



2013 APR 25 A 9:16

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

HEARINGS OFFICE

In the Matter of)	PDH-2013-002
)	
ROBERT'S HAWAII, INC. and ROBERT'S)	HEARINGS OFFICER'S FINDINGS OF
TOURS AND TRANSPORTATION, INC.,)	FACT, CONCLUSIONS OF LAW, AND
)	DECISION
Petitioners,)	
)	Senior Hearings Officer:
vs.)	David H. Karlen
)	
DANILO F. AGSALOG, in his capacity as)	
CHIEF PROCUREMENT OFFICER FOR)	
THE COUNTY OF MAUI; JO ANNE)	
JOHNSON WINER, in her capacity as)	
DIRECTOR OF THE MAUI COUNTY)	
DEPARTMENT OF TRASPORTATION;)	
JOHN DOES 1-5; JANE DOES 1-5; DOE)	
PARTNERSHIPS 1-5; DOE)	
CORPORATIONS 1-5; DOE)	
ASSOCIATIONS 1-5; DOE)	
GOVERNMENTAL UNITS 1-5; DOE)	
TRUSTS 1-5; AND DOE ENTITIES 1-5,)	
)	
Respondents,)	
)	
and)	
)	
MAUI ECONOMIC OPPORTUNITY,)	
INC.)	
)	
Intervenor)	
)	
)	
)	

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

I. INTRODUCTION

By petition submitted March 14, 2013, Petitioners Robert's Hawaii, Inc. ("Robert's Hawaii") and Robert's Tours and Transportation, Inc. ("Robert's Tours") filed their Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PDH-2013-002. Respondents were Danilo F. Agsalog, in his capacity as Chief Procurement Officer for the County of Maui, and Jo Anne Johnson Winer, in her capacity as Director of the Maui County Department of Transportation (hereinafter referred to collectively as "Respondents" or "Maui County").

A Notice of Hearing and Prehearing Conference was filed on March 15, 2013. A prehearing conference was set for March 25, 2013, and a hearing was set for June April 3, 2013.

On March 22, 2013, Maui Economic Opportunity, Inc. (hereinafter "MEO" or "Intervenor") filed a Motion to Intervene and for an Extension of Time.

A prehearing conference was held in this matter on March 25, 2013. Jonathan S. Moore, Esq. represented Robert's Hawaii and Robert's Tours. Thomas Kolbe, Esq., appeared by telephone for Maui County Austin F. McCullough, Esq., appeared on behalf of MEO.

A Prehearing Order was filed March 27, 2013. Pursuant to the stipulation of the parties, MEO was allowed to intervene in this matter. In addition, the hearing was continued to April 15, 2013, for the hearing of motions. If, as a result of the motions, an evidentiary hearing was necessary, that hearing was scheduled for April 16, 2013.

In connections with its Response to the RFAH, Maui County filed a Motion to Dismiss on March 25, 2013. Thereafter, Robert's Hawaii and Robert's Tours filed their Motion for Summary Judgment on April 4, 2013. MEO filed its motion for Summary Judgment on April 4, 2013, as well.

On April 11, 2013, Maui County filed a Memorandum in Opposition to Robert's Hawaii's and Robert's Tours' Motion for Summary Judgment, Robert's Hawaii and Robert's Tours filed their Memorandum in Opposition to the County of Maui's Motion to Dismiss, and MEO filed its Memorandum in Opposition to the Motion of Robert's Hawaii and Robert's Tours.

All motions came on for hearing on April 15, 2013. Robert's Hawaii and Robert's Tours were represented by Jonathan S. Moore, Esq., Maui County was represented by Shinken Naitoh, Esq., and MEO was represented by Austin F. McCullough, Esq.

During the hearing, Robert's Hawaii and Robert's Tours confirmed that they had not filed any memorandum in opposition to the motion of MEO. Instead, they requested that their own motion for summary judgment also be considered as a memorandum in opposition to MEO's Motion.

