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HEARINGS OFFICE

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


In the Matter of	)	PCH-96-1
)	
NIU CONSTRUCTION, INC.,	)	ERRATA
)	
Petitioner,)	
)	
vs.)	
)	
COUNTY OF KAUAI, DEPARTMENT)	
OF FINANCE,)	
)	
Respondent.)	

ERRATA

The first full sentence on page 13 of the Findings of Fact, Conclusions of Law and Decision filed on April 11, 1996 should be corrected to read:

Respondent also failed to comply with the requirements of HRS § 103D-701(f) and HAR § 3-126-5 by awarding the contract after a protest was filed, without making a written determination that the award of the contract without delay was necessary to protect the substantial interests of the County of Kauai.

DATED: Honolulu, Hawaii, APR 15 1996



 SHERYL LEE A. NAGATA
 Hearings Officer
 Department of Commerce
 and Consumer Affairs



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DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of)	PCH-96-1
)	
NIU CONSTRUCTION,	)	HEARINGS OFFICER'S FINAL
	)	ORDER DENYING MOTION TO
Petitioner-Appellant,	)	EXTEND TIME <i>NUNC PRO</i>
	)	<i>TUNC</i> FOR FILING NOTICE
vs.	)	OF APPEAL
)	
COUNTY OF KAUAI,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent-Appellee.)	
)	

HEARINGS OFFICER'S FINAL ORDER DENYING MOTION TO
EXTEND TIME *NUNC PRO TUNC* FOR FILING NOTICE OF APPEAL

I. INTRODUCTION

On July 22, 1996, Warren C.R. Perry, Esq., on behalf of Niu Construction, Inc. ("Petitioner-Appellant") filed a Motion to Extend Time Nunc Pro Tunc For Filing Notice of Appeal ("Motion"). On August 1, 1996, Amy I. Esaki, Esq., on behalf of the County of Kauai, Department of Finance ("Respondent-Appellee") filed a Memorandum in Opposition to Petitioner-Appellant's Motion.

A hearing on the Motion was held on August 5, 1996 by telephone conference. Petitioner-Appellant was represented by Mr. Perry and Respondent-Appellee was represented by Ms. Esaki. The matter was taken under advisement.

Having reviewed and considered the evidence and argument presented, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order.

II. FINDINGS OF FACT

1. The Findings of Fact, Conclusions of Law and Decision ("Decision") in the above-captioned matter was issued on April 11, 1996.
2. An Errata to the Decision was issued on April 15, 1996.
3. Petitioner-Appellant mailed its Notice of Appeal to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("DCCA") on Friday, April 19, 1996 via the United States Postal Service, Certified Mail, Return Receipt Requested.
4. On April 29, 1996, the DCCA received and filed Petitioner-Appellant's Notice of Appeal.
5. On July 18, 1996, Petitioner-Appellant received the Hearings Officer's affidavit which affirmed that the DCCA received Petitioner-Appellant's appeal on April 29, 1996.
6. On July 19, 1996, the Supreme Court of the State of Hawaii issued an Order of Dismissal, dismissing Petitioner-Appellant's appeal on the basis that the appeal was untimely, and thus the Supreme Court lacked jurisdiction over the appeal.
7. On July 22, 1996, the DCCA received and filed Petitioner-Appellant's Motion to Extend Time Nunc Pro Tunc For Filing Notice of Appeal.

III. CONCLUSIONS OF LAW

The issue to be resolved is whether Petitioner-Appellant's Motion was timely filed. Rule 4(a)(5) of the Hawaii Rules of Appellate Procedure ("HRAP") recognizes that strict adherence to time deadlines may be unduly burdensome or unjust in some cases. Consequently, within thirty (30) days after the expiration of the time for filing an appeal, and upon a showing of excusable neglect or good cause, the agency may extend the time for filing an appeal. HRAP Rule 4(a)(5) provides:

(5) The court or agency appealed from, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion actually filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(4) of this Rule 4. Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other


parties in accordance with the rules of the court or agency appealed from. No such extensions shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

The Hearings Officer's Decision was issued on April 11, 1996. Hawaii Revised Statutes § 103D-712, requires that Petitioner-Appellant's appeal be filed within ten calendar days after the issuance of a written decision by the Hearings Officer. Accordingly, Petitioner-Appellant's appeal was due on April 22, 1996. Pursuant to HRAP Rule 4(a)(5), Petitioner-Appellant's Motion should have been filed on or before May 22, 1996, thirty days after the expiration of the deadline for Petitioner-Appellant to file its appeal. However, the Motion was not filed until July 22, 1996. "A failure to file a timely motion bars an appeal, for the trial court may not grant an extension not authorized by Rule 4(a)(5)." Bacon v. Karlin, 68 Haw. 648 (1986).

