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

In the Matter of	PCY-2012-017
SODERHOLM SALES AND LEASING, INC.	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
Petitioner,	
vs.	Senior Hearings Officer: David H. Karlen
COUNTY OF KAUAI, DEPARTMENT OF FINANCE,	
Respondent.	

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

I. INTRODUCTION

By petition submitted May 21, 2012, Petitioner Soderholm Sales and Leasing, Inc., (hereinafter "Petitioner" or "Soderholm") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCY-2012-017. Respondent was the County of Kauai, Department of Finance (hereinafter "Respondent" or "County").

A Notice of Hearing and Pre-Hearing Conference was filed on May 22, 2012. A pre-hearing conference was set for June 4, 2012 and a hearing was set for June 12, 2012.

A Pre-Hearing Conference in this matter was held on June 4, 2012. Soderholm was represented by Jeffrey P. Miller, Esq. The County was represented by Jennifer S. Winn, Esq. A Pre-Hearing Order was filed on June 4, 2012.

On June 7, 2012, the City and County of Honolulu filed a Motion to Intervene in this matter. By Order filed June 8, 2012, the City and County of Honolulu's Motion to Intervene was denied. The Order also allowed the City and County of Honolulu to participate in the case as an *amicus curiae* under certain limiting conditions.

On June 7, 2012, the County filed its Response to the RFAH. On that day, the County also filed its Brief Regarding Hearing Officer's Authority. Further on that day, the County filed its Motion for Summary Judgment ("County's Motion").

Soderholm filed its Motion for Summary Judgment ("Soderholm's Motion") on June 7, 2012.

The City and County of Honolulu filed its Brief of *Amicus Curiae* in support of Respondent on June 8, 2012.

Soderholm filed its Opposition to the County's Motion on June 13, 2012. The County filed its Memorandum in Opposition to Soderholm's Motion on June 13, 2012.

The motions came on for hearing on June 15, 2012. Jeffrey P. Miller, Esq. represented Soderholm. Jennifer S Winn, Esq. represented the County. Nicole R. Chapman, Esq., appeared on behalf of the City and County of Honolulu.

As a preliminary matter, Soderholm objected to the participation of the City and County of Honolulu as an *amicus curiae.* This objection was overruled by the Hearings Officer.

At the conclusion of the hearing, the motions were taken under advisement.

On June 18, 2012, per the Hearings Officer's request, the County filed a copy of the Master Agreement of the United States Department of Transportation, Federal Transit Administration, for Federal Transit Administration Agreements authorized by 49 U.S.C. Chapter 53, Title 23, the Safe, Accountable, Flexible, Efficient Transportation Equity Act; A Legacy for Users (SAFETEA-LU), as amended "Master Agreement").

On June 18, 2012, the County also filed a copy of the County's Memorandum of Agreement with the State of Hawaii Department of Transportation.

By Order Regarding Supplemental Memoranda, filed June 25, 2012, and a Corrected Order Regarding Supplemental Memoranda, filed June 26, 2012, the parties were requested to file supplemental memoranda on seven issues. The County and Soderholm filed their supplemental memoranda on June 29, 2012.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On or about April 24, 2012, the County issued Invitation for Bid No. 3238 for the Furnishing and Delivery of Six (6) Paratransit, Wheelchair Lift Accessible Passenger Buses and Seven (7) Wheelchair Lift Accessible Passenger Buses for the County of Kauai ("RFB").

2. The bid opening for this RFB was scheduled for May 31, 2012.

3. Bidders were notified on page 5 of the RFB that: "this bid is subject to a financial assistance contract between the State of Hawaii and the U.S. Department of Transportation."

4. Bidders were notified on pages 5 and 6 of the RFB that the winning bidder would be obligated to "comply in all respects" with the "Incorporation of Federal Transit Administration (FTA) terms."

5. On page 29 of its Scope of Work section, the RFB states:

> QUALIFICATION OF THE BIDDER: In order to be considered for award, the bidder shall meet the following conditions:
>
> . . .
>
> c. The bidder shall be in compliance with the current rules and regulations of the Traffic and Motor Vehicle Laws of the Federal Government and the State of

Hawaii. In the event of any conflict between the two entities, the federal requirements shall exempt the State of Hawaii's motor vehicle standards.

6. On April 30, 2012, Soderholm, a prospective bidder, filed a protest with the County. The protest was made on the grounds that the RFB was in violation of the law because (1) it did not require a prospective bidder to be licensed pursuant to the Motor Vehicle Industry Licensing Act, HRS Chapter 437 ("MVILA"), and (2) it was fatally vague and ambiguous because the RFB did not state which "rules," "regulations" or "standards" of the "Traffic and Motor Vehicle Laws" a prospective bidder must be in compliance with to be considered a qualified bidder. With respect to the second claim, Soderholm was referring to the "Qualification of the Bidder" text on Page 29 of the RFB's Scope of Work section, the relevant portions of which are set forth in Finding of Fact No. 5 above.

