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

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| In the Matter of<br><br>REFRIGERANT RECYCLING, INC.,<br><br>Petitioner,<br><br>vs.<br><br>DEPARTMENT OF BUDGET & FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,<br><br>Respondent,<br><br>and<br><br>ISLAND RECYCLING, INC.,<br><br>Intervenor. | PCY 2012-005<br><br>HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION; EXHIBIT "A" |

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

## I. INTRODUCTION

On February 8, 2012, Refrigerant Recycling, Inc. ("Petitioner") filed a request for hearing to contest the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest regarding Solicitation No. RFB-ENV-397204, Proposal for the Recycling and Disposal of White Goods for the Various Agencies for the City and County of Honolulu. The matter was set for hearing and Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On February 10, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Conference Dates. On February 15, 2012, Respondent filed a stipulation to continue the dates for the pre-hearing conference, summary disposition motions filing deadlines and hearing. On February 17, 2012, Petitioner withdrew its Motion to Continue Hearing and Pre-Hearing Conference Dates.

On February 24, 2012, Island Recycling, Inc. ("Intervenor") filed a Stipulation for Intervention by Island Recycling, Inc.

On March 14, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Dates. By a letter dated March 15, 2012, the Hearings Officer informed the parties that Petitioner's Motion to Continue the Pre-Hearing Conference was denied and that the pre-hearing conference was still scheduled for March 16, 2012. The parties were further informed that a hearing on the Motion to Continue the Hearing Date, if necessary, would be held on March 23, 2012.

At the pre-hearing conference held on March 16, 2012, the parties discussed and agreed to deadlines for filing final witness and exhibit lists and exhibits, dispositive motions, motions in limine, and memoranda in opposition to motions filed. The parties also agreed that a hearing on dispositive motions and motions in limine would be held on March 30, 2012 and that the hearing would begin on April 2, 2012.

By a letter dated March 22, 2012, Petitioner informed the Hearings Officer that a hearing on its Motion to Continue Hearing and Pre-Hearing Conference was no longer needed and the Motion was therefore withdrawn.

On March 23, 2012, the following motions were filed: 1) Motion for Summary Determination (Petitioner), 2) Motion for Dismissal or Other Summary Disposition of Petitioner's Protest Re Bidder Experience (Intervenor), 3) Motion for Dismissal or Other Summary Disposition of Petitioner's Protest On Island Recycling's Prior Conduct (Intervenor), 4) Motion for Dismissal or Other Summary Disposition of Petitioner's Protest on Island Recycling's Equipment (Intervenor), 5) Motion for Dismissal or Summary Disposition of Petitioner's Protest on Refrigerant Recovery Technician Certification (Intervenor) and 6) Motion for Dismissal or Other Summary Disposition on Petitioner's Protest Re Subcontract To EPA-Approved "Refrigerant Reclaimer" (Intervenor).

On March 27, 2012, Intervenor filed Motions in Limine to Preclude Evidence of Prior Events and Testimony by Expert Witness Ned Murphy. Respondent also filed a Motion in Limine.

On March 28, 2012, Intervenor and Respondent filed their memoranda in opposition to Petitioner's Motion for Summary Determination. Respondent also filed a substantive joinder to Intervenor's motions for dismissal or summary disposition filed on March 23, 2012.

On March 28, 2012, Petitioner filed memoranda in opposition to motions filed by Intervenor on March 23, 2012.

On March 29, 2012, 1) Intervenor filed a joinder in Respondent's motion in limine, 2) Respondent filed a substantive joinder to Intervenor's motions in limine and 3) Petitioner filed a memorandum in opposition to the motions in limine filed by Intervenor and Respondent.

A hearing on the motions for summary disposition and motions in limine was held on March 30, 2012. Petitioner was represented by Jeffrey M. Osterkamp, Esq., Amanda M. Jones, Esq. and Calvert G. Chipchase, Esq. Respondent was represented by Geoffrey M. Kam, Esq. and Ryan H. Ota, Esq. Intervenor was represented by Craig T. Kugisaki, Esq. The matters were taken under advisement.

By a letter dated March 30, 2012, the Hearings Officer notified the parties that Intervenor/Respondent's Motions to Dismiss or for Summary Disposition regarding: 1) protest on bidder experience, 2) subcontract to EPA-approved refrigerant reclaimer and 3) refrigerant recovery technician certification were granted and that all other motions were denied. Orders denying the motions were issued on May 30, 2012.

On April 2, 2012, a Motion to Quash Subpoena Directed at Glenn Okimoto, Department of Transportation ("Motion to Quash") was filed by Michael Q.Y. Lau, Esq., Deputy Attorney General, attorney for Mr. Okimoto in his official capacity.

On April 2, 2012, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Messrs. Osterkamp and Chipchase and Ms. Jones. Respondent was represented by Messrs. Kam and Ota. Intervenor was represented by Mr. Kugisaki. Prior to beginning the hearing on the merits, Mr. Lau presented arguments in support of the Motion to Quash Subpoena. Petitioner presented arguments in opposition to the Motion to Quash. The Hearings Officer took the matter under advisement and asked the parties to try to resolve the matter. The hearing commenced but did not finish so the parties agreed to reconvene on April 13, 2012.[1]

On April 10, 2012, Respondent filed Motions to Quash Subpoenas of Alvin Washiashi and Wendy Imamura ("Respondent's Motions to Quash"). On April 11, 2012, Intervenor filed a

[1] The hearing subsequently reconvened on April 26 and 30, 2012, and May 1, 2, 3, 10, 11 and 15, 2012.

joinder to Respondent's Motions to Quash. On April 12, 2012, Petitioner filed a memorandum in opposition to Respondent's Motions to Quash.

On April 13, 2012, prior to reconvening the hearing on the merits, the parties presented arguments on Respondent's Motions to Quash. After considering the arguments presented, Respondent's Motions to Quash were denied. Further argument was also heard on the Motion to Quash Mr. Okimoto's subpoena. An Order granting the Motion to Quash Mr. Okimoto's subpoena was issued on April 18, 2012.

At the April 13, 2012 hearing, the Hearings Officer requested a memorandum regarding Petitioner's request to admit documents received from the Solid and Hazardous Waste Branch, Department of Health, State of Hawai'i. Petitioner filed its memorandum on April 19, 2012 and Intervenor and Respondent filed their memoranda on April 24, 2012. Petitioner filed its reply memorandum on April 27, 2012. By a letter dated April 27, 2012, the Hearings Officer informed the parties that rulings sustaining objections to Petitioner's Exhibits P-11, P-28 and P-91-100 being received into evidence were upheld and Petitioner's request to re-call Steven Y.K. Chang was denied.

On April 27, 2012, Respondent filed a Motion to Quash Subpoenas of Carter Luke, Linden Joesting, Barry Fukunaga, Patti Miyashiro, Kazu Hayashida and Rod Haraga. On April 30, 2012, Intervenor filed a substantive joinder in Respondent's Motion. On May 1, 2012, Petitioner filed a memorandum in opposition to Respondent's Motion. After hearing arguments by Messrs. Chipchase, Kam, Kugisaki and Laura Kim, Esq., Deputy Attorney General representing Carter Luke, Linden Joesting and Patti Miyashiro, the Motion to Quash was denied.

On May 14, 2012, Respondent filed a Motion to Dismiss. On May 15, 2012, Intervenor filed a Joinder in Respondent's Motion. At the hearing on May 15, 2012, Respondent withdrew its motion.

On May 15, 2012, Petitioner filed a Motion for Reconsideration of Order Granting Intervenor's Motion for Dismissal or Other Summary Disposition of Petitioner's Protest on Refrigerant Recovery Technician Certification. On May 18, 2012, Intervenor and Respondent filed memoranda in opposition to Petitioner's Motion for Reconsideration. On May 21, 2012, Petitioner filed a reply memorandum in support of its motion. On May 22, 2012, oral arguments were heard on Petitioner's Motion. Petitioner was represented by Messrs. Osterkamp and Chipchase, Respondent was represented by Messrs. Kam and Ota, and Intervenor was represented by Mr. Kugisaki. The matter was taken under advisement. On May 30, 2012, an Order denying Petititioner's Motion for Reconsideration was issued.

On June 12, 2012, Petitioner filed its Closing Argument. On June 26, 2012, Respondent and Intervenor filed their Closing Arguments. On July 3, 2012, Petitioner filed a Response to Respondent's Closing Argument and a Motion to Strike Declaration and Exhibit Attached to Intervenor's Closing Argument ("Motion to Strike"). On July 11, 2012, Intervenor filed a memorandum in opposition to Petitioner's Motion to Strike. On July 16, 2012, Petitioner filed a reply memorandum. On July 18, 2012, the Hearings Officer issued an Order Granting Petitioner's Motion to Strike.

On July 11, 2012, Petitioner and Respondent filed their Proposed Findings of Fact, Conclusion of Law and Decision and on July 12, 2012, Intervenor filed its Proposed Findings of Fact Conclusions of Law and Decision. On July 20, 2012, the parties filed their comments and responses to the proposed findings of fact and conclusions of law filed earlier.

The Hearings Officer's Findings of Fact, Conclusions of Law and Decision Granting Intervenor/Respondent's Motions to Dismiss or for Summary Disposition regarding: 1) protest on bidder experience, 2) subcontract to EPA-approved refrigerant reclaimer and 3) refrigerant recovery technician certification are being issued concurrently with this Decision.

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

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 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. Omitted findings and conclusions include matters that were not considered by Respondent in making its determination to deny Petitioner's protest. *See, Ohana Flooring v. Department of Transportation, State of Hawai'i,* PCH 2011-12 (November 18, 2011).[2]

[2] "...[T]he Hearings Officer can only make a decision about the 'determinations' of the chief procurement officer, and the chief procurement officer can only make 'determinations' about complaints brought before that officer. The statute [ HRS § 103D-709] literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer."