IV. FINAL ORDER

IT IS HEREBY ORDERED that Petitioner-Appellant's Motion to Extend Time Nunc Pro Tunc For Filing Notice of Appeal is denied.

DATED: Honolulu, Hawaii, AUG 21 1996.



SHERYL LEE A. NAGATA
Hearings Officer
Department of Commerce
and Consumer Affairs

APR 11 12 34 PM '96

HEARINGS OFFICE



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

In the Matter of	)	PCH-96-1
)	
NIU CONSTRUCTION, INC.,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Petitioner,	)	AND DECISION
)	
vs.)	
)	
COUNTY OF KAUAI, DEPARTMENT)	
OF FINANCE,)	
)	
Respondent.)	
_____)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. CHRONOLOGY OF CASE

By a letter dated September 25, 1995, Warren C.R. Perry, Esq., attorney for Niu Construction ("Petitioner") submitted a request to the Director of Finance of the County of Kauai ("Respondent") for an administrative hearing to contest Respondent's decision to disregard the provisions of the Hawaii Products Preference Laws. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") § 103D-709 and Hawaii Administrative Rules ("HAR") § 3-126-42.

On October 24, 1995, Respondent transmitted Petitioner's request for hearing to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii ("OAH"). By a letter dated November 1,

1995, Rodney A. Maile, Senior Hearings Officer, OAH, advised the parties that Petitioner's September 25, 1995 letter did not comply with the requirements of HAR § 3-126-59, and that a hearing would be scheduled within twenty-one calendar days of receipt of a proper request for a hearing.

By a letter dated November 7, 1995, Petitioner submitted an amended request for hearing to Respondent. On January 29, 1996, Respondent transmitted Petitioner's amended request to the OAH. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On February 20, 1996 a hearing was conducted by the undersigned Hearings Officer. Petitioner was represented by Mr. Perry. Respondent was represented by Jay Murobayashi, Esq., Deputy County Attorney, County of Kauai.

On March 7, 1996, the parties filed their proposed findings of fact and conclusions of law.

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

II. FINDINGS OF FACT

As a preliminary matter, the proposed findings of fact and conclusions of law filed by the parties have been considered. To the extent that the proposed findings and conclusions submitted are in accordance with the findings and conclusions stated herein, they have been accepted, and to the extent that they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as the Hearings Officer determined

them to be not relevant or necessary to a proper determination of the material issues presented.

1. Respondent initiated a public procurement of services and issued Solicitation Document No. 1871 which is entitled "Invitation for Bid and Specifications for Resurfacing and Refinishing Various Basketball and Tennis Courts, Islandwide, County of Kauai" ("IFB"). The project involved resurfacing basketball and tennis courts at approximately 12 public parks on Kauai.

2. The major items of work included:

- a. Court surface preparation, including cleaning, filling and patching all cracks and depressions.
- b. Installation of new asphalt concrete overlay system on specified courts.
- c. Sealing asphalt concrete surface with multiple coats of sealer and finish surface compounds.
- d. Layout and painting of court lines and markings.
- e. Raise basketball backboard/rim posts and tennis net posts to regulation height after repavement.
- f. Provide barricades around the newly finished courts to prevent traffic from damaging new wearcoat.
- g. All miscellaneous and appurtenant work as called for on the plans and specifications.

3. Page 19 of the IFB was a full sheet entitled "Hawaii Products List." Therein, Respondent informed potential bidders that the only registered Hawaii product designated for this project was "Asphalt Concrete Mixes: City and County Mix V" manufactured by Grace Pacific Corporation. Bidders were

also informed that they must list the price or total cost of each item f.o.b. jobsite, unloaded, including applicable general excise tax and use tax if they intended to use or supply a non-Hawaii product in lieu of the registered Hawaii product listed. The bidders were further informed that a failure to designate a non-Hawaii product will mean that the bidder was offering a registered Hawaii product and the award, if made to the bidder, will be on the basis that a registered Hawaii product will be delivered or used.

4. On May 24 and 26, 1995, Respondent published a Notice to Contractors seeking bids for Solicitation Document No. 1871. The Notice stated that prospective bidders must give written notice of their intention to bid no later than 4:00 p.m. June 6, 1995, and that bids would be opened on June 16, 1995 at 2:00 p.m.