7. By letter dated May 15, 2012, the County denied Soderholm's protest of the RFB.

8. The County's letter stated that "HRS 437 was not included in this invitation for bids because, to the extent it conflicts with an applicable federal statute or regulation when applied to a federally-supported procurement process, federal law controls."

9. In addition, the County's letter of May 15, 2012 identifies HRS §437-11 as conflicting with federal law when it "requires dealers to have an in-state facility" by imposing "a local geographical preference and, in doing so, restricts full and open competition." The letter also claimed that HRS §437-11 required buses to be purchased through in-state dealers, a requirement that allegedly conflicted with federal law.

10. The letter further stated that "various provisions" of HRS Chapter 437 conflict with federal law but did not identify any "various provisions" except HRS §437-11 discussed immediately above.

11. On March 30, 2012, a Transportation Program Specialist with the Federal Transit Administration Region IX office in San Francisco, California, sent an e-mail to two employees of the State of Hawaii stating that "various provisions" of HRS Chapter 437 conflict with applicable federal law.

12. The e-mail stated that HRS §437-11 conflicts with federal law and the Master Agreement "because it imposes a local geographical preference and, in doing so, restricts full and open competition." The e-mail further stated that HRS §437-11 operates as a state law requiring buses to be purchased through in-state dealers, and the e-mail concluded that this also conflicts with federal law.

13. The e-mail then finished with a warning that: "Should HDOT choose to apply HRS 437 provisions that conflict with federal law, as well as the Master Agreement, to a procurement process, then any contract awarded as a result of that process I ineligible for federal funds."

14. The County is purchasing the vehicles listed in the RFP using federal funds by means of being a sub-recipient of federal funds through the State of Hawaii, Department of Transportation's ("DOT") Master Agreement with the federal government and the County's Memorandum of Understanding with the DOT.

III. CONCLUSIONS OF LAW

A. General Considerations

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting

one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. Reed v. City & County of Honolulu, 76 Haw. 219, 225, 873 P.2d 98, 104 (1994).

B. Ambiguity or Vagueness of the RFB

When a term of the RFB is patently ambiguous, a bidder has an "affirmative duty" to make an inquiry to the procuring agency. The procuring agency can then, if it so desires, clarify what it meant by the term in question and provide this clarification to all bidders. The successful bidder will then be bound by the meaning of the term in question that is attributed to it by the procuring agency. See Foundation International, Inc., v. E.T. Ige Construction, Inc., 102 Haw. 487, 78 P.3d 23 (2002)

If the meaning of the ambiguous term that is adopted by the procuring agency is, in the view of a prospective bidder, inappropriate, that bidder should file a bid protest within five (5) days of when it knew or should have known of the facts giving rise to that allegedly inappropriate interpretation and in any event prior to the date of bid opening. HRS §103D-701(a). Cf. Interior Showplace, Ltd., v. Department of Human Services, State of Hawaii, PCY-2012-009 (April 2, 2012).

Because Soderholm did not seek clarification from the County over what is meant by the "Qualifications of the Bidder" terminology, it could be argued that its bid protest was premature.

However, at page 4, fn. 1, of its Memorandum in Support of its Motion, the County cleared up any question of vagueness or ambiguity when it stated:

> The protest is somewhat premature as the IFB does require compliance with state law unless preempted and does not state that Chapter 437 is inapplicable. Admittedly, however, the reason for wording the IFB in this manner is because the chief procurement officer believes that Section 437-2 is preempted by federal regulations to the extent it does not provide for full and fair competition.

This statement can essentially be taken as the County's response to an "inquiry" as to the County's interpretation of an allegedly vague and ambiguous section of the RFB. It responds to the basic complaint of Soderholm that potential bidders cannot tell which Hawaii law, if any, is preempted by federal regulations.

In addition, the remainder of the County's Motion is quite specific about the portion of Hawaii law allegedly preempted by identified federal provisions.

Under these circumstances, it would be a futile gesture to decide that Soderholm's bid protest was premature, dismiss it on that ground, and require it to file a new protest, just to get the same answer about the specific preempted Hawaii law that the County had in mind at the time and that it has now officially received from the County. Cf. Road Builder Corporation v. City and County Department of Budget and Fiscal Services, PCY-2012-013 (April 27, 2012). Accordingly, this matter will proceed to consider the argument over whether federal law preempts the MVILA.

C. Federal Law Preemption of State Law

The vehicles that are the subject of the County's procurement are vehicles within the definition of the MVILA such that dealers in those vehicles must, under the terms of the MVILA, be licensed in Hawaii.