1. Petitioner has held the current contract for recycling and disposal of white goods since 2008.

2. On April 8, 2011, Respondent issued RFB-ENV-397204 for the Recycling and Disposal of White Goods for the Various Agencies of the City and County of Honolulu, Hawai'i ("RFB"). The Minimum Specifications require the contractor to ensure that all hazardous materials or components of the white goods, including refrigerant, are properly recycled and/or disposed of in accordance with all applicable City, State and Federal laws, rules and regulations. The refrigerant containing white goods are described as including but not limited to: "air conditioners, refrigerators, chillers, freezers, heat pumps, etc." Non-refrigerated white goods are described as including but not limited to: "washing machines, dryers, hot water heaters, stoves, ovens, ranges, dishwashers, etc." The RFB indicated that it estimated that 35,000 units of refrigerant containing white goods and 37,000 non-refrigerated white goods would be processed annually.

3. Bids were opened on April 26, 2011. Intervenor was the apparent low bidder, proposing to pay Respondent $148,000.00 per year. Petitioner's bid proposed to provide the services at an estimated cost to Respondent of $237,000.00 per year. Petitioner and Intervenor were the only two bidders for the RFB. The contract has not been awarded.

4. By a letter dated May 4, 2011, Petitioner protested "the award of RFN-ENV-397204 to Island Recycling, Inc. on April 26, 2011." By a letter dated May 19, 2011, Respondent notified Petitioner that no award had been made. Respondent also stated that it considered Petitioner's protest untimely as it was not an "aggrieved bidder". However, Respondent, without waiving its position that Petitioner's protest was untimely, addressed the claims raised in Petitioner's protest and denied Petitioner's protest.

5. By a letter dated May 26, 2011, Petitioner protested the official actions taken in Respondent's May 19, 2011 letter. By a letter dated July 5, 2011, Petitioner supplemented its May 26, 2011 protest. On February 1, 2012, Respondent denied Petitioner's protest. On February 8, 2012, Petitioner filed a request for hearing with the Office of Administrative Hearings ("OAH") to contest Respondent's February 1, 2012 written determination.

6. Alvin Washiashi is Respondent's assigned buyer for the RFB, and was responsible for reviewing and coordinating responses to Petitioner's protests, with assistance from the Department of Environmental Services ("ENV").

7. Michael Hiu assisted and monitored Mr. Washiashi's investigation of the issues raised by the protest.

8. According to Mr. Washiashi, prior to the initial protest, Respondent determined that Intervenor was a responsive bidder. Respondent was in the process of determining whether Intervenor was a responsible bidder when the initial protest was filed. Once the protest was filed, "everything came to a screeching halt" because once a protest is filed, it is Mr. Washiashi's understanding that Respondent cannot proceed forward with any awarding of the contract and cannot proceed with any documentation.

9. Mr. Washiashi worked with Mr. Hiu, Michael O'Keefe and Suzanne Jones from ENV and Geoffrey Kam, Ryan Ota and Amy Kondo from the Corporation Counsel's office to review the issues raised in the protest.

Equipment and Capacity Claims

10. By a letter dated May 26, 2011, Petitioner protested the official actions taken in Respondent's May 19, 2011 letter. Petitioner argued that Intervenor was not a responsible bidder because it lacked the recovery equipment to fulfill the requirements of the contract, cannot store large numbers of appliances and did not have the ability to handle R410A.

11. By a letter dated August 5, 2011, Respondent asked Intervenor to provide a written response to Petitioner's allegation that it is not a responsible bidder because it lacked the recovery equipment, the ability to handle R410A and faced significant limitations on the appliances it may keep on site.

12. By a letter dated August 22, 2011, Intervenor's counsel responded to Respondent by stating that:

> Island Recycling has three (3) PROMAX RG5410A recovery machines and recently acquired two (2) new state-of-the art Steenburgh CV15 recovery machines. Island Recycling anticipates that the five (5) recovery machines have the capacity to process about 120 units per 8-hour day, or a capacity of more than 37,000 units a year. Island Recycling also expects to add more recovery machines in the future. The RFB calls for processing 35,000 units annually so Island Recycling currently has sufficient recovery equipment and recovery capacity for performing the proposed contract.
>
> . . .
>
> Moreover, RRI's contention that Island Recycling does not have the capacity to store the volume of white goods called for by the proposed contract is unfounded. RRI admits that Island Recyling's Solid Waste Management Permit allows it to store 250 appliances on site at any one time, but RRI's own

> experience indicates that only 240 appliances are delivered by the City on an average day. Only half of the white goods are expected to contain refrigerant, with the balance constituting non-refrigerant containing white goods such as clothes washers and dryers.
>
> Under the DOH Solid Waste Management Permit, Island Recycling must process and bale white goods within 24 hours of acceptance...This processing requirement minimizes the on-site storage facilities needed for white goods.
>
> Island Recycling does not anticipate any site capacity issues in handling the volume of white goods generated by the proposed contract. In anticipation of a worst case scenario, e.g. breakdown of its baling equipment, however, Island Recycling has requested that its Solid Waste Management Permit be modified to allow for storage of up to 2,000 appliances on site at any one time. Island Recycling is awaiting the DOH's approval of that request.
>
> RRI is erroneous in its assertion that Island Recycling lacks the ability to recover R410a. Island Recycling is using Amtrol 123lb capacity tanks capable of recovering R410a refrigerant. A copy of the label on the Amtrol tanks specifying its capabilities is attached as Exhibit "2".

13. By a letter dated February 1, 2012, Respondent denied Petitioner's protest. This letter stated:

> The Solicitation requires the successful bidder to recycle and dispose of an estimated 35,000 White Goods, Refrigerant-Containing. Solicitation, Proposal, page 1.
>
> As stated previously, IRI may establish responsibility by a sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations. *Browning-Ferris Industries v. State Dept. of Transportation,* PCH 2000-4 (June 8, 2000). In this case, the City is informed that IRI has three Promax RG5410A recovery machines, has recently acquired two Steenburgh CV15 recovery machines, and will acquire additional machines as necessary to fulfill its obligations under the contract.
>
> Therefore, IRI has the necessary processing capacity, or may add such capacity, to handle the work required by the proposed contract.

Accordingly, this claim of RRI's protest is denied.

. . .

With respect to the argument that IRI cannot meet its contractual requirements because its permit limits the number of appliances it can store on-site, RRI has understated IRI's storage capacity. As RRI notes, IRI's permit allows it to store a maximum of 250 units (100 unprepared and 150 prepared). However, IRI's permit also allows it to store 200 bales of waste for up to 15 days prior to transport to its barge facility for shipping. IRI's overall storage capacity is therefore considerably greater than represented by RRI.

IRI will have to process appliances steadily so as not to exceed its limits on non-baled appliances. However, IRI's permit limit of 250 units (100 unprepared and 150 prepared) appears adequate to handle the 200 units (City estimate) to 240 units (RRI estimate) per day. IRI may also add storage capacity to handle the work required by the proposed contract.

Therefore IRI is responsible because it may subcontract the responsibility for recycling and disposing of recovered refrigerant and, further, IRI has the necessary storage capacity, or may add such capacity, to handle the work required by the proposed contract.

Accordingly, these claims of RRI's protest are denied.

. . .

Similarly, insofar as the lack of properly rated tanks is an issue of responsibility, IRI may obtain appropriately rated tanks as necessary to carry out its responsibilities under the contract. It is also the City's understanding that IRI actually has appropriately rated tanks to handle R410a.

Accordingly, these claims of RR's protest are denied.

14. The Steenburgh CV-15 machines can be used to recover refrigerant and the Promax machines are rated for recovering R410a refrigerant.

15. Respondent did not confirm that Intervenor did in fact have the equipment it stated it had or would acquire.

16. Respondent did not calculate the refrigerant recovery capacity of the Steenburgh CV 15 machines. However, it was generally felt that Intervenor had sufficient capacity or if it was not sufficient, then sufficient capacity could be brought on.

17. Intervenor uses Amtrol 123 lb capacity tanks which are capable of recovering R410a refrigerant.

Intervenor's Past Performance

18. By a letter dated May 26, 2011, Petitioner protested the official actions taken in Respondent's May 19, 2011 letter. Petitioner argued that Intervenor was not a responsible bidder because it has "consistently demonstrated that it lacks the reliability and business integrity to perform the contract in the manner expected of those who serve the City." Petitioner listed five examples of Intervenor's lack of reliability and business integrity: 1) an April 2, 2008 State Department of Health ("DOH") Inspection Report noting potential permit violations based on Intervenor's stacking of unprocessed refrigerators and failure to collect mercury switches, 2) Intervenor's 2006 eviction from the Kauai Resource Center in Lihue because Intervenor used County property and facilities for a private business contract unrelated to the contract it had with the County, 3) November 2, 2004 *Honolulu Advertiser* article which reported that Intervenor was ordered to vacate its Sand Island facility because of numerous state violations, 4) May 18, 2004 news release that the City Council's Public Works and Economic Development Committee instituted an investigation into an improper relationship between Intervenor and Mayor Jeremy Harris. The news release also reported that Intervenor owed back rent and electricity costs to the State Department of Transportation and 5) May 1, 2004 *Honolulu Advertiser* article that reported "old tires, bales of cardboard and other materials" fueled an inferno at Intervenor's Sand Island facility.

19. The DOH Inspection report noted that the potential violation of stacking unprocessed refrigerators observed on March 28, 2008 was corrected by the second inspection on March 31, 2008. With respect to the DOH's concern that it did not observe a collection of mercury switches, it was Intervenor's position that there was none because they had not received commercial appliances or older model refrigerators that contain mercury switches. However the inspection report noted that Intervenor requested additional direction and or literature if the DOH found inadequacies with the process.

20. According to a news article from *The Garden Island* dated January 4, 2006, the County of Kauai terminated its contract with Intervenor in January 2006, because it found that

between April and July 2005, Intervenor used the County's forklift to empty bins from Intervenor's private customer at the Lihue Refuse Transfer Station or into a roll-off bin. This activity occurred once or twice a week for about three months. Intervenor confirmed that it used the forklift because it had no other means of dumping the 3 cubic yard container until July 2005 when Intervenor's own front-end loader truck arrived on Kauai from Honolulu. This article also stated that Intervenor was being given permission to rebid for the contract.

21. According to a news article from *The Honolulu Advertiser* dated November 2, 2004, Intervenor was notified by the State Department of Transportation ("DOT") that it had to vacate its Sand Island facility because of continued encroachment onto DOT property despite orders to vacate those parcels, failure to comply with City building permit requirements despite being ordered to do so by the City and the DOT, nullification of Intervenor's special management area permit—which allows it to operate on Sand Island—because of the building permit violations, failure to comply with water pollution laws despite a notice of apparent violation from the DOH, and construction of fixtures on the property without DOT approval.

