent on November 19, 2008 between 12:41 p.m. and 12:46 p.m.

18. The First Protest raised the following claims:

1. Delta has learned that Paradigm’s bid submission was non-compliant with its request for consideration of the In-State Contractor Preference because Paradigm did not include the requisite number of tax years required for a project over \$5,000,000.

2. Paradigm’s submission of the Certificate of Vendor Compliance did not conform to the requirement of the In-State Contractor Preference provision requiring the State of Hawaii Tax Clearance Certificate.

3. Even if Paradigm were to be awarded the contract for the Project, Delta believes that Paradigm cannot meet the requirement of the Department’s General Conditions, section 3.7, which mandates that the successful bidder shall file good and sufficient performance and payment bonds in an amount equal to one hundred percent (100%) of the amount of the contract price.³

19. By letter dated and hand-delivered to Respondent on December 9, 2008, Petitioner protested the award of the contract to Intervenor (“Second Protest”) on the following additional grounds:

* * * *

3. Delta is concerned that Paradigm now intends to perform the Project with a previously unidentified joint venturer, which is both impermissible under the Solicitation, and may be a violation of the In-State Contractor Preference requirement.⁴

4. Delta has been informed and believes that although the Department included the In-State Contractor Preference in

² The first page of this letter was dated November 18, 2008 and the remaining 3 pages were dated November 19, 2008.

³ This claim has been withdrawn by Petitioner.

⁴ This claim has been withdrawn by Petitioner.

the Solicitation documents, the Department now intends (after the bids are opened) to evaluate the bids and award the contract without giving consideration to Delta's In-State Contractor Preference. This post-bid opening change of terms irreparably corrupted the competitive bid process and requires cancellation of this Solicitation.

* * * *

20. By letter dated December 4, 2008 to Petitioner, Respondent denied the First Protest. The denial was mailed to Petitioner on December 10, 2008 as evidenced by the postmark date.

21. Respondent's denial of the First Protest was based in part on the following:

* * * *

Items 1 and 2 allege non-compliance with the In-State Contractor Preference requirements. Section 103D-1007 of the Hawaii Revised Statutes (HRS) was repealed by Act 52, Section 8 of Session Laws of Hawaii 2003. The corresponding section of the Hawaii Administrative Rules (Chapter 3-124, Subchapter 6) was repealed effective May 20, 2004 by Procurement Directive No. 2004-1 (August 18, 2004). Thus, inclusion of In-State Contractor Preference in the bid documents was in error and its requirements are unenforceable.

* * * *

22. On December 17, 2008, Petitioner filed with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, a request for administrative review of the First Protest.

23. By letter dated February 25, 2009 and received by Petitioner on March 5, 2009, Respondent denied the Second Protest.

24. On March 9, 2009, Petitioner filed a request for administrative review of the Second Protest.

25. To date, no contract has been awarded in this solicitation.

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).

Initially, Respondent and Intervenor contend that the First Protest was untimely under HRS §103D-701(a). That section 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. Except as provided in sections 103D-303 and 103D-304, *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 award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, 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).

Both Respondent and Intervenor argue that Petitioner's First Protest was a protest based on the content of the solicitation and therefore should have been submitted by the October 31, 2008 bid submission and opening date. According to Intervenor, "to the extent that Delta was concerned about how the In-State Contractor Preference provision would be applied or whether it should even be in the IFB, its deadline to submit a protest was the date set for the receipt of offers – October 31, 2008." Similarly, Respondent contends that

Petitioner should have filed its protest prior to the opening of the bids “because Delta knew that the in-state contractor preference was improper”.

HRS §103D-701(a) requires that protests based on the content of the solicitation be filed prior to the date set for the receipt of offers so that the procuring agency has an opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services; PCH 2000-8 (October 17, 2000)*. Petitioner’s protests, however, did not complain of any deficiencies in the content of the IFB. Nor did the protests seek to challenge the inclusion of the Preference in the IFB. On the contrary, the protests were based on the argument that Respondent, having included the Preference in the IFB, *was required to apply the Preference in this solicitation* by extending the Preference to those qualified bidders who had elected to be considered for the Preference. Consistent with that position, the First Protest complained that Intervenor was not entitled to the Preference because it had failed to meet or could not meet some of the requirements for the Preference while the Second Protest was based on a concern that Respondent would “evaluate the bids and award the contract without giving consideration to Delta’s In-State Contractor Preference.” Clearly, these protests were based on information beyond the content of the IFB. *See, Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)(Because the protest was based in part on information that was not included in the bid documents, the protest was not a protest based upon the content of the solicitation)*. Accordingly, the Hearings Officer concludes that neither protest was based on the content of the solicitation.

