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

In the Matter of MAUI RADIOLOGY ASSOCIATES, LLP, Petitioner, vs. WESLEY P. LO, IN HIS CAPACITY AS REGIONAL CHIEF PROCUREMENT OFFICER/REGIONAL CHIEF EXECUTIVE OFFICER FOR HAWAII HEALTH SYSTEMS CORPORATION, MAUI REGIONAL SYSTEM, Respondent.	PCY-2012-020 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION Senior Hearings Officer: David H. Karlen

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

I. INTRODUCTION

By petition submitted June 19, 2012, Petitioner Maui Radiology Associates, LLP, (hereinafter "Petitioner" or "Maui Radiology") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCY-2012-020. Respondent was Wesley P. Lo, in his capacity as Regional Chief Procurement Officer/Regional Chief Executive Officer for Hawaii Health Systems Corporation, Maui Regional System (hereinafter "Respondent" or "Maui Regional System").

A Notice of Hearing and Pre-Hearing Conference was filed on June 20, 2012. A pre-hearing conference was set for June 28, 2012 and a hearing was set for July 3, 2012.

A Pre-Hearing Conference in this matter was held on June 28, 2012. Petitioner was represented by Rex Y. Fujichaku, Esq. The Respondent was represented by Kristin S. Shigemura, Esq. A Pre-Hearing Order was filed on June 28, 2012.

On June 28, 2012, the Petitioner filed its Memorandum of Law on Jurisdiction ("Petitioner's Memorandum"). On June 28, 2012, Respondent filed its Memorandum of Law Concerning the Department of Commerce and Consumer Affairs' Lack of Jurisdiction ("Respondent's Memorandum").

A telephone status conference was held on June 29, 2012. The parties agreed that reply memoranda would be filed on July 2, 2012, as scheduled in the Notice of Hearing and Pre-Hearing Conference, but that the hearing scheduled for July 3, 2012 would be taken off calendar and the matter submitted to the Hearings Officer on the parties' memoranda and without oral argument. See HAR §3-126-68(d).[1]

On July 2, 2012, Petitioner filed its Memorandum of Law Regarding Proposed Decision and Order Regarding Jurisdiction; Proposed Decision and Order ("Petitioner's Reply Memorandum"). On July 2, 2012, Respondent filed its Reply Memorandum of Law concerning the Department of Commerce and Consumer Affairs' Lack of Jurisdiction in this Matter ("Respondent's Reply Memorandum").

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. Hawaii Health Systems Corporation ("HHSC") is a public body corporate and politic established by HRS Chapter 323F.

[1] Contrary to Petitioner's assertions, HAR Title 3, Subtitle 11, Chapter 126, Subchapter 5 (not HAR Title 16, Chapter 201) applies to procurement protests before the DCAA.

2. HHSC is divided into five regional systems. The Maui Regional System ("Respondent") is one of those five regional systems of the HHSC. HRS §323F-2.

3. Respondent operates Maui Memorial Medical Center.

4. Maui Memorial Medical Center issued a Request for Proposals for Radiology Services, HHSC FY12-005 ("RFP"). Pages of this RFP are dated October 12, 2011. The parties agree that Maui Memorial Medical Center published notice of the RFP on November 21, 2011.

5. On January 26, 2012, Petitioner submitted its proposal in response to the RFP to Maui Memorial Medical Center.

6. By letter dated April 3, 2012, Respondent purported to inform Petitioner that its proposal was not selected.

7. By letter dated May 15, 2012, Petitioner protested the award of the contract that was the subject of the RFP to another party.

8. By letter dated May 29, 2012, Respondent responded to Petitioner's May 15, 2012 letter stating that the protest was untimely.

9. On June 5, 2012, Petitioner formally protested the award of the contract to another party.

10. On June 12, 2012, Respondent rejected the protest of June 5, 2012.

III. CONCLUSIONS OF LAW

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.

The scope of the Department of Commerce and Consumer Affairs' ("DCCA") jurisdiction to hear and decide an administrative review of a procurement decision is set forth in HRS §103D-709(a), which provides that:

> (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702. (Emphasis supplied)

Further, only parties to procurement protests to procuring agencies under specified portions of HRS Chapter 103D may initiate an RFAH with the DCCA, as HRS §103D-709)c) provides:

> (c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(g) may initiate a proceeding under this section.

The Regional System boards of HHSC are exempt from HRS Chapter 103D. See the following statutes:

> a. HRS 103D-102(c): "Notwithstanding subsection (a), this chapter shall not apply to contracts made by: (1) any regional system board of the Hawaii health systems corporation."
>
> b. HS 323F-7(c)(30)(A): "The regional system boards shall enjoy the exemption under chapter 103D."
>
> c. HRS 323F-7(d): "Each regional system board shall not be subject to chapters ... 103D ..."

The procurement contract in this case was not awarded pursuant to HRS 103D-301, 103D-701, or 103D-702.

The procurement protest in this case was not made and decided pursuant to HRS 103D-701, 103D-709(a), 103D-310(b) or 103D-702(g).

The DCCA lacks jurisdiction to hear and consider Petitioner's RFAH herein.

III. DECISION

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

a. Petitioner's Request for Administrative Hearing herein is dismissed with prejudice for lack of jurisdiction.

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

DATED: Honolulu, Hawai`i, July 3, 2012

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