22. On May 18, 2004, Councilman Rod Tam, Chair of the Public Works and Economic Development Committee announced through a memo to the news media that it would investigate the "questionable improper awarding" of the Mililani pilot recycling program contract to Intervenor. The investigation was due to *The Honolulu Advertiser* and *The Honolulu Star-Bulletin*'s investigation of the relationship between Mayor Jeremy Harris' administration and Intervenor. The memo also cites eight reasons that Carol Cox of Enviro Watch protested the bidding process: no zoning clearance, no conditional use permit, no special management area permit, no national pollutant discharge elimination system permit, a solid waste management ("SWMP") permit for only one parcel, a notice of violation for 11 illegal structures, a notice of order for civil fines, and an illegal toilet facility with a holding tank. The memo also notes that Intervenor owes back rent and electricity costs to the DOT.

23. According to a May 1, 2004 article from *The Honolulu Advertiser*, a fire was reported at 5:03 p.m. on April 30, 2004 at Intervenor's Sand Island facility where old tires, bales of cardboard and other materials fueled an inferno that filled the air with flames and thick, black smoke.

24. On July 5, 2011, Petitioner supplemented its May 26, 2011 protest letter with eight other examples of why Petitioner believed Intervenor was not a responsible bidder. These included: 1) February 9, 2009 response to a January 23, 2009 DOH warning letter in which Intervenor explained the circumstances as to why it stored excess material on an unpermitted lot

and why it may continue to do so until they receive a SWMP (application submitted in October 2008) for that lot, 2) May 13, 2008 response to a May 9, 2008 DOH warning letter explaining how Intervenor intended to address issues regarding stacking of refrigerators and inspection and removal of mercury switches, 3) false statement that Intervenor was on the EPA approved reclaimers list in February 8, 2008 Proposal for Disposal of White Goods submitted to Respondent, 4) February 29, 2008 protest letter from Intervenor which incorrectly stated that an EPA designation allowed Intervenor to remove refrigerant from appliances as a large quantity generator, 5) March 27, 2008 letter in which Environmental Solutions denied that Intervenor sent refrigerant to Environmental Solutions to be recycled, 6) May 1, 2007 Notice of Violation issued by Department of Planning and Permitting ("DPP") because "three office trailers, tarp shelters and one wood framed storage shed have been constructed without the required building permits" at 91-140 Kaomi Loop, 7) August 23, 2005 Notice of Violation issued by DPP at 91-140 Kaomi Loop because "all sidewalks, curbs, and driveways shall be constructed according to city standards and specifications" and that the approved plan shows a 30 feet driveway width. The driveway width is 60 feet with no flares, scoring and finish," and 8) June 21, 2005 Notice of Violation issued by DPP for grading and grubbing without a permit at 91-140 Kaomi Loop.

25. By a letter dated August 5, 2011, Respondent asked Intervenor to provide a written response to Petitioner's allegations that it is not a responsible bidder.

26. By a letter dated August 22, 2011, Intervenor's counsel responded to Respondent's August 5, 2011 letter. A copy of pages 7 to 12 of that letter is attached hereto and incorporated here in by reference as Exhibit "A".

27. By a letter dated February 1, 2012, Respondent denied Petitioner's protest as to the issue of Intervenor's past performance. As to issues raised by Petitioner's May 26, 2011 letter, this letter stated:

> With respect to IRI's ability to perform the contract, to the extent that RRI's evidence questions IRI's ability to perform based on prior State DOH warning letters, the City notes that there is no current State DOH cease and desist order or notice of violation that prohibits IRI from performing the services required by the current solicitation.
>
> To the extent that RRI's evidence questions IRI's past performance of a government contract, the City notes that IRI has not been debarred and that there is no evidence that IRI cannot perform the services required by the current solicitation. As stated previously, the City is also informed

that IRI, in addition to the experience previously stated, also held commercial contracts through the relevant time period.

Based on our review of your claims, the City finds that IRI is sufficiently responsible to perform the services required by the solicitation. Accordingly, this claim of RRI's protest is denied.

28. With respect to the issues Petitioner raised in its July 5, 2011 letter, Respondent's February 1, 2012 letter stated:

> As a preliminary matter, RRI's July 5, 2011 is untimely.
> . . .
>
> In this case, RRI's March (sic) 26, 2011 protest stated:
>
> 'RRI believes that significant additional evidence of other IRI issues and violations exists. RRI has not yet had sufficient time to compile this additional evidence, but reserves the right to submit future evidence to the Procurement Officer and/or the OAH when it is obtained.'
>
> There is no indication that the 'additional evidence of other IRI issues and violations' were not available within the filing time and there was no indication of the expected availability date required by HAR § 3-126-3.
>
> Therefore, RRI's June (sic) 5, 2011 letter is untimely and RRI's additional evidence of other IRI issues and/or violations is dismissed on that basis.
>
> However, without waiving the foregoing, the City also considered the additional material provided and responds substantively below.
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> . . .
>
> With respect to IRI's present ability to perform the contract, to the extent that RRI's evidence questions IRI's ability to perform based on prior State DOH warning letters, the City notes that there is no current State DOH cease and desist order or notice of violation that prohibits IRI from performing the services required by the current solicitation.
>
> To the extent that RRI's evidence questions IRI's past performance of a government contract, the City notes that IRI has not been debarred and that there is no evidence that IRI cannot perform the services required by the current solicitation. As stated previously, the City is also informed

> that IRI in addition to the experience previously stated, also held commercial contracts during the relevant time period.
>
> Based on our review of your claims, the City finds that IRI is sufficiently responsible to perform the services required by the solicitation.
>
> Accordingly, this claim of RRI's protest is denied.

29. With respect to the May 26, 2011 protest, Mr. Washiashi consulted with Messrs. O'Keefe and Hiu, Ms. Jones and the Corporation Counsel's office.

30. Respondent did not have meetings with the State Department of Health or Transportation or the City's Department of Planning and Permitting to inquire about Intervenor's past performance.

31. Following receipt of the July 5, 2011 letter from Petitioner, Mr. Washiashi asked Intervenor to respond to the allegations contained in Petitioner's May 26, 2011 and July 5, 2011 letters. Mr. Washiashi was concerned about the numerous notices of violation mentioned in the letter. Specifically, Mr. Washiashi was concerned whether Intervenor could retain its SWMP and fulfill the requirements of the contract. However, it did not in any way alter his determination that Intervenor was a responsible bidder because of the existence of the SWMP and no evidence of debarment. Mr. Washiashi considered it a warning to Respondent to monitor the administration of the contract.

32. Mr. Washiashi was satisfied that Intervenor was financially capable of performing the contract because a tax clearance certificate was submitted.

33. Mr. Washiashi was satisfied that Intervenor had integrity based on his review of the allegations made in the protest, the responses by Intervenor and his consultation with ENV.

34. Respondent (Purchasing and ENV) is familiar with Intervenor because Intervenor holds a contract with Respondent for recycling paper and has been adequately performing the contract.

35. With respect to the fire and illegal storage issues raised by Petitioner, Michael Hiu, who was acting as the chief procurement officer for this RFB, could not draw the conclusion that Intervenor could not perform on the contract.

36. With respect to the issues raised regarding Intervenor's past performance, it was Mr. Hiu's opinion that the instances cited by Petitioner occurred quite a while ago so it was difficult to use those instances to substantiate that Intervenor could not perform going forward.

37. It is Mr. Hiu's opinion that in evaluating bidder responsibility, it is not relevant that a bidder submitted incorrect statements or lied in a previous solicitation to Respondent because solicitations are independent and Respondent is not allowed to consider a response to a previous solicitation in the new solicitation.

38. Except to confirm that Intervenor had a SWMP and to ask Intervenor for a response, Respondent did not investigate the points raised in Petitioner's May 26, 2011 and July 5, 2011 letters regarding Intervenor's past performance.

## III. CONCLUSIONS OF LAW

The issue to be resolved is whether Intervenor is a responsible bidder with respect to its equipment and capacity, and past performance. 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 § 103D-104 defines a responsible bidder as "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance." "Capability" means capability at the time of award of contract. *See,* Hawai'i Administrative Rules § 3-122-1. Responsibility is determined at any time up to the award based upon information available up to that time. *Ohana Flooring v. Department of Transportation, State of Hawai'i,* PCH 2011-12 (November 18, 2011), citing *Okada Trucking Co., Ltd. v. Board of Water Supply,* 97 Haw. 544, 556, 40 P.3d 946, 958 (Haw. App. 2001). In addition, when it comes to matters of responsibility, a bidder can supplement its bid after bid opening even when the invitation for bids requires, on its face, submission of the responsibility documentation with the bid. *Hawai'i Specialty Vehicles, LLC v. Wendy K. Imamura,* PCH 2011-7 (January 20, 2012).

At the outset, the Hearings Officer addresses Petitioner's argument that Respondent's denial of Petitioner's protests was improper because Respondent denied the protests without taking "basic investigative steps like contacting Island's references, visiting Island's place of business, reviewing the numerous warning letters and notices of violation on file with the DOH and DPP, resolving factual conflicts between RRI's allegations and Island's responses, reviewing the volume and kind of white goods that would be covered by the contract, verifying Island's certifications and personnel or inspecting Island's facilities and equipment." *See,* pages 12-13 of Petitioner's Closing Argument. Respondent contended that it conducted an investigation

"appropriate to the situation" and subsequently concluded that it had sufficient information to make a decision.

