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HEARINGS OFFICE



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

In the Matter of)	PCH-99-14
)	
HAWAIIAN NATURAL WATER)	HEARINGS OFFICER'S
COMPANY, INC.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND FINAL ORDER
)	GRANTING RESPONDENT'S
vs.)	MOTION TO DISMISS REQUEST
)	FOR ADMINISTRATIVE
CITY & COUNTY OF HONOLULU,)	HEARING
DEPARTMENT OF BUDGET &)	
FISCAL SERVICES,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS REQUEST FOR ADMINISTRATIVE HEARING

This matter having come before the undersigned Hearings Officer on March 10, 2000, for consideration of the City & County of Honolulu, Department of Budget and Fiscal Services' ("Respondent") Motion to Dismiss Request for Administrative Hearing; with Hawaiian Natural Water Company, Inc. ("Petitioner"), represented by Steven B. Jacobson, Esq.; and Respondent represented by Chris A. Diebling, Esq.; and after having reviewed the memoranda, affidavit, exhibits, records and files herein and having heard the argument of counsel, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Final Order.

I. FINDINGS OF FACT

1. On or about August 20, 1998, Respondent issued Request for Proposals No. 13039 ("RFP"), for the purpose of soliciting proposals to enter into an exclusive license agreement for the vending of soft drinks on property rented or owned by Respondent.

2. Respondent subsequently issued two addenda to the RFP on September 6, 1998 and October 8, 1998, respectively. The first addendum changed the date for the submission of proposals from September 25, 1998 to October 14, 1998. The second addendum extended the deadline for the submission of proposals to October 28, 1998.

3. Respondent received proposals from two bidders on October 28, 1998, and received "best and final offers" from those bidders on February 26, 1999.

4. Petitioner did not submit a proposal in connection with the RFP.

5. Respondent entered into a contract with the low bidder, Pepsi-Cola Company ("Pepsi"), on August 12, 1999, and posted a notice of the awarding of the contract to Pepsi on August 13, 1999.

6. Petitioner filed the instant protest with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("Office"), on September 21, 1999.

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 asserts that it is entitled to summary disposition because Petitioner was not a "prospective bidder" under Hawaii Revised Statutes ("HRS") Chapter 103D, and therefore lacks standing to pursue the instant protest. Additionally, Respondent argues that this action should be dismissed because Petitioner failed to file its protest within 5 working days after the posting of the notice of award as required under Act 162, Session Laws of Hawaii, Regular Session of 1999.

Petitioner counters that Respondent improperly interpreted or amended Pepsi's contract "post hoc," giving Pepsi an exclusive license to sell bottled water to the

City's concessionaires even though the RFP did not include bottled water. According to Petitioner, a new request for proposals should be issued and a new contract entered into for the sale of bottled water to Respondent's concessions. It is Petitioner's position that had such a request been issued earlier, it would have submitted a proposal in response to that request.

In determining whether Petitioner has standing to bring this protest, the Hearings Officer looks to HRS §103D-701(a). That section 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

Similarly, 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 the award of a contract and who files a protest.

The foregoing statutory provision and rule extend the ability to protest under HRS Chapter 103D only to actual or prospective bidders, offerors, or contractors. In this case, Petitioner does not dispute that it did not submit a proposal in response to or as a result of the RFP. Instead, Petitioner argues that it has standing as a "prospective bidder" because it would have bid on any request for proposals involving the sale of *bottled water*.

The language of HRS §103D-701(a), however, 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).**

More recently, this Office 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 Virginia Supreme

Court's opinion in **Concerned Taxpayers of Brunswick County, et al., v. County of Brunswick**, 455 S.E.2d 712 (Va. 1995) was cited 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 an offer in response to the RFP. Because the opportunity to qualify either as an actual or a prospective bidder ended when the proposal period ended, Petitioner's argument that it would have submitted a bid in response to a "new" solicitation for bottled water does not entitle Petitioner to prospective bidder status for purposes of the present protest. Consequently, no matter how well-founded Petitioner's claim may be that Respondent improperly interpreted or amended the contract "post hoc" to include bottled water, Petitioner is not entitled to pursue this claim as a protest under HRS Chapter 103D. Under the circumstances presented here, the Hearings Officer concludes that no material issues of fact exist and Respondent is entitled to relief as a matter of law.

Respondent also argued that the protest was not timely filed. However, in light of the Hearings Officer's conclusion that Petitioner lacks standing to pursue this protest, the resolution of this issue is unnecessary for a full disposition of this matter.

III. FINAL ORDER

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

DATED at Honolulu, Hawaii: APR 25 2000



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