

2009 JUL -2 A 11: 53

HEARINGS OFFICE



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

In the Matter of	)	PCH 2009-9
	)	
HAWAIIAN DREDGING	)	HEARINGS OFFICER'S FINDINGS OF
CONSTRUCTION COMPANY,	)	FACT, CONCLUSIONS OF LAW AND
	)	DECISION; APPENDIX "A"
Petitioner,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	
	)	
	)	

2009 JUL -6 A 11: 58  
LAND/TRANS. DIV.  
DEPARTMENT OF  
ATTORNEY GENERAL

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On May 5, 2009, Hawaiian Dredging Construction Company, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Transportation, State of Hawai'i's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On May 11, 2009, Goodfellow Bros., Inc. filed a Motion to Intervene ("Motion"). On May 13, 2009, Respondent filed a statement in support of the Motion and Petitioner filed a memorandum in opposition to the Motion. On May 14, 2009, Goodfellow Bros., Inc. filed a reply memorandum in support of the Motion. On May 19, 2009, the Hearings Officer issued an order denying the Motion.

I HEREBY CERTIFY THAT THE ATTACHED  
IS A TRUE AND CORRECT COPY OF THE  
ORIGINAL ON FILE IN THE DEPARTMENT  
OF COMMERCE & CONSUMER AFFAIRS.

*[Handwritten Signature]*

At the pre-hearing conference held on May 12, 2009, the parties agreed to move the hearing from May 26, 2009 to May 27, 2009.

On May 27, 2009, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Keith Y. Yamada, Esq. and David F.E. Banks, Esq. Respondent was represented by Stella M.L. Kam, Esq.

At the close of the hearing, the parties agreed to file written closing arguments. As agreed, the parties' written closing arguments were filed on June 5, 2009 and their responses were filed on June 12, 2009.

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 decision.

## II. FINDINGS OF FACT

1. Respondent issued a Request for Proposals ("RFP") for a design-build highway project in Kona. The RFP was entitled "Queen Kaahumanu Highway Widening Phase 2, Kealakehe Parkway to Keahole Airport Road, Federal Aid Project No. NH-019-1(38), District of North Kona, Island of Hawai'i (the "Project"). The Project involves the widening of Queen Kaahumanu Highway from an existing two-lane highway to a four-lane divided highway.

2. Proposals were submitted by Petitioner, Goodfellow Bros., Inc. and Kiewit Pacific Co. ("Kiewit").

3. The Technical Provisions of the RFP state that "[t]he construction phasing and traffic control around the work areas shall contain...(2)-11 feet wide travel lanes minimum; ten feet wide paved shoulder on both sides for pedestrians and bicyclists[.]"

4. Petitioner's Design Concept documents state that Petitioner's team developed a plan that "meets the project RFP for a minimum of two 11-foot lanes and two 10-foot shoulders at all times[.]

5. Petitioner's Project Drawing 102A which depicts typical road sections shows a 10-foot shoulder on only one side of Work Zone Sequence C, although drawings for Work Zone Sequences A and B on the same page show 10-foot shoulders on both sides. According

to Project Drawing 102A, Work Zone Sequence C encompasses the existing 10-foot shoulder shown in Work Zone Sequences A and B.

6. According to Petitioner, Project Drawing 102A was not intended to show all of the 10-foot shoulders during the Project's construction phase but was meant to show the construction of new pavement during each phase of construction.

7. Petitioner's Project Drawing 101A, which shows typical phasing for work sequences A through C, provides for shoulders on both sides, however, that drawing was not drawn to scale. Respondent's engineer testified that Project Drawing 101A complied with the RFP.

8. A spreadsheet prepared by Respondent at the time they initially evaluated the three proposals listed pros and cons for each proposal. Under "Cons", it was noted that Petitioner "[d]id not provide minimum 10-foot shoulders at all times. Work zone sequence C shows only a 10-foot shoulder and a 6-foot shoulder."

9. Respondent determined that Goodfellow Bros., Inc. had the highest score and was awarded the Project. Petitioner protested the award by a letter dated December 24, 2008. By a letter dated January 14, 2008, Respondent denied Petitioner's protest. This letter states in part:

[Petitioner's] proposal was considered responsive so we agree that [Petitioner's] proposal met the minimum requirements of the RFP...Information provided by [Petitioner] for some of the RFP requirements were minimal, such as pedestrian access through work areas at each intersection, while others includes conflicting information, such as provisions for (2) 10-foot shoulders throughout the work area. In accordance with the requirements of the procurement rules, the evaluation committee and advisory board carefully weighed [Petitioner's] proposal and made interpretations based on the information available, their best engineering judgment, and the RFP criteria.

10. Petitioner filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs on January 21, 2009 to contest the denial of its protest. On April 3, 2009, the Hearings Officer issued her decision after conducting an administrative hearing to determine whether the denial of Petitioner's protest

should be upheld. A copy of the Hearings Officer's decision is attached hereto and incorporated herein by reference as Appendix "A".

11. After receiving the Hearings Officer's decision, Respondent re-evaluated Petitioner's proposal and by a letter dated April 14, 2009, informed Petitioner that its proposal was being rejected as non-responsive and that Respondent intended to advertise a new solicitation utilizing the competitive sealed proposal procurement process. This letter states in part:

This rejection is based on the failure of all proposals to meet the requirements of the solicitation in a material respect. Our decision follows the Office of Administrative Hearings ("OAH") Department of Commerce and Consumer Affairs, Hearings Officer's decision on April 3, 2009 (reference Hearing No. PCH 2009-1)...Based upon the Hearings Officer's reasoning, all proposals failed to meet the requirements of the RFP in a number of material respects and must therefore be rejected.