HRS § 103D-701 permits the chief procurement officer or a designee to "settle and resolve a protest" and if it is not resolved by mutual agreement, issue a written decision "promptly". The decision on the protest "shall be made as expeditiously as possible after reviewing all relevant information[.]" *See,* HAR § 3-126-7. In order to expedite the resolution of protests, Hawai'i Administrative Rules ("HAR") § 3-126-3 requires that the written protest contain a statement of reasons for the protest and supporting exhibits, evidence or documents to substantiate any claims and if not available, its expected availability date shall be indicated. *GTE Hawaiian Telephone Company, Incorporated v. Department of Finance, County of Maui,* PCH 98-6 (December 9, 1998, affirmed June 17, 1999). In the case at bar, the requirement that the protest contain all the information necessary to substantiate its claim is especially relevant because Respondent did not make a responsibility determination prior to the protest being filed, and the stay required by HRS § 103D-701(f) prohibited Respondent from taking further action on the RFB, except to resolve the protest. The evidence presented showed that Respondent's investigation included Messrs. Washiashi and Hiu's discussions with the ENV and Intervenor, and a request to Intervenor to specifically address the issues raised by Petitioner. Respondent also had independent knowledge that Intervenor held a contract with Respondent for recycling paper and that it had been adequately performing that contract. Based on the evidence presented, the Hearings Officer concludes that, in the context of resolving the protest, Respondent reviewed all the relevant information necessary to make a decision on whether to uphold or deny Petitioner's protest.

With respect to the "equipment and capacity issues", Petitioner contends that Intervenor is not responsible because it lacked the recovery equipment to fulfill the requirements of the contract, cannot store large numbers of appliances and did not have the ability to handle R410A. A bidder's responsibility may be established by a "sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations." *Browning-Ferris Industries of Hawai'i, Inc. v. State of Hawai'i, Department of Transportation,* PCH 2000-4 (June 8, 2000) at page 11. The evidence presented showed that Respondent was satisfied that Intervenor had the necessary recovery equipment, could handle R410A, and had sufficient storage and permit capacity to handle the anticipated number of white goods and/or that Intervenor had the ability to obtain the equipment, storage and permit capacity necessary to perform the contract. Since the procuring agency's determination "will be given wide discretion

and will not be interfered with unless the determination is unreasonable, arbitrary or capricious." *Browning Ferris, supra,* at page 11, the Hearings Officer concludes that Petitioner has not proven by a preponderance of the evidence that Respondent's denial of Petitioner's protest as to the "equipment and capacity issues" was not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

With respect to Intervenor's past performance, Petitioner argued in its May 26, 2011 protest that Intervenor lacked reliability and business integrity because of regulatory violations (2008), disputes with government agencies resulting in contract termination (2006) and eviction (2004), a fire at Intervenor's Sand Island facility (2004), and an investigation by a City Council committee because of an improper relationship between the Mayor Jeremy Harris' administration and Intervenor (2004). Based on the evidence presented, the Hearings Officer finds that Respondent's determination to deny Petitioner's protest was not unreasonable, arbitrary or capricious. Except for the DOH's inspection report in 2008 noting the potential violation of stacking unprocessed refrigerators and concern that Intervenor did not have a collection of mercury switches,[3] none of the examples cited by Petitioner relate to the processing of white goods, the subject of this solicitation. In addition, the events cited by Respondent are five to seven years old and while Intervenor's management may not have changed, its facility moved from Sand Island to Campbell Industrial Park and Mayor Harris is no longer in office. Accordingly, the Hearings Officer concludes that Petitioner has not shown by a preponderance of the evidence that Respondent's denial of Petitioner's protest as to Intervenor's past performance was not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation.

On July 5, 2011, Petitioner supplemented its May 26, 2011 protest with eight other examples of Intervenor's lack of reliability and business integrity. In Respondent's denial of Petitioner's protest, Respondent determined that pursuant to HAR § 3-126-3, Petitioner's July 5, 2011 letter was untimely, citing the fact that the there was no indication that the additional evidence was not available within the filing time and there was no indication of the expected availability date. Petitioner's supplemental letter is also untimely because it should have been filed within seven (7) calendar days after Respondent issued the denial of Petitioner's protest (May 19, 2011) because "[t]o be considered, the supplemental letter must independently meet the timeliness requirement for the filing of protests." *GTE Hawaiian Telephone Company, supra,* at

[3] Intervenor corrected the potential violations noted on March 28, 2008 by the second inspection on March 31, 2008.

14. Accordingly, the Hearings Officer finds that Petitioner's July 5, 2011 protest was not timely and concludes that the OAH lacks jurisdiction over Petitioner's request for review of Respondent's denial of Petitioner's protest regarding the supplemental evidence provided on July 5, 2011.

## IV. DECISION

Based on the foregoing Findings of Fact and Conclusions 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, SEP 17 2012.

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

**H. PROTEST: Island Recycling past performance.**

The term "Responsible bidder" is defined as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." HRS §103D-104.

RRI alleges that Island Recycling "lacks the reliability and business integrity to perform the contract" at issue. To support that allegation, RRI relies upon information unrelated to Island Recycling's performance of any contract involving the recycling or disposal of white goods, or any other contract with the City.

The incidents described by RRI to support its "argument" are distorted and of no probative value. They are presented purely for the purpose of disparaging a business competitor and prejudicing the City against Island Recycling. Nonetheless, a fair and balanced recitation of the facts underlying the incidents described by RRI is in order to clarify any misapprehension created by RRI's one-sided, baseless attacks:

(1) March 28, 2008 DOH Inspection Report.

In its routine inspection in March 2008, the DOH noted "potential" violations involving refrigerator stacking and mercury switches. The deficiencies were resolved and the DOH never issued a Notice of Violation or fined Island Recycling.

(2) January 4, 2006 Newspaper Article.

As described in the newspaper article, the termination of Island Recycling's contract at the Kauai Resource Center (KRC) occurred after a long history of "competition for business between Island Recycling and Garden Isle Disposal, two of the main recycling competitors on Kauai". Trouble began after Island Recycling entered the Kauai market by successfully bidding on the KRC contract. (It had been the sole bidder.)

About a year before being terminated, Island Recycling requested that its KRC contract be modified to allow for the recycling of glass. The State's new "HI-5" program had just started, and the modification would have allowed the KRC to

EXHIBIT "A"

become a certified redemption center (CRC). Although the requested modification would have added another HI-5 redemption center on Kauai, the request was denied to protect the existing redemption centers of Garden Isle Disposal.

When Island Recycling later began trash hauling and obtained a number of accounts by charging lower rates, trash hauling competitor Garden Isle Disposal threatened to sue Island Recycling for "interfering" with its contracts. Shortly thereafter, Island Recycling's contract for the KRC was terminated, even though it would take at between 6 to 8 months for a new contractor to be put in place.

(3) November 2, 2004 Newspaper Article.

The news article regards the circumstances under which Island Recyclings' revocable permits for its Sand Island recycling facility was terminated. As indicated in the article, the termination was coincident with Island Recycling being awarded the bid for City's curbside recycling program. The only other qualified bidder, Honolulu Recovery Systems, submitted a bid that was $1 million a year higher than Island Recycling's bid. As reported in the article, Island Recycling disputed the alleged "violations", and ultimately was told that its revocable permits were being terminated because "recycling" was not a "maritime" use of Sand Island. (The area is now being used for asphalt processing.) It was under those circumstances that Island Recycling was given only a few months to acquire a new location, obtain the requisite permits for recycling activities, and move all of its equipment and operations to Campbell Industrial Park in Kapolei.

The article reports on the City Council politics relating to Island Recycling's award of the curbside recycling contract. Notwithstanding Island Recycling's "low bid", the contract was eventually cancelled for "convenience".

The Hanneman administration subsequently contracted for another "pilot" curbside recycling project. (Island Recycling successfully provided recycling for the first "pilot" project in Mililani which lasted from November 2003 to February 2004.) The City later expanded the second "pilot" project to an "island-wide" curbside recycling program without a public bid after 3 years.

(4) May 18, 2004 News Release.

This news release by Councilman Rod Tam relates to Island Recycling's contract for curbside recycling in the Mililani "pilot" project described above. Notwithstanding Councilman Tam's desire for an investigation, the "fact" is that Island Recycling was the only recycling company that bid on the Mililani "pilot" project. It is also a "fact" that the publicized investigation into "the questionable improper awarding of the Mililani pilot recycling program contract" found no improprieties, and that there was never publicity of or prosecution based on any investigative findings that resulted.

(5) May 1, 2004 Newspaper Article.

This newspaper story involves the sensational fire that occurred coincident with Island Recycling's issues involving the City's curbside recycling program. The State DOH's investigation into "allegations of illegal storage" did not result in adverse findings or violations against Island Recycling. As a matter of fact, none of Enviro Watch Inc.'s complaints against Island Recycling has ever been validated by any investigative authority.

(6) Scrap Metal Issue.

In late 2008, there was a collapse of the international market for scrap metals as a result of the worldwide rescession. As indicated in Island Recycling's letter dated January 9, 2009, the price of scrap steel for recycling plummeting 70% in a month and steel mills around the world were not buying scrap metal. No one, including Hawaii recyclers, could sell scrap steel. Scrap metal storage became a problem on Oahu.

Other than Island Recycling, there was only one other recycler permitted by the DOH to store scrap metal on Oahu. When that recycler stopped taking in scrap metal (because it could not be sold) in the 4th quarter of 2008, Island Recycling continued to accept the material to prevent the dumping of white goods and vehicles in public places. At that time, residents and commercial entities had no place on Oahu to dump their scrap steel, appliances and vehicles. Island Recycling also expected that the market would improve shortly and that it would be able to ship scrap metal overseas again.

In the fall of 2008, Island Recycling also planned to relocate its scrap metal processing and storage to a larger parcel next door (Lot 32). In September of 2008, Island Recycling submitted an application for a Solid Waste Management Permit for Lot 32 for the purpose of relocating its "steel storage and processing to an area with larger capacity". As its needs for additional storage space increased that fall, however, Island Recycling proactively informed and consulted with the DOH about the storage of scrap metal on Lot 32, and asked for expeditious processing of its application. Island Recycling even requested that an emergency permit be issued.

By January of 2009, the DOH issued Island Recycling with a warning letter. Island Recycling immediately responded to the DOH's concerns, but the Solid Waste Management Permit for Lot 32 was not issued until June of 2009. No notice of violation was ever issued to Island Recycling for using Lot 32 to store scrap metal prior to issuance of that permit.

(7) Berm Issue.

RRI's assertions on this issue confuse apples and oranges. The berm relating to H-Power material referenced in the letter dated October 23, 2007 regarded an area that was not where white goods were being processed in 2008. Separate and distinct areas of the premises were involved. The implication that Island Recycling failed to comply with a commitment made 6 months earlier is incorrect.