In HRS §437-2, the MVILA provides:

> No person shall engage in the business as or serve in the capacity of, or act as a motor vehicle dealer ...without being licensed as provided in this chapter.

The buses to be supplied to the County under the RFB are motor vehicles within the meaning of HRS §437-1.1, and the successful bidder on the RFB would be a motor vehicle

dealer under the terms of that statute. Therefore, when viewed solely from the perspective of Hawaii law, the successful bidder on the RFB would be required to have a Hawaii motor vehicle dealer license.

HRS Chapter 437 requires a motor vehicle dealer licensed in Hawaii to have a facility in Hawaii because HRS 437-11(a) imposes the following requirements on license applicants:

> (a) Requirements to be met before issuance of dealer's and auction's license.
> (1) The following requirements shall be met by an applicant for a dealer's license before a license may be issued by the motor vehicle industry licensing board:
> (A) The applicant has a site which will be used primarily for the purpose of selling, displaying, offering for sale, or otherwise dealing in motor vehicles;
> (B) The site has a permanent building thereon suitable for the display at any one time of at least three motor vehicles having an average base of at least ninety inches; and
> (C) The site has suitable sanitation facilities.

The County asserts that HRS §437-11 conflicts with 49 §§USC 5325 (a), (h), and (i), as well as 49 CFR §§18.36 (b) and (c) that require that federally supported procurements: (1) conform to applicable federal law; (2) are conduced in a manner that promotes full and open competition; (3) are not discriminatory; and (4) are conducted in a manner that prohibits the use of statutory or administratively imposed in-state or local geographical preferences. It also relies on FTA Circular 4220.1.F, Third Party Contracting Guidance, as well as statements in the Federal Transportation Administration ("FTA") website on Frequently Asked Questions.

In their summary judgment motions and in their opposition memoranda, the parties extensively briefed the law of federal preemption of state statutes under both the principles of the Commerce Clause and the Spending Clause of the Constitution of the United States. However neither party mentioned HRS §29-15 until the County did so during oral argument on the summary judgment motions. As the Hearings Officer stated during that oral argument, he had been prepared to ask the parties questions about this statute. Since the

application of the statute had not been briefed, its role in this proceeding was one of the topics the Hearings Officer listed in the Order Requiring Supplemental Memoranda.

HRS §29-15 provides that:

> **Conflict between federal and state requirements.** In the case of any contract, the funds for which have been wholly or in part promised, loaned, or furnished by the United States, or any instrumentality thereof, if the United States, or its instrumentality, requires that the advertisement for tenders, tenders, performance bond, or contract contain terms or provisions contrary to any state law, then as to the advertisements, tenders, bonds, or contracts the terms and provisions required by the United States, or its instrumentality, shall govern and are made applicable, and the officer expending the funds shall conform to such requirements as the United States, or its instrumentality, shall provide or require, any other law or laws of the State to the contrary notwithstanding. The provisions of this section shall be liberally construed so as not to hinder or impede the State in contracting for any project involving financial aid from the federal government.

In commenting upon this statute, the Petitioner identifies the Master Agreement as the "contract, the funds for which have been wholly or in part promised, loaned or furnished by the United States." The County agrees.

At page 9, the Master Agreement provides as follows:

> [T]he Recipient understands and agrees that it must comply with all applicable Federal laws and regulations, and follow applicable Federal directives, except to the extent the FTA determines otherwise in writing. Any violation of a Federal law or regulation, or failure to follow a Federal directive applicable to the Recipient or its Project may result in penalties to the violating party.

To similar effect is Section 2.c beginning on page 13 of the Master Agreement and entitled "Project Implementation—Application of Federal, State, and Local Laws, Regulations, and Directives."

The term "Federal directive" used on page 9 of the Master Agreement is defined on page 10 of the Master Agreement in extremely broad terms as follows:

> Federal Directive, for purposes of this Master Agreement, includes any Executive Order of the President of the United States, and <u>any Federal document</u>, irrespective of whether it is a published policy, administrative practice, circular, guideline, guidance, or letter signed by the head of a Federal agency or his or her designee, <u>that provides instructions or official advice about a Federal program, including application processing procedures, program management, or other similar matters</u>. The term

"Federal Directive" encompasses "FTA Directives," "U.S. DOT Directives," and a similar document issued by another Federal department or agency.
(Emphasis supplied)

On page 43, Section 15.a of the Master Agreement requires the Recipient to "follow the provisions of the most recent edition and revisions of FTA Circular 4220.1F, "Third Party Contracting Guidance," except to the extent FTA determines otherwise in writing.

At pages 43-44, the Master Agreement requires full and open competition, prohibits exclusionary or discriminatory specifications, and prohibits State or local geographic preferences unless permitted by the FTA.