5. On June 5, 1995, Addendum No. 1 to Solicitation Document No. 1871 was issued, changing the Notice of Intent to Bid filing date to June 13, 1995 at 4:00 p.m. and the bid opening date to June 23, 1995 at 2:00 p.m.

6. On June 23, 1995 the bids were publicly opened. There were three qualified bidders: (1) Petitioner, (2) Specialty Surfacing Company Hawaii, Inc. ("SSCH") and (3) Site Engineering.

7. The bids (total sums) came in as follows:

Specialty Surfacing Company Hawaii, Inc.	\$161,066.00
Niu Construction (Petitioner)	\$161,292.00
Site Engineering	\$180,936.10

8. SSCH and Site Engineering submitted blank Hawaii Products Preference pages.

9. Respondent submitted a Hawaii Products Preference page which listed a non-Hawaii product, City and County Mix V, 275 tons, Brand Name--Hot Mix, Total cost of materials, \$5,198.80.

10. Grace Pacific Corporation, the supplier of the registered Hawaii product specified in the IFB, is located on Oahu, and does not have a plant for making the asphalt concrete mix on Kauai.

11. The asphalt concrete is a hot mix, which must be applied at a minimum temperature of 250 degrees Fahrenheit. The hot mix cannot be shipped from Oahu to Kauai.

12. At the bid opening, Petitioner discovered that SSCH and Site Engineering's bids failed to specify that they were using a non-Hawaii product. Petitioner then informed Elmer Muraoka, Purchasing and Assistant Contracts Administrator for Respondent, that if SSCH or Site Engineering were awarded the bid, they would have to use the asphalt concrete mix from Grace Pacific Corporation's plant on Oahu.

13. After Mr. Muraoka's discussion with Petitioner, Mr. Muraoka raised the issue with Mel Nishihara, Superintendent of the Division of Parks and Recreation, and Jay Murobayashi, Esq., Deputy County Attorney. It was decided to contact SSCH concerning its compliance with the Hawaii Products Preference laws.

14. By a memorandum dated June 26, 1995, to Mr. Muraoka, Steve Oliver, County Engineer, Department of Public Works, recommended that an award in the amount of \$161,061.44 be made to SSCH, the low bidder.

15. By a letter dated June 27, 1995, Petitioner filed a protest with Respondent.

16. By a memorandum dated June 28, 1995 to Mr. Muraoka, Mr. Nishihara reported that he contacted SSCH, and that Tom Christy, general manager for SSCH informed him that the hot mix would be made on Kauai, and that the asphalt liquid necessary for preparing the hot mix will be shipped to Kauai from Hawaiian Bitumuls' distribution center at Barbers Point, Oahu. It was Mr. Christy's opinion that the asphalt liquid from the Barbers Point distribution center was a Hawaii product, and that Grace Pacific Corporation

probably purchased their asphalt liquid from the Barbers Point distribution center and prepared their hot mix at their respective baseyards.

17. The asphalt liquid from Hawaiian Bitumuls' distribution center at Barbers Point, Oahu is not the registered Hawaii product designated in the IFB.

18. Mr. Nishihara's June 28, 1995 memorandum also states:

Since the County Attorney office has no problem with accepting bids as submitted and verification of the low bidder use of Hawaii Products was clarified, Notice of Award to vendor by PACA should (sic) forthcoming.

19. On June 29, 1995, Respondent awarded the contract to SSCH. The award was made even though the protest had not been settled because funding for the contract was to expire on June 30, 1995. Respondent did not make a written determination that awarding the contract without delay was necessary to protect the substantial interests of the County of Kauai. Petitioner was not notified that Respondent awarded the contract to SSCH.

20. By a letter dated July 5, 1995, Respondent denied Petitioner's protest. This letter states in part:

In the bid evaluation process, it has been determined that the preferences for Hawaii Products is inapplicable to this specific construction project bid item...It is obvious that any bidder on Kauai would find it physically impossible to ship this type of hot asphalt (sic) concrete mix from Grace Pacific Corporation in Honolulu for use on a construction project located on Kauai.

Thus, this preference for purchasing Hawaii products from Grace Pacific Corporation is deemed not applicable and will not be applied in the evaluation of bids in Solicitation No. 1871. All bids will be evaluated in accordance with the objective criteria as stated in the solicitation documents with no preferences being given to any bidder.

21. By a letter dated July 7, 1995, Petitioner filed a request for reconsideration.

22. Having received no response to its July 7, 1995 letter, and having received information that Respondent may have awarded the contract to SSCH, Petitioner wrote to Respondent on August 23, 1995 to protest the award of the contract.

