

DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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MEMPHIS, TN 38101

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

In the Matter of	)	PCH 2011-3
	)	
ROBERT’S TOURS AND	)	HEARINGS OFFICER’S FINDINGS OF
TRANSPORTATION, INC.,	)	FACT, CONCLUSIONS OF LAW AND
	)	FINAL ORDER GRANTING
Petitioner,	)	RESPONDENT’S MOTION TO DISMISS
	)	AND DENYING PETITIONER’S MOTION
vs.	)	FOR SUMMARY JUDGMENT
	)	
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	
	)	

HEARINGS OFFICER’S FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND FINAL ORDER GRANTING RESPONDENT’S MOTION TO DISMISS  
AND DENYING PETITIONER’S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On August 9, 2011, Robert’s Tours and Transportation, 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 August 16, 2011, Respondent filed a Motion to Dismiss.

On August 17, 2011, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Jonathan S. Moore, Esq. Respondent was represented by Laura Y. Kim, Esq. At the pre-hearing conference the parties agreed that an evidentiary hearing was not necessary because there were no relevant facts in dispute. Petitioner agreed to file its Motion for Summary Judgment on or before August

18, 2011. Respondent agreed to file a memorandum in opposition to Petitioner's motion by August 23, 2011. Petitioner agreed to file a reply by August 24, 2011. The parties agreed that the hearing on both motions would take place on August 25, 2011.

On August 25, 2011, oral arguments were heard by the undersigned Hearings Officer. Petitioner was represented by Mr. Moore and Respondent was represented by Ms. Kim. The matter was taken under advisement.

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. On January 25, 2011, Respondent advertised a Request for Proposals ("RFP") for an Airports Division project entitled "Request for Proposals (RFP) and Concession Agreement Relating to Operation of On-Demand Shuttle Services Concession at Honolulu International Airport." Respondent was seeking proposals from proposers interested in operating the on-demand shuttle services concession at the Honolulu International Airport.

2. By a letter dated July 12, 2011, Respondent notified Petitioner that it had selected another firm for the on-demand shuttle services concession. Petitioner received this letter on July 19, 2011.

3. By a letter dated July 21, 2011 to Respondent, Petitioner requested a debriefing session pursuant to Hawai'i Revised Statutes ("HRS") § 103D-303(h).

4. By a letter dated July 26, 2011, Respondent declined Petitioner's request for a debriefing. This letter states in part:

The basis for your request is Section 103D-303(h), Hawaii Revised Statutes (HRS). As noted in your letter, the State of Hawai'i, Department of Transportation, Airports Division (DOTA) issued the Request for Proposals and awarded the concession under Chapter 102, HRS, which governs concessions.

Chapter 102, HRS does not provide for debriefings or protests of concession awards. Consequently, the DOTA respectfully declines Roberts' request for a debriefing.

5. Petitioner filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i ("DCCA"), on August 9, 2011.

6. Article VI of the Concession Agreement provides that a concession fee and space rent, which is separate from the concession fee, shall be paid to Respondent.

### 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 to Dismiss is based on the assertion that the Hearings Officer does not have jurisdiction over the award of concession contracts. Petitioner contends that the Hearings Officer does have jurisdiction over this matter because HRS Chapter 103D applies to this RFP.

Hawai'i Revised Statutes § 103D-102(a) provides in part:

**§ 103D-102 Application of this chapter.** (a) This chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance[.]

HRS § 103D-104 defines "procurement" as "buying, purchasing, renting, leasing or otherwise acquiring any good, service or construction," and "services" as "the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance."

In *Waikiki Windriders/Hawaiian Ocean's Waikiki v. Department of Budget and Fiscal Services, City and County of Honolulu*, PCH 2002-9 (July 26, 2002) the Hearings Officer found that:

The [Procurement] Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that *involve the expenditure of public funds* as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts or

earnings, “any of which the State receives or is owed; in kind benefits or forbearance”. According to this interpretation, the language in HRS § 103D-102(a) upon which Petitioner relies (‘consideration for the contract...which the State receives or is owed’) was intended to clarify the *source of funds* used by the procuring agency as consideration for the contract rather than to expand the application of the Code to include concession contracts. (Emphasis in original.)

As Petitioner points out, the purpose of the RFP was to acquire on-demand shuttle services at the Honolulu International Airport. In exchange for the right to operate the on-demand shuttle service, the awardee pays Respondent a concession fee and rent for the spaces occupied by the awardee. The concession agreement does not contemplate the expenditure of public funds by Respondent as consideration for “buying, purchasing, renting, leasing, or otherwise acquiring any...service.” Petitioner argued that the RFP offers to pay valuable consideration to the awardee—exclusivity and the right to use public land for business. However, pursuant to the holding in *Windriders/Hawaiian Ocean’s Waikiki*, this type of consideration is not a factor in determining whether HRS Chapter 103D applies to the RFP.

Petitioner also argued that HRS § 103D-102 had no specific exemption for concession contracts. This issue was also dealt with in *Waikiki Windriders/Hawaiian Ocean’s Waikiki, Id.*, where the Hearings Officer reasoned:

A closer inspection of HRS § 103D-102(b) reveals that all of the contracts listed in that section involve contracts for the acquisition of a good, service or construction *and* the expenditure of public funds as consideration for those contracts. As such, HRS § 103D-102(b) is consistent with the conclusion that only procurement contracts involving the expenditure of public funds are governed by the Code. Moreover, it follows that because the Code does not apply to concession contracts, there was no need to ‘exempt’ those contracts under HRS § 103D-102(b). (Emphasis in original.)

Petitioner also argued that this RFP is specifically exempted from HRS Chapter

102<sup>1</sup> so HRS Chapter 103D should apply. As the Hearings Officer found that HRS Chapter 103D does not apply to concession contracts, Petitioner's argument is rejected.

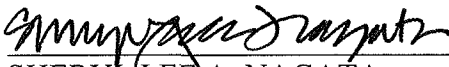
Accordingly, the Hearings Officer concludes that the RFP at issue is not subject to the requirements of HRS Chapter 103D and therefore the Hearings Officer lacks jurisdiction over this matter.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss is granted and Petitioner's Motion to Dismiss is denied and,

IT IS HEREBY ORDERED that the above-entitled matter is dismissed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, SEP - 2 2011.

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

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<sup>1</sup> HRS § 102-2(b) states: "The bidding requirements of subsection (a) shall not apply to concessions or space on public property set aside for the following purposes: (1) For operation of ground transportation services and parking lot operations at airports, except for motor vehicle rental operations under chapter 437D[.]"