Hearings Officer's Exhibit No. 1 was admitted into evidence during the hearing without objection. This exhibit consisted of a fax transmittal sheet dated April 15, 2013, and a copy of the written bid protest of Robert's Hawaii dated February 20, 2013, that had been submitted to Maui County.

Also during the course of the hearing, it was agreed that Robert's Tour's had submitted a proposal to Maui County with regard to the procurement in question in this proceeding, and that, in connection with the RFAH, Robert's Tours had submitted the \$10,000.00 procurement protest bond required by HRS §103D-709(e). Robert's Hawaii submitted neither a procurement proposal to Maui County nor a procurement protest bond in this proceeding, and it was therefore dismissed as a party.

During the course of the argument, the Hearings Officer granted the motions of Maui County and MEO and denied the motion of Robert's Tours. As a result, the evidentiary hearing

scheduled for April 16, 2013, became unnecessary and was taken off calendar. This Order, based on the record at the conclusion of the hearing on April 15, 2013, stands as the formal order with respect to all of the aforesaid motions.

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. Maui County issued a Request for Proposals, RFP No. 12-13/P-16 (“RFP”), to solicit proposals to provide paratransit services.

2. Both Robert’s Tours and MEO submitted proposals to Maui County in response to this RFP.

3. On February 13, 2013, Maui County sent a letter to Roberts Hawaii announcing that Robert’s Hawaii had been selected as the winning bidder on two other proposals (for fixed route and commuter route bus services), but that Robert’s Hawaii had not been selected as the winner for the RFP for paratransit services.

4. Instead, Maui County awarded the paratransit services contract to MEO.

5. On February 5, 2013, Robert’s Hawaii asked Maui County for a debriefing. The debriefing took place on February 13, 2013.

6. By letter dated February 20, 2013, Robert’s Hawaii and Robert’s Tours submitted to Maui County their protest of the award to MEO.

7. The protest of the award was based on the following claims:

a. Federal regulations prohibit MEO from being awarded the contract for paratransit services; and

b. MEO was not a responsible bidder because:

i. MEO’s main source of funding is government grants, the funding for which must be renewed on an annual basis and the availability of which is

subject to MEO's application for, and subsequent award of, such grants, so it "may not be a financially 'responsible' bidder"; and

ii. MEO supplied "no realistic information whatsoever about its assets and revenues."

See Hearings Officer's Exhibit No. 1, page 6 of letter of February 20, 2013.

8. By letter dated March 6, 2013, Maui County denied this protest of the award to MEO. Although dated March 6, 2013, the letter was not mailed on that date. Instead, it was mailed out on March 7, 2013.

9. Neither Robert's Hawaii nor Robert's Tours has ever made any request or complaint to the Federal Transit Administration regarding MEO and/or the RFP.

10. The contract awarded to MEO is for one year with four (4) one year options to renew.

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. Preliminary Jurisdictional and Standing Issues

The RFAH was brought in the names of both Robert's Hawaii and Robert's Tours, but the RFAH does not make clear the relationship between the two companies other than that they are "associated entities." What is clear is that the response to the RFP submitted to Maui County was in the name of Robert's Tours. See the cover sheet to RFAH, Exhibit "D," as well as the cover letter in that exhibit stating that "Robert's Tours and Transportation, Inc. hereby submits five (5) copies of its proposal in response to the County's Request for Proposals ("RFP") for the Maui Bus ADA Paratransit Services RFP."

Robert's Tours is the only party that submitted a protest bond in this proceeding as required by HRS §103D-709(e).

Robert's Tours is therefore the only corporate entity with standing to appeal the March 6, 2013 decision of Maui County, and Robert's Hawaii is hereby dismissed as a party to this proceeding.

In its RFAH, Robert's Tours asserts that its appeal meets the jurisdictional threshold set forth in HRS §103D-709(d)(2). Neither Maui County nor MEO dispute this assertion. The Hearings Officer has independently evaluated this assertion and concurs that the jurisdictional threshold has been met.