23. By a letter dated September 12, 1995 to Respondent, Petitioner asked for a response to its August 23, 1995 protest.

24. By a letter dated September 19, 1995, Respondent informed Petitioner that it was not inclined to reverse its prior decision, and stated that it was Respondent's position that the action it took with regard to Solicitation Document No. 1871 was "reasonable in light of all the circumstances." This letter did not inform Petitioner of his right to request an administrative hearing.

25. By a letter dated September 25, 1995 to Respondent, Petitioner requested an administrative hearing.

26. By a letter dated October 5, 1995, Mr. Murobayashi forwarded Petitioner's request for an administrative hearing to Lloyd Unebasami, Administrator of the State Procurement Office.

27. On October 12, 1995, the State Procurement Office instructed Respondent to send Petitioner's request directly to the OAH. The OAH received Petitioner's request on October 26, 1995.

28. By a letter dated November 1, 1995, Rodney A. Maile, Senior Hearings Officer, OAH, informed the parties that a hearing would not be scheduled until a proper request for hearing was received.

29. The Notice to Proceed was issued to SSCH on November 3, 1995. It instructed SSCH to commence work on November 13, 1995. The notice to proceed also stated that the original contract completion date was to be June 9, 1996.

30. By a letter dated November 7, 1995 to Respondent, Petitioner submitted an amendment to his September 25, 1995 request for hearing.

31. By a letter dated January 22, 1996 to Respondent, Petitioner inquired about the status of his request for an administrative hearing, and requested that a hearing be scheduled immediately.

32. By a letter of transmittal dated January 29, 1996, Respondent transmitted Petitioner's amended request for hearing to the OAH.

33. Between January 1, 1994 and June 1, 1994, Petitioner completed 23 paving contracts and averaged 12.9% profit on those contracts.

34. Between October 1, 1994 and April 1, 1995, Petitioner completed thirty seven (37) contracts and averaged 14.1% profit on those contracts.

35. If the contract had been awarded to Petitioner, Petitioner would have realized a profit of \$17,684.90.

36. Mr. Robert L. Kaeo, Petitioner's president, spent approximately 12 hours preparing Petitioner's bid. At that time, Mr. Kaeo was paid a salary of \$2,100.00 per week.

III. CONCLUSIONS OF LAW

Petitioner contends that Respondent's determination that the Hawaii Products Preference law was inapplicable to the IFB was improper, and therefore, its award of the contract to the lowest bidder, SSCH, was also improper. Petitioner also contends that Respondent committed numerous procedural errors which substantially delayed the resolution of this matter. In order to prevail, Petitioner has the burden of proving by a preponderance of the evidence that Respondent's conduct was not in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract.

The evidence presented established that SSCH was the low bidder and that its bid indicated that it would be using the registered Hawaii product specified in the IFB. After bid opening, however, Respondent was informed that it was not possible for SSCH to use the registered Hawaii product called for in the IFB because the registered Hawaii product, City and County Mix V, supplied by Grace Pacific Corporation on Oahu, is not shipped from Oahu to Kauai. The evidence presented also established that Respondent was told by SSCH that it would not be using the registered Hawaii product specified in the IFB, but would be using asphalt liquid (one component of the City and County Mix V) that was to be shipped from Oahu, and that in SSCH's opinion, the asphalt liquid was a Hawaii product. Respondent then determined that the Hawaii products preference law was inapplicable because the registered Hawaii product could not be delivered to the jobsite on Kauai; evaluated the bids based on the dollar figures submitted by each bidder without applying a preference for the registered Hawaii product specified in the IFB, and awarded the contract to SSCH because it submitted the lowest bid.

Based on the evidence presented, the Hearings Officer concludes that Respondent's conduct was not in accordance with the statutes, regulations and conditions of the solicitation because pursuant to HRS Chapter 103D, the Hawaii Public Procurement Code, Respondent was required to either: (1) award the contract to Petitioner, the lowest responsible and responsive bidder pursuant to the provisions of HRS § 103D-302(h), or (2) cancel the solicitation pursuant to the provisions of HAR § 3-122-96.

A. Petitioner was the lowest responsible, and responsive bidder.

Hawaii Revised Statutes § 103D-302(h) requires that the contract be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the IFB. Based on the evidence presented,

the Hearings Officer concludes that SSCH's failure to specify that it planned to use a non-Hawaii product required Respondent to find that SSCH was not a responsive bidder because SSCH's bid did not meet the requirements and criteria set forth in the IFB. Accordingly, Respondent should have rejected SSCH's bid and awarded the contract to Petitioner, the lowest responsible and responsive bidder.