(8) Approved Reclaimer Issue.

Island Recycling incorrectly indicated that it was a refrigerant "reclaimer" in a document submitted in 2008. The EPA letter at issue assigned the RCRA ID number HIR000138263 to Island Recycling, and stated that the EPA listed Island Recycling's status as a "Large Quantity Generator". The RCRA designation authorizes Island Recycling to engage in refrigerant "processing", as opposed to "reclaiming". The error was inadvertent, not meant to deceive, and apparent by a review of the letter from the EPA. The subject letter dated August 3, 2007 from the EPA was included as Attachment C-1 to Island Recycling's bid.

(9) EPA Designation as "Large Quantity Generator".

RRI's allegations on this point are entirely off the mark. The February 29, 2008 letter from Island Recycling explains that its EPA designation "*allows us to remove refrigerant from appliances as a 'large quantity generator.' We then bale the appliances and send them to smelters, where the metal is used to make new alloys. The refrigerant is then sent to a reclaimer to be tested for contaminants, purified and resold.*" This is consistent with the EPA letter dated August 3, 2007 to Island Recycling previously submitted as Attachment C-1 to Island Recycling's bid.

(10) Environmental Solutions Issue.

Before submitting its bid in 2008, Island Recycling contacted Mary DeTienne of Environmental Solutions and was told by Ms. DeTienne that her company was a certified refrigerant reclaimer. Ms. DeTienne informed Island Recycling that Environmental Solutions would pay for the refrigerant sent to her company and advised as to the size of containers that should be used to ship the refrigerant. In reliance upon Ms. DeTienne's representations, Island Recycling identified Environmental Solutions as an end user for its refrigerant and an EPA certified refrigerant reclaimer.

Upon submission of its bid to the City, however, Ms. DeTienne unexpectedly demanded that Island Recycling retract all statements regarding Environmental Solutions' status as an EPA certified "reclaimer". Island Recycling suspects that Environmental Solutions was never certified by the EPA.

(11) Office Trailer Issue.

The Notice of Violation (NOV) dated May 1, 2007 was addressed by a Building Permit issued May 17, 2007. A copy of that Building Permit is attached as Exhibit "3". There is no outstanding violation.

(12) Driveway Issue.

The NOV dated September 23, 2005 occurred as Island Recycling was hastily relocating from Sand Island to its present site at Campbell Industrial Park in Kapolei. A Building Permit

for a 30 foot wide driveway had been obtained, but an application to increase the width to 50 feet had been submitted. In the process, the workers poured a 60 foot wide driveway. The NOV resulted and a Building Permit for the 50 foot driveway was issued on November 21, 2005. A copy of that Building Permit is attached as Exhibit "4". The excess ten foot width of the driveway was removed by Island Recycling. There is no outstanding violation.

(13) Grading Issue.

The NOV dated June 21, 2005 also occurred when Island Recycling was working furiously to meet the State's deadline for moving its whole recycling facility from Sand Island. A Grading Permit was obtained on June 24, 2005. A copy of the Building Permit is attached as Exhibit "5". No fines were imposed and there is no outstanding violation.

The thrust of RRI's complaint regarding past performance under HRS §103D-104 is that Island Recycling has not demonstrated "the reliability and business integrity to perform the contract" at issue. In relying upon isolated and unrelated incidents to support its argument, RRI fails to address the fundamental question of whether Island Recycling will be reliable and trustworthy in its performance of the proposed recycling contract. Island Recycling contends that the best evidence of its reliability and integrity as a contractor is demonstrated by its historical performance and its successful prior completion of the following government contracts:

(a) City and County of Honolulu:

2003-2004 Mililani Curbside Pilot Program
2003-2009 Paper recycling contractor
2002-2011 Advance Disposal Fee (ADF) glass contractor
2007-2011 Trash container recycler

(b) State of Hawaii:

2005-2011 Paper recycling contractor
2005-2011 HI-5 Redemption Program - 6 sites

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

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| In the Matter of<br><br>REFRIGERANT RECYCLING, INC.,<br><br>Petitioner,<br><br>vs.<br><br>DEPARTMENT OF BUDGET & FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,<br><br>Respondent,<br><br>and<br><br>ISLAND RECYCLING, INC.,<br><br>Intervenor. | PCY 2012-005<br><br>HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION GRANTING INTERVENOR/RESPONDENT'S MOTION FOR DISMISSAL OR OTHER SUMMARY DISPOSITION OF PETITIONER'S PROTEST RE BIDDER EXPERIENCE |

# HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION GRANTING INTERVENOR/RESPONDENT'S MOTION FOR DISMISSAL OR OTHER SUMMARY DISPOSITION OF PETITIONER'S PROTEST RE BIDDER EXPERIENCE

## I. INTRODUCTION

On February 8, 2012, Refrigerant Recycling, Inc. ("Petitioner") filed a request for hearing to contest the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest regarding Solicitation No. RFB-ENV-397204, Proposal for the Recycling and Disposal of White Goods for the Various Agencies for the City and County of Honolulu. The matter was set for hearing and Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On February 10, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Conference Dates. On February 15, 2012, Respondent filed a stipulation to continue the dates for the pre-hearing conference, summary disposition motions filing deadlines and hearing. On February 17, 2012, Petitioner withdrew its Motion to Continue Hearing and Pre-Hearing Conference Dates.

On February 24, 2012, Island Recycling, Inc. ("Intervenor") filed a Stipulation for Intervention by Island Recycling, Inc.

On March 14, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Dates. By a letter dated March 15, 2012, the Hearings Officer informed the parties that Petitioner's Motion to Continue the Pre-Hearing Conference was denied and that the pre-hearing conference was still scheduled for March 16, 2012. The parties were further informed that a hearing on the Motion to Continue the Hearing Date, if necessary, would be held on March 23, 2012.

At the pre-hearing conference held on March 16, 2012, the parties discussed and agreed to deadlines for filing final witness and exhibit lists and exhibits, dispositive motions, motions in limine, and memoranda in opposition to motions filed. The parties also agreed that a hearing on dispositive motions and motions in limine would be held on March 30, 2012 and that the hearing would begin on April 2, 2012.

By a letter dated March 22, 2012, Petitioner informed the Hearings Officer that a hearing on its Motion to Continue Hearing and Pre-Hearing Conference was no longer needed and the Motion was therefore withdrawn.

On March 23, 2012, Intervenor filed a Motion for Dismissal or Other Summary Disposition of Petitioner's Protest Re Bidder Experience ("Motion"). On March 28, 2012, Respondent filed a substantive joinder to Intervenor's Motion and Petitioner filed a memorandum in opposition to the Motion.

A hearing on the Motion was held on March 30, 2012. Petitioner was represented by Jeffrey M. Osterkamp, Esq., Amanda M. Jones, Esq. and Calvert G. Chipchase, Esq. Respondent was represented by Geoffrey M. Kam, Esq. and Ryan H. Ota, Esq. Intervenor was represented by Craig T. Kugisaki, Esq. The matter was taken under advisement.

By a letter dated March 30, 2012, the Hearings Officer notified the parties that Intervenor/Respondent's Motion was granted.

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 April 8, 2011, Respondent issued RFB-ENV-397204 for the Recycling and Disposal of White Goods for the Various Agencies of the City and County of Honolulu, Hawai'i ("RFB").

2. Section 4(d) of the RFB provides:

> **4. QUALIFICATION OF BIDDERS AND SUBMITTAL OF DOCUMENTS FOR RECYCLING OF FREON AND WHITE GOODS.** It shall be understood and agreed herein that each bidder shall submit the documents listed below with their bid.
>
> . . .
>
> d. In addition, notwithstanding Section 11 of the General Instructions to Bidders herein, it shall be understood and agreed herein that the City will consider offers only from bidders who have been providing the services specified herein for a minimum of three (3) years, from the date of bid opening (See PROPOSAL page 2).
>
> . . .
>
> Failure to comply with any of the requirements herein shall be sufficient grounds for rejection of bid and cancellation of contract award, if applicable.

3. Page 2 of the Proposal submitted by Intervenor stated that it had "6 years" of "business performing services described herein". In a letter dated April 26, 2011 that accompanied its bid, Intervenor stated:

> Island Recycling has been providing the specified services in recycling white goods on Oahu since 2005, when it was contracted to recycle appliances picked up from the Sears distribution Center (sic) as well as from smaller appliance dealers and the general public.
>
> In its capacity as the controlling member of Big Island Scrap Metal, LLC, which was established in 2003 with Atlas Recycling of Hilo to run the metal recycling for the County of

> Hawai'i landfills, Island Recycling has experience handling thousands of appliances delivered to the Kona and Hilo landfills under the contract terms.
>
> The 10-year contract with the County of Hawai'i is still on-going and all required shipping arrangements, reporting and paperwork are processed by Island Recycling's personnel on Oahu.
>
> Island Recycling started recycling appliances from the Navy Exchange early this year and was recently awarded the appliance account from the new Lowe's that opened in Honolulu.

4. Bids were opened on April 26, 2011. Intervenor was the apparent low bidder.

5. On May 4, 2011, Petitioner submitted a written protest to Respondent alleging:

> The claims are misleading in that:
>
> (1) As the attached letter from Sears indicates, IRI provided appliance recycling for Sears between August, 2007 and January, 2009, a period of less than two (2) years and not beginning in 2005 as claimed by IRI.
>
> (2) To the undersigned's actual knowledge, IRI performed appliance recycling services for the Navy Exchange from January, 2011 through the present.
>
> (3) To the undersigned's actual knowledge, IRI performed appliance recycling services for OK TV & appliances (sic) from August, 2009 to April, 2011, a period of less than two (2) years.