Respondent and Intervenor also argue that Petitioner knew or should have known of the facts giving rise to its protest when the bids were opened on October 31, 2008, and, as such, Petitioner should have submitted its protest within 5 working days. More specifically, Intervenor contends that, “at the time of bid opening, Delta was well aware that it had applied for the In-State Contractor Preference and that Paradigm did not qualify for the In-State Contractor Preference.” This argument, however, assumes that by October 31, 2008, Petitioner also knew or should have known that Intervenor had indicated in its bid that it

wished to be considered for the Preference. According to the evidence, however, the only information Petitioner received on October 31, 2008 concerning Intervenor's bid was the total amount of the bid and that Intervenor was the apparent low bidder. Petitioner was unable to determine whether Intervenor had requested that it be considered for the Preference until it was provided with a copy of Intervenor's bid documents on November 12, 2008. The 5-day period within which a protest must be submitted is not triggered by mere speculation or hindsight. Moreover, the evidence also established that Petitioner diligently attempted to obtain the Intervenor's bid documents from Respondent by repeatedly requesting a copy of those documents beginning on October 31, 2008⁵. Under these circumstances, there is no reasonable basis to charge Petitioner with knowledge of the facts giving rise to its protest prior to November 12, 2008. Petitioner's First Protest, having been submitted within 5 working days on November 19, 2008, was therefore timely.⁶

Intervenor also urges the Hearings Officer to determine that the Preference is "unenforceable because the law that required the preference was repealed." Intervenor, however, does not articulate, and the Hearings Officer cannot find, any authority to support the conclusion that the repeal of HRS §103D-1007 in 2003 renders the Preference in the IFB unenforceable or void⁷. While the repeal of HRS §103D-1007 eliminates the requirement that agencies award HRS §§103D-302 and 103D-303 contracts to contractors meeting the criteria outlined in that section, it does not prohibit agencies from including such a provision in a solicitation. In the absence of any authority to the contrary⁸, the Hearings Officer must

⁵ Intervenor also cites this Office's decision in *Brewer Environ. Indust., Inc. v. County of Kauai, PCH 96-9 (Nov. 20, 1996)*, for the proposition that the State's failure to provide information is not a basis for a protestor's failure to comply with the time requirements for submitting a protest. Intervenor's reliance on *Brewer*, however, is misplaced as *Brewer* did not involve the timeliness of a protest. There, the Hearings Officer found that, "[t]he timeliness of the protest has never been an issue in this matter and to argue that the [Respondent's] alleged failure to provide information (that might support an already filed protest) constituted a legitimate basis for the Petitioner's failure to comply with the time requirements for requesting an agency reconsideration or an administrative hearing is quite without merit."

⁶ Intervenor also claimed that the December 17, 2008 request for administrative hearing in connection with the First Protest was not filed within 7 days following the issuance of the denial as required by HRS §103D-712(a) and, consequently, is untimely. The undisputed evidence, however, established that the denial was issued on December 10, 2008 as evidenced by the postmark date. Thus, this argument is without merit.

⁷ Rather, the repeal of HRS §103D-1007 was apparently based on the Legislature's conclusions that the preference was "unnecessary" and "did not serve its purpose to assist local contractors to win construction project awards." *Stand. Com. Rep. No. 876, 2003, Senate Journal*.

⁸ Neither Respondent nor Intervenor asserts that the application of the Preference is unconstitutional. Therefore, that issue is not properly before the Hearings Officer and will not be addressed.

conclude that Respondent, having included the Preference in the IFB, must now apply the Preference according to the terms of the IFB to *all qualified* bidders who had elected to be considered for the Preference and award the contract pursuant to HRS §103D-302. The Hearings Officer further concludes that Intervenor, having been established in June 2005 and having failed to provide proof⁹ that it has filed State unemployment, general excise, and income tax returns and that it has paid all amounts owing on such returns for four successive years immediately prior to submitting the bid, does not qualify for the Preference. Having arrived at these conclusions, consideration of Petitioner's claim that Intervenor's submission of a Certificate of Vendor Compliance did not conform to the requirement of the In-State Contractor Preference provision requiring a State of Hawaii Tax Clearance Certificate is unnecessary.

IV. DECISION

Based upon the foregoing findings and conclusions, Respondent's denials of Petitioner's First and Second Protests are hereby vacated and this matter is remanded to Respondent for reevaluation of the bids consistent with the Hearings Officer's Findings of Fact and Conclusions of Law herein. The Hearings Officer further orders that each party shall bear its own attorneys' fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: _____ APR - 9 2009

/s/ CRAIG H. UYEHARA

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

⁹ The evidence proved and Intervenor does not dispute that because Intervenor was registered in the State of Hawaii in June 2005, it cannot and did not provide proof that it has filed unemployment, general excise, and income tax returns and that it has paid all amounts owing on such returns for the four successive years immediately prior to the submission of its bid.