Respondent argued that although it may have made an error in preparing the Hawaii products preference page, the error was an "obvious mistake", and pursuant to HAR § 3-122-31, the "obvious mistake" may be corrected or waived. HAR § 3-122-31 provides in part:

§ 3-122-31 Mistakes in bids. (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

...

(c) Corrections to bids after opening but prior to award may be made under the following conditions:

...

(3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or for the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake[.]

Respondent's reliance on HAR § 3-122-31 is misplaced, because it is relying on this section to justify its waiver of the application of the Hawaii products requirement of the IFB, while HAR § 3-122-31 allows for correction of "obvious mistakes" in the bid. Respondent also argued that pursuant to HAR §

3-122-31(c)(3), SSCH's failure to specify a non-Hawaii product in its bid was an "obvious mistake", that if waived, would be in the best interest of the County of Kauai. SSCH did not intend to use the registered Hawaii product, but apparently believed that using the asphalt liquid, a component of the registered Hawaii product, made the designation of a non-Hawaii product unnecessary. However, the IFB clearly stated that the failure to designate a non-Hawaii product will mean that the bidder is offering a registered Hawaii product and the award to the bidder is made on the basis that the bidder will deliver or use the registered Hawaii product. While SSCH was clearly mistaken, the Hearings Officer finds that it is not the type of mistake which may be corrected or waived by Respondent because it would result in unfair treatment of the other bidders, particularly Petitioner, who submitted a responsive bid.

B. Cancellation of Solicitation

After bid opening, Respondent determined that its designation of the registered Hawaii product was inapplicable because it was impossible to use the registered Hawaii product designated. While it appears that Respondent responded to the situation in an equitable and common sense manner by determining that no preference would apply and then awarding the bid to the lowest bidder, HAR § 3-122-96 required that the solicitation be canceled. HAR § 3-122-96 provides in part:

§ 3-122-96 Cancellation of solicitation. (a) A solicitation shall be canceled for reasons including but not limited to the following:

(2) Cancellation after opening but prior to award:

(B) Ambiguous or otherwise inadequate specifications were part of the solicitation[.]

(Emphasis added.) If cancellation was not an option, then, as determined above, SSCH's bid should have been rejected as non-responsive, and Petitioner should have been awarded the contract as the lowest responsible and responsive bidder.

C. Remedies available under HRS Chapter 103D

Petitioner requested that it be awarded a 13.5% profit on its bid of \$161,192.00 or \$21,774.42; plus \$17,684.90, which is the amount Petitioner would have received based on that portion of the bid it submitted for the non-paving work; \$630.00 in bid preparation costs, and reasonable attorney's fees and costs Petitioner incurred in pursuing this matter. There is no authority for the Hearings Officer to award Petitioner the relief it is seeking because HRS § 103D-705 provides that the remedies specified in HRS §§ 103D-706 (prior to an award) and 103D-707 (after an award) apply where it is determined that a solicitation or award of a contract is in violation of the law. In this matter, HRS § 103D-707 and HAR § 3-126-38(a) are applicable, as they specify the remedies available in the situation where, after an award, a determination is made that a solicitation or contract award is in violation of law, and there was no fraud or bad faith on the part of the contractor. The remedies available are: (1) ratification or affirmation of the contract if the violation can be waived without prejudice to the County of Kauai or the bidders, or (2) if the violation cannot be waived, termination of the contract and compensation to the person awarded the contract.

D. Procedural violations by Respondent


Respondent failed to comply with the requirements of HRS § 103D-701(c)(2) and HAR § 3-126-8 by failing to inform Petitioner about its right to an

administrative hearing, and HAR § 3-126-42 by failing to transmit Petitioner's request for an administrative hearing to the Office of Administrative Hearings within three (3) business days. ~~Petitioner~~^P also failed to comply with the requirements of HRS § 103D-701(f) and HAR § 3-126-5 by awarding the contract after a protest was filed, without making a written determination that the award of the contract without delay was necessary to protect the substantial interests of the County of Kauai. The Hearings Officer strongly recommends that Respondent modify its procurement procedures to prevent future procedural violations of the Hawaii Public Procurement Code and the applicable rules and regulations.

IV. DECISION

Based on the foregoing, Respondent is ordered to ratify or affirm the contract or terminate it after consultation with the Office of the County Attorney in accordance with HRS § 103D-707 and HAR § 3-126-38.

DATED: Honolulu, Hawaii, APR 11 1996



SHERYL LEE A. NAGATA
Hearings Officer
Department of Commerce
and Consumer Affairs