6. By a letter dated May 19, 2011, Respondent denied Petitioner's protest as to the issue of bidder experience. Respondent's letter states:

> The City requirement is only that a bidder have provided services of the type specified for a minimum of three years. IRI's bid states the following:
> Island Recycling has been providing the specified services in recycling white goods on Oahu since 2005, when it was contacted to recycle appliances picked up from Sears distribution Center, (sic) as well as from smaller appliance dealers and the general public.
>
> In its capacity as the controlling member of Big Island Scrap Metal, LLC, which was established in 2003 with Atlas Recycling of Hilo to run the metal recycling for the County of

> Hawai'i landfills, Island Recycling has experience handling thousands of appliances delivered to the Kona and Hilo Landfills under the contract terms.
>
> Island Recycling started recycling from the Navy Exchange early this year and was recently awarded the appliance account from the new Lowe's that opened in Honolulu.
>
> Section 4.d does not require that the bidder have three years of experience with one client. Rather, it only requires the bidder have provided these services of the required type for a minimum of three years.
>
> Considering the foregoing, the City notes that IRI has provided services to at least one client, the County of Hawai'i, for over seven consecutive years and that even by RRI's own allegation has provided services since 2007.
>
> The City has therefore determined that IRI has met the experience requirements listed in Section 4.d of the Minimum Specifications of the Solicitation.
>
> Accordingly, IRI's bid is responsive to the requirement stated in the Solicitation.
>
> Accordingly, this claim of your protest is denied.

7. By a letter dated May 26, 2010, Petitioner protested the official actions taken in Respondent's May 19, 2011 letter. Petitioner argued that Intervenor's bid should be rejected because it has not continuously performed applicable services for the last three years.

8. By a letter dated August 5, 2011, Respondent asked Intervenor to provide a written response to Petitioner's allegation that it had not continuously performed applicable services for the last three years.

9. By a letter dated August 22, 2011, Intervenor's counsel responded to Petitioner's allegation by stating:

> The RFB does not require Bidders to perform the requested service 'continuously' for three years. Paragraph 4 of the RFB's Minimum Specifications only requires bidders who have been providing the services specified 'for a minimum of three (3) years'. Nowhere in paragraph 4.d is the word 'continuously' to be found.
>
> Nonetheless, it should be noted that the State Department of Health issued a Solid Waste Management Permit for Island Recycling's premises at the Campbell Industrial Park in 2005,

and it has been providing white goods recycling and disposal services since at least 2007. Island Recycling has 'continuously' processed and recycled white goods brought in by the general public since that time. The volume of white goods recycled over the years has varied, depending upon whether Island Recycling has had commercial contracts for white goods recycling, but members of the public have always brought small appliances to Island Recycling's Kapolei facility for more than the minimum three year period required by the RFB.

In addition, Island Recycling has had commercial contracts for recycling white goods with Sears, OK TV & Appliances, Discount Appliances, Quality Used Appliances, Lowe's, Whirlpool, Forest City, and the Navy Exchange since 2007. Island Recycling also has been the controlling member of Big Island Scrap Metal, LLC, the County of Hawai'i's scrap metal recycler since 2003. Under that 10-year contract, Island Recycling implemented the refrigerant recovery program for small appliances at the County of Hawai'i's Hilo and Kona landfills. There is no question that Island Recycling has performed white goods recycling and/or disposal for more than the minimum three years required by the RFB.

10. By a letter dated February 1, 2012, Respondent denied Petitioner's protest. This letter stated:

> IRI's bid states that Island has provided the specified services 'since 2005, when it was contracted to recycle appliances picked up from Sears distribution Center (sic) as well as from smaller appliance dealers and the general public' as well as contracts with the County of Hawai'i, Sears, and Lowe's.
>
> Responsiveness must be determined solely by 'reference to materials submitted with the bid and facts available to the government at the time of bid opening.' *Browning-Ferris Industries of Hawai'i v. State Department of Transportation,* PCH 2000-4 (June 8, 2000). The City has therefore determined that IRI's statement, in its bid, regarding its experience, adequately addresses the requirement that it have three years of experience processing white goods and IRI's bid is responsive to the requirement in the Solicitation.
>
> Accordingly, RRI's claim that IRI's bid was not responsive on this point is denied.
>
> To the extent, however, that RRI seeks to introduce additional information regarding IRI's experience, it would appear that RRI is claiming that IRI is not responsible. *Okada Trucking*

> *v. Board of Water Supply,* 97 Hawai'i 544 (Hawai'i App. 2001) and 101 Hawai'i 68 (Hawii App. 2002) ('Responsibility addresses issue of performance capability of bidder, which can include inquiries into...experience').
>
> With respect to IRI's experience, from a responsibility perspective, the City is informed that IRI, in addition to the experience previously stated, also held commercial contracts through the relevant time period.
>
> Accordingly, assuming RRI claims that IRI was not responsible on this point, that claim is also denied.

11. On February 8, 2012, Petitioner filed a request for hearing with the Office of Administrative Hearings to contest Respondent's denial of its protest.

## 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).

Petitioner alleged that Intervenor was not a responsive or responsible bidder because it did not show that it has been *continuously* providing the services specified in the RFB for a minimum of three years from the date of bid opening, or from April 26, 2008 to April 26, 2011. Respondent and Intervenor argue that it did not have to be "continuously" providing the service during the three year period.

At the outset, the Hearings Officer finds that whether Intervenor had been providing white goods recycling for three years prior to bid opening is an issue of responsibility, not responsiveness, as this requirement involves Intervenor's ability to perform the work. Even when the invitation for bids requires, on its face, submission of responsibility documentation with its bid, a bidder can supplement its bid after bid opening. *See, Hawai'i Specialty Vehicles, LLC v. Wendy K. Imamura,* PCH 2011-7 (January 20, 2012) at page 9.

Based on the evidence presented, the Hearings Officer finds that Intervenor has the requisite three years of "continuous" experience as it had the SWMP since April 5, 2007 and had commercial contracts since that time. While there was no one contract that was in effect for the three years, a sufficient showing was made that Intervenor was providing white goods recycling services continuously for the three years prior to April 26, 2011. Accordingly, the Hearings

Officer concludes that Petitioner failed to prove by a preponderance of the evidence that Respondent's denial of Petitioner's protest was improper and not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Intervenor/Respondent's Motion for Summary Judgment is granted.

DATED: Honolulu, Hawaii, SEP 17 2012.

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

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

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| In the Matter of<br><br>REFRIGERANT RECYCLING, INC.,<br><br>Petitioner,<br><br>vs.<br><br>DEPARTMENT OF BUDGET & FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,<br><br>Respondent,<br><br>and<br><br>ISLAND RECYCLING, INC.,<br><br>Intervenor. | PCY 2012-005<br><br>HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION GRANTING INTERVENOR/RESPONDENT'S MOTION FOR DISMISSAL OR OTHER SUMMARY DISPOSITION OF PETITIONER'S PROTEST RE SUBCONTRACT TO EPA-APPROVED "REFRIGERANT RECLAIMER" |

# HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION GRANTING INTERVENOR/RESPONDENT'S MOTION FOR DISMISSAL OR OTHER SUMMARY DISPOSITION OF PETITIONER'S PROTEST RE SUBCONTRACT TO EPA-APPROVED "REFRIGERANT RECLAIMER"

## I. INTRODUCTION

On February 8, 2012, Refrigerant Recycling, Inc. ("Petitioner") filed a request for hearing to contest the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest regarding Solicitation No. RFB-ENV-397204, Proposal for the Recycling and Disposal of White Goods for the Various Agencies for

the City and County of Honolulu. The matter was set for hearing and Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On February 10, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Conference Dates. On February 15, 2012, Respondent filed a stipulation to continue the dates for the pre-hearing conference, summary disposition motions filing deadlines and hearing. On February 17, 2012, Petitioner withdrew its Motion to Continue Hearing and Pre-Hearing Conference Dates.

On February 24, 2012, Island Recycling, Inc. ("Intervenor") filed a Stipulation for Intervention by Island Recycling, Inc.

On March 14, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Dates. By a letter dated March 15, 2012, the Hearings Officer informed the parties that Petitioner's Motion to Continue the Pre-Hearing Conference was denied and that the pre-hearing conference was still scheduled for March 16, 2012. The parties were further informed that a hearing on the Motion to Continue the Hearing Date, if necessary, would be held on March 23, 2012.

At the pre-hearing conference held on March 16, 2012, the parties discussed and agreed to deadlines for filing final witness and exhibit lists and exhibits, dispositive motions, motions in limine, and memoranda in opposition to motions filed. The parties also agreed that a hearing on dispositive motions and motions in limine would be held on March 30, 2012 and that the hearing would begin on April 2, 2012.

By a letter dated March 22, 2012, Petitioner informed the Hearings Officer that a hearing on its Motion to Continue Hearing and Pre-Hearing Conference was no longer needed and the Motion was therefore withdrawn.

On March 23, 2012, Intervenor filed a Motion for Dismissal or Other Summary Disposition of Petitioner's Protest Re Subcontract to EPA-Approved "Refrigerant Reclaimer" ("Motion"). On March 28, 2012, Respondent filed a substantive joinder to Intervenor's Motion and Petitioner filed a memorandum in opposition to the Motion.

A hearing on the Motion was held on March 30, 2012. Petitioner was represented by Jeffrey M. Osterkamp, Esq., Amanda M. Jones, Esq. and Calvert G. Chipchase, Esq. Respondent was represented by Geoffrey M. Kam, Esq. and Ryan H. Ota, Esq. Intervenor was represented by Craig T. Kugisaki, Esq. The matter was taken under advisement.

By a letter dated March 30, 2012, the Hearings Officer notified the parties that Intervenor/Respondent's Motion was granted.

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 April 8, 2011, Respondent issued RFB-ENV-397204 for the Recycling and Disposal of White Goods for the Various Agencies of the City and County of Honolulu, Hawai'i ("RFB").

2. Number 2(c) of the RFB provides:

> 2. Locations and contact information of where recycling and disposal of the following shall be made by the Contractor, as well as any applicable licensing information, such as copies of permits license numbers, etc.:
>
> . . .
>
> (c) Recycling and/or disposal of reclaimed refrigerants:
>
> Company:
> Address:
> Contact Name:
> Phone No.
> Cellular No.
> Facsimile:
> E-Mail:
> Licenses, Certifications and Permits:
>
> . . .

3. Section 4(c) of the Minimum Specifications provides:

> **4. QUALIFICATION OF BIDDERS AND SUBMITTAL OF DOCUMENTS FOR RECYCLING OF FREON AND WHITE GOODS.** It shall be understood and agreed herein that each bidder shall submit the documents listed below with their bid.
>
> . . .
>
> c. Pursuant to Section 608 of the Clean Air Act of 1990, as amended, provide the applicable certifications for the technicians and the recovery and recycling equipment

> to be used under the contract and provide documentation that the recycling and/or disposal of refrigerant is performed by an authorized Contractor approved by the Federal EPA listed on the approved refrigerant reclaimer's list as maintained by the Federal EPA.

