



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2010 DEC -8 P 12: 12

HEARINGS OFFICE

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

In the Matter of)	PCX 2010-8
)	
ROBERT'S TOURS AND)	HEARINGS OFFICER'S FINDINGS OF
TRANSPORTATION, INC.,)	FACT, CONCLUSIONS OF LAW AND
)	DECISION GRANTING PETITIONER'S
Petitioner,)	MOTION FOR SUMMARY JUDGMENT
)	
vs.)	
)	
DEPARTMENT OF FINANCE, COUNTY)	
OF MAUI,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION GRANTING
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On October 26, 2010, Robert's Tours and Transportation, Inc. ("Petitioner") filed its request for hearing to contest the Department of Finance, County of Maui's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the pre-hearing conference held on November 4, 2010 and attended by Jonathan S. Moore, Esq. on behalf of Petitioner and Cheryl A. Tipton, Esq. on behalf of Respondent, the parties agreed that the hearing scheduled for November 17, 2010 would be taken off the calendar and that a hearing on cross motions for summary judgment would be held on December 1, 2010.

On November 9, 2010, Petitioner filed a Motion for Reconsideration of Department of Commerce and Consumer Affairs' Ruling Denying Discovery and Requiring Parties to

Submit Respective Cross Motions for Summary Judgment Entered November 4, 2010. On November 10, 2010, the Hearings Officer issued an order denying Petitioner's Motion.

On November 15, 2010, Respondent filed a Motion to Dismiss or in the Alternative for Summary Judgment and Petitioner filed its Motion for Summary Judgment. On November 16, 2010, Petitioner filed a Supplement to its Motion for Summary Judgment. On November 22, 2010, Petitioner and Respondent filed their memoranda in opposition to the other party's motion. On November 29, 2010, the parties filed their reply memoranda.

On December 1, 2010, a hearing on the motions was held by telephone conference. Petitioner was represented by Mr. Moore and Christopher A. Santos, Esq. Respondent was represented by Ms. Tipton. The matters were taken under advisement. Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. The Operating Budget of the County of Maui for the Fiscal Year July 1, 2010 to June 30, 2011, as adopted by Ordinance No. 3751 provides for:

- (6) Grants and disbursements for Paratransit services-Highway Fund
 - (i) Provided, that the Department issue a request for proposals for Paratransit services and execute a grant agreement no later than September 30, 2010.

The appropriated amount was \$375,000.00.

2. Respondent issued Request for Proposals, Job No. 10-11/P8, Maui Bus ADA Paratransit Services Project ("RFP") on August 8, 2010. The RFP provided that:

Funding of \$375,000.00 for the project has been appropriated in the Department of Transportation FY-11 budget. Paratransit service is passenger driven, therefore, the total annual service hours is not known. The County Department of Transportation may provide additional federal funding for this service if necessary.

3. Two proposals were submitted and an evaluation committee evaluated and scored the proposals. Maui Economic Opportunity Inc.'s proposal scored higher than the proposal submitted by Petitioner.

4. On September 16, 2010, Petitioner was notified that its proposal had not been selected. On September 21, 2010, Petitioner requested a debriefing, and it was held on September 27, 2010.

5. By a letter dated October 1, 2010, Petitioner filed a protest with Respondent.

6. By a letter dated October 5, 2010, Respondent denied the protest. This letter states in part:

It is the understanding of the Finance Department that the paratransit services solicitation, by budget ordinance, is a grant. Because the Procurement Code set out in Chapter 103D of the Hawai'i Revised Statutes does not apply to grants, there is no protest process applicable. Therefore, Roberts Tours & Transportation's protest is denied.

7. On October 13, 2010, Petitioner filed a Complaint for Declaratory Relief in the Circuit Court of the Second Circuit, and on October 14, 2010, filed an Ex Parte Motion for Temporary Restraining Order ("Ex Parte Motion"), requesting that Respondent be prohibited from awarding the contract to Maui Economic Opportunity, Inc. until the Court ruled on Petitioner's Motion for Preliminary Injunction.

8. At the hearing on the Ex Parte Motion on October 20, 2010, Circuit Court Judge Joel August denied the Ex Parte Motion without prejudice. Judge August also ordered that Petitioner be provided seven days from October 20, 2010 to file an appeal with the Department of Commerce and Consumer Affairs ("DCCA"). In the Court's view, Petitioner's appeal would be timely because Respondent had not given Petitioner notice that it had a right to an appeal.