HRS §103D-712(a) required that Robert's Tours file its RFAH within seven calendar days of the issuance of Maui County's decision denying the bid protest. Maui County has stipulated with Robert's Tours that this time period can start running on March 8, 2013 because Robert's Tours received Maui County's letter of March 6, 2013, on that date. However, that stipulation is invalid and of no effect in this proceeding because the time

period is measured from the date the letter was issued, i.e., mailed, rather than the date it was received. See Nihi Lewa, Inc. v. Department of Budget and Fiscal Services, 103 Haw. 163, 80 P.3d 984 (2003). The parties cannot confer jurisdiction by a stipulation contrary to law that waives a jurisdictional requirement.. Captain Andy's Sailing, Inc. v. Department of Land and Natural Resources, 113 Haw. 184, 194-195, 150 P.3d 833, 843-844 (2006).

Nevertheless, the RFAH was timely filed because it was filed on March 14, 2013, seven (7) days after the March 6, 2013 letter was actually issued because, despite its date, it was actually mailed on March 7, 2013.

C. The Hearing Officer Has No Jurisdiction to Consider Robert's Tours Assertions of the Violation of Federal Laws

At the heart of Robert's Tours' challenge to the award to MEO is its assertion that such an award would violate the provisions of 49 U.S.C. §5323(d)(1). According to Robert's Tours, that statute restricts MEO from competing with a private charter bus operator such as Robert's Tours because MEO is receiving financial assistance from the federal government either in the form of direct grants or indirectly through federal grants initially made to Maui County. This federal statutory provision is sometimes known as the "Charter Rule." American Bus Association v. Rogoff, 649 F.3d 734, 735 (D.C. Cir. 2011).

At pages 3-4 of its Motion to Dismiss, filed March 25, 2013, Maui County asserted that the Hearings Officer had no jurisdiction to determine whether Maui County or MEO violated any federal funding regulations. MEO made the same assertion at pages 4-5 of its Motion for Summary Judgment filed on April 5, 2013.

Federal law has a comprehensive system for handling alleged violations of the Charter Rule as initially set forth in 49 U.S.C. §5323(d)(2), entitled "Violations."

If a complaint is made about an alleged violation of the Charter Rule, Federal law first provides that the "Secretary shall investigate and decide whether a violation has

occurred.” 49 U.S.C. §5323(d)(2)(A). The parties hereto recognize that the duties of the “Secretary” have been delegated to the Federal Transit Administration (“FTA”). There is no restriction on who can make a complaint to the FTA, so Robert’s Tours could have made such a complaint but chose not to do so.

If the FTA finds that a violation has occurred, it “shall correct the violation under terms of the agreement [with the recipient of federal funds]. 49 USC §5323(d)(2)(B). The FTA can also bar the offending recipient or operator from receiving future federal transit assistance in an amount commensurate with the violation. 49 U.S.C. §5323(d)(2)(C).

Further remedies are provided by the implementing regulations of the FTA that allow “interested parties to request advisory opinions regarding the Charter Rule, as well as orders to cease and desist from violations of that Rule. In addition, a party dissatisfied with the FTA’s resolution of a complaint may file a petition for federal judicial review under the federal Administrative Procedure Act. American Bus Association v. Rogoff, supra, 649 F.3d at 735.

Nothing in the federal law upon which Robert’s Tours relies gives Robert’s Tours any private right of action or any ability to, on its own, enforce the statute in a state judicial or administrative proceeding against a recipient of FTA financial assistance. The sole remedy provided to private parties by the Charter Rule is to petition the FTA for relief.

In American Bus Association v. Rogoff, supra, private charter bus operators claimed that federal law improperly exempted one public agency in the state of Washington from the Charter Rule. The Court noted that the private charter bus operators’ only remedy against the public agency for violations of the Charter Rule was enforcement by FTA action, which this special exemption has just taken away, because the federal law had not created a private cause of action. 649 F.3d at 741. See also Blue Bird Coach Lines, Inc. v. Linton, 48 F.