12. By a letter dated April 17, 2009, Petitioner protested Respondent's decision to reject its proposal on the basis of being non-responsive.

13. By a letter dated April 29, 2009, Respondent informed Petitioner that it stood by its earlier decision to reject all proposals submitted as non-responsive. This letter also informed Petitioner that Respondent intended to proceed with advertising a new RFP. This letter states in part:

It was clear to the DOT evaluation committee and advisory board that [Petitioner's] construction phasing and traffic control around the work areas did not contain the minimum 10-foot wide paved shoulders (Reference Plan submittal for Best and Final Offer, Supplemental Design build Plans, dated May 2008, specifically plan sheet 102A...The Typical Road Section (For Work Zone Sequence C) did not have the mandatory 10-foot wide paved shoulders on both sides as required in the Technical Provisions of the Specifications...In addition, within [Petitioner's] design concept, item no. 1, Traffic Impacts and Management, part A., Design Phase Consideration, it states in part, 'The HDCC team has developed a plan that meets the project RFP for a minimum of two 11-foot lanes and two 10-foot wide shoulders at all times...' which is not consistent with the Phasing Plan.

In the hearing officer's decision in PCH 2009-1, it is apparent that the 11-foot wide travel lanes and the 10-foot wide shoulder lanes were deemed to be unconditional minimum requirements...If the hearing officer determined that GBI's proposal was nonresponsive because it deviated in a material respect from the RFP requirement of 11 foot wide travel lanes, then [Petitioner's] proposal, which also was inconsistent and deviated in a material respect from the RFP requirement of 10-foot side shoulder lanes on each side, must similarly be rejected as nonresponsive.

14. The technical provisions of the RFP do not require bidders to submit: (1) a specific number of schematic drawings showing the traffic control phasing and management scheme, (2) specific details regarding traffic control phasing and management scheme, (3) a schematic drawing showing the 10-foot shoulders during the construction phase drawn to scale as part of the traffic control phasing and management scheme.

### III. CONCLUSIONS OF LAW

The issue to be resolved is whether Petitioner's proposal should be rejected because it failed to meet the minimum requirements of the RFP by not providing for 10-foot shoulders on both sides for pedestrians and bicyclists. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's determinations were not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Hawai'i Revised Statutes ("HRS") § 103D-303(g) provides:

**§ 103D-303 Competitive sealed proposals.**

...

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract shall contain the basis on which the award is made.

Hawai'i Administrative Rules ("HAR") § 3-122-97(b) provides:

**§ 3-122-97 Rejection of offer.**

...

(b) A proposal may be accepted with modification or correction, unless the solicitation states otherwise.

(1) This allowance must be considered in determining whether reasons exist for rejecting all or any part of a proposal.

(2) A proposal shall be rejected for reasons including but not limited to:

(A) The offeror is nonresponsible as determined by subchapter 13;

(B) The proposal, after any opportunity has passed for modification or clarification, fails to meet the announced requirements of the agency in some material respect; or

(C) The proposed price is clearly unreasonable.

There is no dispute that the RFP contained the requirement that a proposal include two 10-foot wide shoulders on both sides for pedestrians and bicyclists. The evidence presented established that while Petitioner's proposal stated that they would provide two 10-foot shoulders at all times, Petitioner's Project Drawing 102A shows a 10-foot shoulder on only one side of Work Zone Sequence C. Petitioner argued that Project Drawing 102A was not meant to show the 10-foot shoulders. However, the Hearings Officer does not find this argument to be persuasive when a ten-foot shoulder is shown for one side of Work Zone Sequence C and 10-foot shoulders are shown for both sides of Work Zone Sequences A and B which are depicted on the same page. Petitioner also argued that the omission of the 10-foot shoulder in Work Zone Sequence C was a minor or trivial inconsistency. In *Hawaiian Dredging Construction Company v. Department of Transportation and Goodfellow Bros., Inc.*, PCH 2009-1, (April 3, 2009) the Hearings Officer concluded that the highest ranked proposal was nonresponsive because it failed to meet a requirement of the RFP in a material respect. Based on the evidence presented in this case, the Hearings Officer finds that the omission of the 10-foot shoulder is material; not minor or trivial as its omission affects price and project duration. Accordingly, the Hearings Officer concludes that Petitioner's proposal


failed to meet the requirements of the RFP in a material respect and pursuant to HAR § 3-122-97, should be rejected.<sup>1</sup>

In light of the findings and conclusions above, a determination as to whether Respondent acted in bad faith is unnecessary.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearings Officer finds that Petitioner failed to prove by a preponderance of the evidence that Respondent's denial of Petitioner's bid protest was improper and not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation. Accordingly, Respondent's denial of Petitioner's bid protest is affirmed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, JUL - 2 2009.

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

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<sup>1</sup> In PCH 2009-1, the Hearings Officer determined that Petitioner was entitled to bid preparation costs because the protest was sustained and because the evidence presented in that case showed that Respondent had determined that Petitioner was a responsive bidder and Petitioner's point total was second to Goodfellow Bros., Inc. In that case, Petitioner's proposal was not in evidence and therefore was not subject to review.