4. Intervenor identified Refrigerant Exchange Corp., 15709 E. Arrow Hwy #4, Irwindale, CA 91706 as the company who would be recycling and/or disposing reclaimed refrigerants.

5. Bids were opened on April 26, 2011. Intervenor was the apparent low bidder. The contract has not been awarded.

6. On May 4, 2011, Petitioner submitted a written protest to Respondent alleging that Intervenor is not an authorized contractor approved by the EPA and is not listed on the EPA's approved reclaimer's list.

7. By a letter dated May 19, 2011, Respondent denied Petitioner's protest as to the issue of compliance with Section 4(c) of the Minimum Specifications. Respondent's letter states:

> Section 4.c required IRI to provide documentation showing that the recycling and/or disposal of refrigerant will be performed by an EPA 'approved refrigerant reclaimer.' IRI has identified Refrigerant Exchange Corp. of Irwindale, CA as its approved refrigerant reclaimer. See IRI PROPOSAL page 3, Section 2(c). Refrigerant Exchange Corp. is an EPA-Certified Refrigerant Reclaimer and is duly authorized by the EPA.
>
> Accordingly, IRI's bid is responsive to the requirement stated in the Solicitation.
>
> Accordingly, this claim of your protest is denied.

8. By a letter dated May 26, 2010, Petitioner protested the official actions taken in Respondent's May 19, 2011 letter. Petitioner argued that Intervenor's bid should be rejected because it is not an EPA-approved contractor. As to this issue, Petitioner's letter stated in part:

> IRI plainly did not and cannot comply with the City's requirement that the refrigerant recycling and disposal be performed by an EPA-approved Contractor. Because IRI is <u>not</u> an EPA-approved Contractor, it identified a California company to perform this work. That is not permissible, because the work must be performed by the actual company that enters into the contract with the City. Accordingly, IRI's bid is non-responsive.

9. By a letter dated August 5, 2011, Respondent asked Intervenor to provide a written response to Petitioner's allegation that it is not a responsive bidder because it is not an EPA-Approved Contractor.

10. By a letter dated August 22, 2011, Intervenor's counsel responded to Respondent's letter by stating that the RFB did not require bidders to be an EPA approved "refrigerant reclaimer". This letter also provides:

> The Director's interpretation of any provision in the RFB controls. The Director's interpretation that the Bidder need not be an EPA 'approved refrigerant reclaimer' is consistent with the RFB provisions that permit the Contractor to sublet any portion of the work with the authorization of the City. Since the person or entity subletting from the Contractor 'shall be considered an agent of the Contractor' under the terms of the RFB's General Terms and Conditions, the Contractor becomes 'an authorized refrigerant reclaimer'. In other words, the Contractor becomes 'an authorized Contractor" once the City permits work under the contract to be performed by an agent which is an EPA 'approved refrigerant reclaimer'.

11. By a letter dated February 1, 2012, Respondent denied Petitioner's protest. This letter stated:

> The Solicitation has several sections regarding who must recycle and/or dispose of refrigerant recovered by the Contractor. Item 2(c) of the Proposal requires the bidder to provide the identity, location and contact information of the company that will recycle and/or dispose of reclaimed refrigerants.
>
> Further, the Solicitation requires the bidder to provide 'documentation that the recycling and/or disposal of refrigerant is performed by an authorized Contractor approved by the Federal EPA listed on the approved refrigerant reclaimer's list as maintained by the Federal EPA. (Minimum Specifications, Par.4(c)).
>
> Taken collectively, Item 2(c) of the Proposal and Par 4(c) of the Minimum Specifications allow a bidder to subcontract the recycling and/or disposal of refrigerant to a subcontractor, provided that subcontractor is on the approved refrigerant reclaimers list as maintained by the Federal EPA. See also, Par. 24 of the General Terms and Conditions for Goods and Services for the City and County of Honolulu (01/18/08) ("GTC").

> IRI's identification of Refrigerant Exchange Corp. is therefore responsive to the solicitation. To the extent that RRI is arguing that the solicitation is ambiguous as to whether a subcontractor may be used, Par. 5 of the GTC provides that in the case of any doubt as to the meaning of any proposal, special provisions, requirements, specifications, plans, and general terms and conditions, the interpretation by the Director of Budget and Fiscal Services shall control and, in this case, the Director's interpretation allows the recycling and/or disposal of refrigerant to be subcontracted.
>
> Further, any protest regarding the ambiguity of the terms or content of a solicitation must be submitted prior to the date set for receipt of offers. (Citations omitted.) Thus, RRI had to raise its protest prior to the date of bid opening, April 26, 2011, and its failure to do so renders its protest on this point untimely.
>
> Accordingly, the City denies this point of your protest because it is untimely and because IRI's bid is responsive.

12. Petitioner named Pacific Environmental Corporation as its "Contractor" for 1) recycling and/or disposal of recovered oil and/or lubricants, 2) for disposal and recycling of capacitors and mercury switches, and 3) for disposal of hazardous waste, when applicable. Petitioner named Schnitzer Steel Hawai'i as its "Contractor" for recycling of processed appliances.

13. On February 8, 2012, Petitioner filed a request for hearing with the Office of Administrative Hearings to contest Respondent's denial of its protest.

## 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).

Petitioner alleged that Intervenor was not a responsive bidder because it is not an EPA approved contractor. Respondent and Intervenor argue that Intervenor's identification of Refrigerant Exchange Corp. is responsive to the solicitation.

Petitioner argued that "Contractor", with the first letter capitalized, could only mean the winning bidder and not an out-of-state subcontractor or delegee. *See,* Footnote 1 on page 4 of Petitioner's Memorandum in Opposition to Motion. If that standard is applied to Petitioner's

proposal, it would also be subject to disqualification as it identified Pacific Environmental Corporation and Schnitzer Steel as a "Contractor" where "recycling and disposal of the following shall be made by the 'Contractor'..." *See*, page 2 of the RFB. Contrary to Petitioner's assertion that Section 4(c) of the Minimum Specifications requires Intervenor to provide the recycling and/or disposal of reclaimed refrigerants, the Hearings Officer finds that Section 4(c) informs bidders that the recycling and disposal must be performed by an "authorized Contractor" listed on the approved refrigerant reclaimer's list maintained by the EPA.[1]

Based on the evidence presented, the Hearings Officer finds that Intervenor is not required to be an EPA approved refrigerant reclaimer and concludes that Petitioner has not proven by a preponderance of the evidence that Respondent's denial of Petitioner's protest was improper and not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation.

## IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Intervenor/Respondent's Motion for Summary Judgment is granted.

DATED: Honolulu, Hawaii, SEP 17 2012.

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

[1] Alternatively, while Petitioner argued that the RFB was not ambiguous, the arguments raised by Petitioner relate to the content of the RFB. Because Hawai'i Revised Statutes ("HRS") § 103D-701(a) states that protests based on the content of the solicitation shall not be considered unless it is submitted in writing prior to the date of receipt of offers, the Hearings Officer also concludes that it does not have jurisdiction to address this issue.

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

| | |
|---|---|
| In the Matter of<br><br>REFRIGERANT RECYCLING, INC.,<br><br>Petitioner,<br><br>vs.<br><br>DEPARTMENT OF BUDGET & FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,<br><br>Respondent,<br><br>and<br><br>ISLAND RECYCLING, INC.,<br><br>Intervenor. | PCY 2012-005<br><br>HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION GRANTING INTERVENOR/RESPONDENT'S MOTION FOR DISMISSAL OR OTHER SUMMARY DISPOSITION OF PETITIONER'S PROTEST ON REFRIGERANT RECOVERY TECHNICIAN CERTIFICATION |

# HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION GRANTING INTERVENOR/RESPONDENT'S MOTION FOR DISMISSAL OR OTHER SUMMARY DISPOSITION OF PETITIONER'S PROTEST ON REFRIGERANT RECOVERY TECHNICIAN CERTIFICATION

## I. INTRODUCTION

On February 8, 2012, Refrigerant Recycling, Inc. ("Petitioner") filed a request for hearing to contest the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest regarding Solicitation No. RFB-ENV-397204, Proposal for the Recycling and Disposal of White Goods for the Various Agencies for

the City and County of Honolulu. The matter was set for hearing and Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On February 10, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Conference Dates. On February 15, 2012, Respondent filed a stipulation to continue the dates for the pre-hearing conference, summary disposition motions filing deadlines and hearing. On February 17, 2012, Petitioner withdrew its Motion to Continue Hearing and Pre-Hearing Conference Dates.

On February 24, 2012, Island Recycling, Inc. ("Intervenor") filed a Stipulation for Intervention by Island Recycling, Inc.

On March 14, 2012, Petitioner filed a Motion to Continue Hearing and Pre-Hearing Dates. By a letter dated March 15, 2012, the Hearings Officer informed the parties that Petitioner's Motion to Continue the Pre-Hearing Conference was denied and that the pre-hearing conference was still scheduled for March 16, 2012. The parties were further informed that a hearing on the Motion to Continue the Hearing Date, if necessary, would be held on March 23, 2012.

At the pre-hearing conference held on March 16, 2012, the parties discussed and agreed to deadlines for filing final witness and exhibit lists and exhibits, dispositive motions, motions in limine, and memoranda in opposition to motions filed. The parties also agreed that a hearing on dispositive motions and motions in limine would be held on March 30, 2012 and that the hearing would begin on April 2, 2012.

By a letter dated March 22, 2012, Petitioner informed the Hearings Officer that a hearing on its Motion to Continue Hearing and Pre-Hearing Conference was no longer needed and the Motion was therefore withdrawn.

On March 23, 2012, Intervenor filed a Motion for Dismissal or Other Summary Disposition of Petitioner's Protest On Refrigerant Recovery Technician Certification ("Motion"). On March 28, 2012, Respondent filed a substantive joinder to Intervenor's Motion and Petitioner filed a memorandum in opposition to the Motion.