Supp. 2d 47, 49 (D.D.C. 1999)(“The FTA Act does not create a private right of action, and none can be implied.”)

The Hearings Officer, therefore, has no ability to adjudicate Robert’s Tours’ claims under the Charter Rule.

The portion of Robert’s Tours RFAH asserting that violations of 49 U.S.C. §5323(d)(1) preclude an award to MEO must be dismissed. In entering this dismissal, the Hearings Officer makes no comment or ruling on any of the specifics of Robert’s Tours’ assertion of violations of federal law.

D. MEO is Not Irresponsible

At pages 18-19 of its Motion for Summary Judgment, Robert’s Tours asserts that MEO is not a responsible bidder because it is a non-profit entity that (1) relies almost entirely on government financial assistance; and (2) plans to commingle funds in order to reduce operating costs.

The Procurement Code defines a “responsible bidder or offeror” as follows:

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.

Pursuant to HRS §103D-303(g), the award in this case must be made to:

the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals.

Financial ability to perform the work is one element to be considered when determining an offeror’s responsibility. HRS §103D-310(b).

Robert’s Tours admits that it has no specific evidence of MEO’s potential financial inability to perform the work required by the RFP in question. All that Robert’s Tours could

say in its written protest to Maui County was that MEO “may not be” a financially responsible bidder. See page 6 of the letter of February 20, 2013, Hearings Officer’s Exhibit No. 1. Robert’s Tours speculates only that government funding for any portion of MEO’s operations dependent upon government funding is inherently uncertain. Such pure speculation is a completely inadequate basis for establishing MEO’s financial inability to perform the work.

Robert’s Tours attempts to claim that the renewable nature of the contract makes this alleged uncertainty even greater. The Hearings Officer concludes that the opposite is the case. Since the initial contract term is for one year, the possible annual review of MEO’s financial condition prior to a renewal actually provides greater safeguards for Maui County that MEO remains a responsible contractor. The fact that this is a rational way to proceed is strongly supported by a case cited by Robert’s Tours, Baumann & Sons Buses, Inc. v. Patchogue-Medford Union Free School Dist., 647 N.Y.S. 2d 288 (N.Y. App. Div. 1996).

The purely speculative assertions of Robert’s Tours in this regard are not sufficient to satisfy Robert’s Tours’ burden in demonstrating in its motion for summary judgment that it would be entitled to judgment as a matter of law. In contrast, the facts in the other case cited by Robert’s Tours, State ex rel. Glidepath, L.L.C. v. Columbus Regional Airport Auth., 2012 WL 19715 (Ohio Cr. App. 2012), demonstrated that the bidder had, for example, an unacceptable record of delayed payments to subcontractors and one of the worst credit risk ratings that could be given by a national credit rating firm (plus it made false representations to the public authority about its financial condition). There have been factual allegations in this case, however, demonstrating anything even approaching such specific evidence of financial irresponsibility. All that Robert’s Tours has shown by means of its motion is that it has made a very abstract allegation that non-profit organizations receiving public funding

cannot, by definition, be financially responsible. The Hearings Officer rejects this blanket proposition as a matter of law.

The assertion in Robert's Tours' motion that MEO plans to commingle funds to reduce operating costs is based on allegations that any such alleged plans to commingle funds from its various transportation operations is a violation of federal law. In response, it has been asserted that this is an efficient practice that is encouraged by the FTA. The Hearings Officer makes no determination on this issue. As discussed above, such a claim by Robert's Tours cannot be brought in this proceeding, and it therefore cannot provide a basis for alleging that MEO is not responsible under state law. In addition, Robert's Tours did not make a claim that alleged commingling shows lack of financial responsibility in its protest to Maui County contained in Hearings Officer's Exhibit No. 1, and Robert's Tours has therefore failed to properly exhaust its administrative remedies with respect to this claim insofar as it might otherwise pertain to allegations of non-responsibility..