The definition of "Federal Directive" used in the Master Agreement, in conjunction with the terms on page 9 of the Master Agreement that are set forth above, is designed to insure compliance with federal instructions that are written ("any document") even though the document may not be as "formal" as a public policy or even a letter from the head of the agency ("irrespective of whether it is" an enumerated "formal" document).

The e-mail of March 30, 2012, Exhibit F to the County's Motion, is a "document" within the meaning of the definition of "Federal Directive" in the Master Agreement. Per the terms of the Master Agreement, it must be followed in order to obtain federal funds for the procurement in question in this matter. Per the terms of HRS §29-15, it must be followed in this procurement to "conform to such requirements as the United States, or its instrumentality, shall provide or require, any other law or laws of the State to the contrary notwithstanding.

Since HRS §437-11 is integral to the licensing requirements of HRS Chapter 437, the terms of HRS §29-15 preclude this procurement from requiring bidders to be licensed under HRS Chapter 437.

The parties have debated over the standard under which a conflict with federal law should be determined under HRS 29-15. Petitioner asserts that federal preemption is an

affirmative defense and that the burden of proof is on the party asserting a preemption defense. For the purposes of this decision, the Hearings Officer will assume that such is the case.

The Petitioner further urges that there is a "strong presumption against preemption." That may be true in cases with constitutional implications with respect to the Commerce Clause or the Spending Clause. In contrast, however, HRS 29-15 embodies a State of Hawaii decision that if there is any "strong presumption" it is one that is strongly in favor of obtaining federal funds by conforming to federal directives, as it states in relevant part:

> The provisions of this section shall be liberally construed so as not to hinder or impede the State in contracting for any project involving financial aid from the federal government.

Accordingly, the Hearings Officer concludes that the County has sustained its burden of proving that HRS §29-15 applies to this procurement protest and that under the terms of HRS §29-15 the licensing provisions of HRS Chapter 437 do not apply to the procurement in question.

The Hearings Officer does not have the power to declare a state law unconstitutional because it has been preempted by federal law, whether it be Commerce Clause preemption or Spending Clause preemption. HOH Corp. v. Motor Vehicle Licensing Board, 69 Haw. 135, 736 P.2d 1271 (1987). However, application of HRS §29-15 is a matter of Hawaii law. There is no decision herein that HRS 437 is preempted under the terms of Commerce Clause or the Spending Clause of the United States Constitution.

Finally, Petitioner claims that the determinations made in the e-mail of March 30, 2012 are legally incorrect and that there is no conflict between federal law, properly interpreted according to Petitioner's viewpoint, and HRS Chapter 437. During oral argument, the Hearings Officer expressed concern over the "definitiveness" of the e-mail's determinations due to, for example, lack of evidence that they were reviewed by a federal

attorney or that Petitioner's argument had been presented for federal consideration. On the other hand, the Hearings Officer also expressed concern during oral argument that the Hearings Officer had no power to declare a federal agency action legally incorrect under federal law in this situation absent participation of the State or the federal government.

The essence of the doctrine of primary jurisdiction is that a court having jurisdiction to determine a matter should nevertheless suspend its process so that critical issues can first be determined by an administrative body with responsibility for, and special competence in, deciding the issue. Pavsek v. Sandvold, ___ P.3d ___ (Haw. App. June 13, 2012).

By analogy, it might be possible to claim that the administrative proceeding herein should initially defer to that of another agency, e.g., the FTA. However, such a claim would not be appropriate in this case because the doctrine of primary jurisdiction depends on the petitioning party being able to participate before the administrative agency to which initial deference is made. There was no evidence presented in this proceeding that the Petitioner had the ability to participate in any meaningful administrative procedure before the FTA concerning the issues in question. Accordingly, the Hearings Officer concludes that the doctrine of primary jurisdiction does not apply in this case.

More problematic is the inability of this proceeding to declare that a federal agency action or directive is not appropriate. That would, on first impression, be beyond the capabilities of a procurement protest decision pursuant to HRS Chapter 103D, especially when the federal government is not a party herein. Moreover, HRS §29-15 establishes that it is the policy of the State of Hawaii to follow federal directives so as not to jeopardize federal funding. If the State (or another party) believes a federal directive is wrong, the policy behind this statute would require the complaining party to seek to have the federal government change its directive. The statute does not contemplate a hearings officer making a decision on the appropriateness of a federal directive. That is especially the case here

where a federal directive already says that any State action in contravention of the directive means federal funding will be lost.

IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

a. The County's Motion is granted for the reasons stated above.

b. Petitioner's Motion is denied.

c. The County's denial of Petitioner's procurement protest is affirmed for the reasons stated herein. Petitioner's Request for Administrative Hearing herein is dismissed.

d. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawai`i, July 5, 2012

DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce
and Consumer Affairs