9. On October 26, 2010, Petitioner filed a request for hearing with the DCCA to contest Respondent's denial of its protest.

10. On November 10, 2010, Judge August issued his Findings, Conclusions and Order Denying Petitioner's Motion for Temporary Restraining Order. Judge August's Order states in part:

Based upon an initial review of the record and the law, it is this Court's distinct impression that, regardless of the nomenclature

or funding methodology utilized by the County, the underlying dispute involved a contract for the procurement of services by a governmental entity and therefore comes within the purview of Hawai'i Revised Statutes Chapter 103 D, also known as the Hawai'i Public Procurement Code.

Pursuant to H.R.S. § 103D-704, the Department of Commerce and Consumer Affairs has exclusive jurisdiction over contract disputes arising under Chapter 103 D and the contested case proceedings set and H.R.S. Chapter 91 shall not apply to protested awards of contracts for services made by governmental agencies.

The court further finds that Plaintiff Robert's timely filed a bid protest with the County of Maui pursuant to H.R.S. § 103 D-701 and that the County's response to said protest was legally deficient in that the County failed to advise Robert's of its right to an administrative appeal as required by H.R.S. § 103D-701.

11. On November 24, 2010, Respondent filed a motion requesting that Judge August clarify and amend his November 10, 2010 Order.

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 law 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).

The issue to be resolved is whether the funding for paratransit services, as described in the Operating Budget approved by the Maui County Council, is a grant and therefore not subject to Hawai'i Revised Statutes ("HRS") Chapter 103D.

Hawai'i Revised Statutes § 103D-102(b)(2)(A) provides:

103D-102 Application of this chapter.

...

(b) Notwithstanding subsection (a), this chapter shall not apply to contracts by governmental bodies:

...

- (2) To disburse funds, irrespective of their source:
 - (A) For grants or subsidies as those terms are defined in section 42F-101, made by the State in accordance with standards provided by law as required by article VII, section 4, of the State Constitution; or by the counties pursuant to their respective charters or ordinances[.]

Section 3.36.010 of the Maui County Code defines a “grant” as “an appropriation or allocation of public funds or personal property to a recipient for a specified purpose, or an agreement by the county to authorize a concession of real property for less than market value.” A “recipient” is defined as a “person, association, or corporation which receives a grant from the County.”

Respondent argued that the funding for paratransit services is a grant because Ordinance 3751 includes a provision for “grants and disbursements for Paratransit services” and provides that a “grant agreement” be executed. In its memorandum in opposition to Petitioner’s Motion for Summary Judgment, Respondent also argued that:

Although the County’s grant was not to a specific recipient named in the ordinance, it would be to a specific recipient chosen through the RFP. As stated above, HRS § 103D-103-2(d) specifically provides that use of one or more provisions of Chapter 103D to determine the recipient does not constitute a waiver of any exemptions (such as for grants). (Emphasis in original).

The Hearings Officer finds that the funding for paratransit services does not meet the Maui County Code’s definition of “grant” as it was not appropriated or allocated to a recipient. In order for the funding to be a “grant” the “recipient”, which is defined as a “person, corporation or association” should have been specified in Ordinance No. 3751. The Hearings Officer rejects the argument that the funding can be considered a “grant” if the recipient is chosen through the RFP process. Accordingly, the Hearings Officer concludes that HRS Chapter 103D applies to the RFP.


IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that Respondent's denial of Petitioner's protest was improper and grants Petitioner's Motion for Summary Judgment and denies Respondent's Motion to Dismiss or in the Alternative for Summary Judgment.

Accordingly, the Hearings Officer orders that this matter be remanded to Respondent to respond to Petitioner's protest in accordance with HRS § 103D-701 and the applicable rules. Each party shall bear their own attorney's fees and costs.

If an appeal is filed, the parties are ordered to inform the Office of Administrative Hearings as to the outcome of the appeal so Petitioner's funds can be processed according to HRS § 103D-709(e).

DATED: Honolulu, Hawaii, DEC - 8 2010.


SHERYL DEE A. NAGATA
Acting Senior Hearings Officer
Department of Commerce
and Consumer Affairs