Robert's Tours' bid protest and its motion for summary judgment (at page 20) asserted that MEO was not responsible because its proposal to Maui County did not provide information as to its assets and revenues. This assertion was withdrawn at the hearing on April 15, 2013, in light of the demonstration by MEO that the document relied upon by Robert's Tours was only a sample document (as required by the terms of the RFP) and that, through other documents submitted with its proposal, MEO had provided extensive financial information to Maui County.

Robert's Tours' summary judgment motion on the issue of MEO's responsibility must therefore be denied. In view of the fact that this motion brought forth everything on the responsibility issue that Robert's Tours had asserted in its February 20, 2013 protest to Maui County, there was no additional evidence that Robert's Tours could have presented at an evidentiary hearing.

The Hearings Officer would probably have been justified in *sua sponte* granting summary judgment to Maui County and MEO on this issue even in the absence of motions filed by those two parties. The Hearings Officer does not have to decide on that course of action, however, in light of the discussion below of the motions filed by Maui County and MEO.

At pages 6 through 8 of its Motion to Dismiss, Maui County discussed the claim of Robert's Tours that MEO was not responsible. In addition to challenging Robert's Tours' reliance on the generalized assertion that non-profit corporations relying on government funding are inherently not responsible, Maui County asserted that MEO's submission of over 600 pages of material with its proposal, including representations regarding its financial records and accounting methods, was sufficient evidence of its responsibility.

In its opposition to Maui County's Motion to dismiss, filed April 11, 2013, Robert's Tours barely mentioned the issue of responsibility. Further, responsibility was only mentioned with respect to the contention that MEO was in violation of the Charter Rule, 49 U.S.C. §5323(d)(1). As already decided above, the Hearings Officer is not able to make a determination of such a violation. While it is far from apparent that any violation of that federal statute would establish the possibility that MEO was not responsible, the Hearings Officer need not reach that issue because Robert's Tours cannot establish in this proceeding that there was any such violation.

MEO devoted pages 13 through 16 of its Motion for Summary Judgment, filed April 5, 2013, to the issue of responsibility. It joined in Maui County's argument against Robert's Tours' principal claim that non-profits are inherently not responsible if they depend upon government funding, pointed out that there was ample evidence in the record to demonstrate MEO's responsibility on past projects, and documented that MEO supplied extensive information on its financial records and accounting methods as sought by the RFP. It also

referred to its financial policies and its recent annual audit by an independent auditor, all in the record as identified by MEO.

As noted above, Robert's Tours did not respond to MEO's motion but instead requested that its own motion be considered a response to MEO's motion as well. However, as also noted above, Robert's Tours' motion is based on the unacceptable and discredited proposition concerning the alleged inherent non-responsibility of non-profit organizations that rely on government funding. There was nothing in Robert's Tours' motion that countered the extensive evidence relied upon by MEO, and there was nothing in Robert's Tours' motion that created any genuine issue of material fact with respect to the issue of responsibility.

Accordingly, on the issue of responsibility, both Maui County and MEO are entitled to have their motions granted.

IV. DECISION

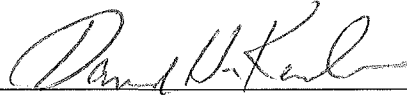
Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. Robert's Hawaii is hereby dismissed as a party to the RFAH.
- b. The Motion of Maui County for Dismissal and the Motion of MEO for Summary Judgment are granted for the reasons stated herein.
- c. The Motion of Robert's Tours for Summary Judgment is denied.
- d. Maui County's denial of Robert's Tours' procurement protest is affirmed for the reasons stated herein.
- e. The Request for Administrative Hearing herein is dismissed..
- f. Pursuant to HRS §103D-709(e), the \$10,000.00 procurement protest bond submitted by Robert's Tours in conjunction with this RFAH is hereby forfeited and shall be deposited into the general fund.

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

APR 25 2013

DATED: Honolulu, Hawaii, _____.



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