A hearing on the Motion was held on March 30, 2012. Petitioner was represented by Jeffrey M. Osterkamp, Esq., Amanda M. Jones, Esq. and Calvert G. Chipchase, Esq. Respondent was represented by Geoffrey M. Kam, Esq. and Ryan H. Ota, Esq. Intervenor was represented by Craig T. Kugisaki, Esq. The matter was taken under advisement.

By a letter dated March 30, 2012, the Hearings Officer notified the parties that Intervenor/Respondent's Motion was granted.

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 April 8, 2011, Respondent issued RFB-ENV-397204 for the Recycling and Disposal of White Goods for the Various Agencies of the City and County of Honolulu, Hawai'i ("RFB").

2. The RFB describes refrigerant containing white goods as, but not limited to: "air conditioners, refrigerators, chillers, freezers, heat pumps, etc." and non-refrigerated white goods as but not limited to: "washing machines, dryers, hot water heaters, stoves, ovens, ranges, dishwashers, etc."

3. Section 4(c) of the Minimum Specifications provides:

> **4. QUALIFICATION OF BIDDERS AND SUBMITTAL OF DOCUMENTS FOR RECYCLING OF FREON AND WHITE GOODS.** It shall be understood and agreed herein that each bidder shall submit the documents listed below with their bid.
>
> . . .
>
> c. Pursuant to Section 608 of the Clean Air Act of 1990, as amended, provide the applicable certifications for the technicians and the recovery and recycling equipment to be used under the contract and provide documentation that the recycling and/or disposal of refrigerant is performed by an authorized Contractor approved by the Federal EPA listed on the approved refrigerant reclaimer's list as maintained by the Federal EPA.

4. In Attachment A to its proposal, Intervenor stated that it had three employees who have received an EPA "Type 1 Refrigerant Recovery Certification" for domestic use small appliances, as required by 40 CFR Part 82, Subpart F. The employees' certificates were included with Intervenor's proposal.

5. Bids were opened on April 26, 2011. Intervenor was the apparent low bidder. The contract has not been awarded.

6. On May 4, 2011, Petitioner submitted a written protest to Respondent alleging that Intervenor's technicians are inadequately certified because the types of appliances to be processed requires recovery technicians to hold Type 1 and Type II certifications and/or Universal certifications.

7. By a letter dated May 19, 2011, Respondent denied Petitioner's protest regarding technician certifications. Respondent's letter states:

> This specification requires the selected contractor to perform the contract in a particular manner. As this Protest questions IRI's ability to perform the contract, it is a challenge to IRI's responsibility. In this regard, the City notes that the State Department of Health has issued IRI a Solid Waste Management permit. No. TF-0081-01 (the "Permit"), which allows IRI to receive and process white goods in accordance with the procedures described in the operations plans included with IRI's bid as Attachment A.
>
> Further, as stated above, under the proposed contract, the City will be delivering small appliance-type white goods to the Contractor's facility for processing. For such items, a Type 1 certification is required. Type 2 certifications would be required for high-pressure systems that are typically part of commercial and industrial applications; as such, Type 2 certifications are not required for this contract.
>
> Therefore, IRI's employees have the certifications necessary to handle the work required by the proposed contract.
>
> Accordingly, this claim of your protest is denied.

8. By a letter dated May 26, 2010, Petitioner protested the official actions taken in Respondent's May 19, 2011 letter. Petitioner argued that Intervenor is not a responsible bidder because it does not have a Type II certification. As to this issue, Petitioner's letter stated in part:

> IRI clearly cannot fully perform the contract, because its personnel do not hold the certifications necessary for Type II refrigerant recovery. Such certifications are necessary for the performance of the contract, because as RRI representatives can testify, many of the items delivered under the contract (which RRI currently holds) are high pressure appliances. By EPA definition, the handling of those appliances require Type II certification.
>
> . . .

> Under EPA rules, 'Type I technicians' are those 'who maintain, service or repair small appliances,' while 'Type II technicians' are those 'who maintain, service, repair or dispose of high or very high pressure appliances, except small appliances and motor-vehicle air-conditioning systems.' The EPA defines 'small appliances' to include only 'the following products that are fully manufactured, charged, and hermetically sealed in a factory with five pounds or less of refrigerant: refrigerators and freezers designed for home use, room air conditioners, (including window air conditioners and packaged terminal air conditioners), packaged terminal heat pumps, dehumidifiers, under-the-counter ice makers, vending machines, and drinking water coolers.'
>
> . . .
>
> Because the City determined that 'Type 2 certifications are not required for this contract'...the City apparently believes that the contract involves only small appliances. This is incorrect. As RRI representatives will testify, as part of the current contract, the City has delivered to RRI numerous items that do not constitute small appliances, including residential split air conditioning units that are not hermetically sealed and heat pumps that may contain more than five pounds of refrigerant. These high pressure appliances plainly require handling by people with Type II certifications, which IRI lacks. Accordingly, IRI is not capable of performing the contract and is not a responsible bidder.

9. By a letter dated August 5, 2011, Respondent asked Intervenor to provide a written response to Petitioner's allegation that Intervenor is not a responsible bidder because it does not have a Type II certification.

10. By a letter dated August 22, 2011, Intervenor's counsel responded to Respondent by stating that the RFB did not require a Type II certification. This letter also provides:

> HAR § 11-58.1-03 states that 'White goods mean electrical and mechanical appliances made primarily of metal parts such as refrigerators, clothes washers, and dryers'. As acknowledged by RRI, the RFB involves white goods such as refrigerators and freezers for home use, room air conditioners, packaged terminal heat pumps, dehumidifiers, under-the-counter ice makers, vending machines, and drinking water coolers. They are classified as small appliances by the EPA and only a Type I certification for refrigerant recovery is necessary for that class of appliance.

> RRI submits, however, that high pressure appliances that are not small appliances are sometimes included with the white goods. For such high pressure appliances, a Type II or Universal Refrigerant Recover Certificate is needed. To the extent that high pressure appliances like split air conditioning units and heat pumps with more than five pounds of refrigerant fall within the scope of the RFB, Island Recycling has an employee with a Universal Certification Card who can perform that work. See Certificate No. 5754654580782 attached as Exhibit '1'.
>
> Island Recycling has the certifications necessary to handle the work required by the proposed contract. In addition, Island Recycling plans to have more personnel trained and qualified for Type II or Universal certification during the course of the proposed contract.

11. By a letter dated February 1, 2012, Respondent denied Petitioner's protest. This letter stated:

> Section 2(b) of the Minimum Specifications requires that 'all hazardous materials or components of the white goods, including refrigerant,...[be] properly recycled and/or disposed of in accordance with all applicable City, State and Federal laws, rules and regulations, including the applicable EPA rules and regulations.'
>
> As stated above, the contract requires processing, for disposal, of white goods, consisting of small household devices of the general type characterized as 'small appliances,' as defined in 40 C.F.R. § 82.152, except that they may contain either refrigerant or refrigerant substitute.
>
> With respect to small household devices containing refrigerant, i.e., small appliances under the Federal definition, the contractor must recover any remaining refrigerant pursuant to 40 C.F.R. § 82.156. However, no certification is necessary for persons disposing of small appliances. 40 C.F.R. § 82.161.
>
> With respect to disposal of small household devices containing refrigerant substitutes, no certification is required for persons dealing with substitutes. Also, the Section 6087 regulations regarding safe disposal of appliances (40 C.F. R. § 82.156(f) are not extended to devices containing substitutes. (Citation omitted.) The action is consistent with EPA decision not to regulate, under Section 608, coolants that do not contain class I or II ozone depleting substances. Id. at

11959. Therefore no certification is required for persons disposing of devices containing substitutes.

Therefore, with respect to the small household devices within the scope of the contract, no technician certification is required for persons disposing of said devices.

RRI's argument that the contract includes processing of items that are not of the general type characterized as small appliances is an attempt to recharacterize the scope of the solicitation. As stated previously, the solicitation only covers small household devices of the general type characterized as 'small appliances' as defined in 40 C.F.R. § 82.152, except that they may contain either refrigerant or refrigerant substitutes.

To the extent that RRI is arguing that the solicitation is ambiguous as to what goods are to be handled under this contract, any protest regarding the ambiguity of the terms or content of the solicitation must be submitted prior to the date set for receipt of offers. (Citations omitted.) Thus, RRI had to raise this point of protest prior to the date of bid opening, April 26, 2011 and its failure to do so renders its protest on this point untimely.

Finally, assuming that Type II goods are within the scope of this contract, IRI may establish responsibility by a sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations. (Citation omitted.) In this case, therefore, IRI may obtain the services of a technician with a Type II certification.

Accordingly, the City denies this point of RRI's protest because it is untimely and because IRI may hire an employee with a Type II certification.

Accordingly, the City denies this point of your protest because it is untimely and because IRI's bid is responsive.

12. On February 8, 2012, Petitioner filed a request for hearing with the Office of Administrative Hearings to contest Respondent's denial of its protest.

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).

Petitioner alleged that Intervenor is not a responsible bidder because it does not have a Type II certification. Respondent and Intervenor argue that the scope of work required by the RFB does not require that the bidder have a Type II certification, but if one is needed, Intervenor has an employee with a Universal Certification on staff or it possesses the ability to obtain someone with a Type II or Universal Certification.

Petitioner argued that Intervenor did not have the required Type II or Universal certifications "effective and applicable at the time of bid opening" and that failure created a genuine issue of material fact. Based on the evidence presented, the Hearings Officer concludes that the scope of work required by the RFB did not require the bidder to have a Type II or Universal certification so Intervenor's failure to provide evidence of Type II or Universal technician certifications did not render it's bid non-responsible. If, as Petitioner contends, Respondent delivers items which require Type II or Universal certifications, Intervenor can either reject those items as not within the scope of the contract or can process the items if it has the requisite technician or obtains the requisite technician to process the items.

Based on the evidence presented, the Hearings Officer finds that Intervenor was a responsible bidder as to the issue of refrigerant recovery technician certification and accordingly, concludes that Petitioner failed to prove by a preponderance of the evidence that Respondent's denial of Petitioner's protest was improper and not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Intervenor/Respondent's Motion for Summary Judgment is granted.

DATED: Honolulu, Hawaii, SEP 17 2012.

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