



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
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HEARINGS OFFICE

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

In the Matter of	)	PCH-2000-8
	)	
CLINICAL LABORATORIES OF HAWAII,	)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS APPEAL
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
CITY & COUNTY OF HONOLULU, DEPARTMENT OF BUDGET & FISCAL SERVICES,	)	
	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS APPEAL

This matter having come before the undersigned Hearings Officer on October 4, 2000, for consideration of the City & County of Honolulu, Department of Budget and Fiscal Services' ("Respondent"), Motion to Dismiss Petitioner Clinical Laboratories of Hawaii's Appeal; with Clinical Laboratories of Hawaii ("Petitioner"), represented by Alyssa J. Park and William W. Watkins; and Respondent represented by Duane W. H. Pang, Esq.; and after having reviewed the memoranda, affidavit, exhibits, records and files herein and having heard the argument of the parties, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Final Order.

I. FINDINGS OF FACT

1. On or before May 18, 2000, Respondent issued a Notice to Bidders in connection with a proposal for the furnishing of all necessary facilities, equipment, services and personnel to provide drug and alcohol testing services to the City and County of Honolulu, designated as Proposal Document No. 13468 ("IFB").

2. The Notice to Bidders stated that "[f]orms of certification, proposal and specifications may be obtained from said Office of the Division of Purchasing upon application for Proposal Document No. 13468."

3. On May 18, 2000, Petitioner obtained the solicitation forms, including the specifications ("Minimum Specifications"), in connection with Proposal Document No. 13468 from Respondent. The forms were included on a computer disk that Petitioner picked up on May 18, 2000<sup>1</sup>.

4. On May 30, 2000, Respondent issued an addendum to the IFB. The addendum extended the date for the submission of bids from May 31, 2000 to June 5, 2000.

5. Prior to June 5, 2000, Respondent received bids from Petitioner, Diagnostic Laboratories Services, Inc., and Compliance Consortium Corporation.

6. By letter dated June 15, 2000, Respondent asked Petitioner to provide documentation that it met Section 5(b) of the Minimum Specifications. Section 5(b) required that :

[t]he Contractor's firm must have provided collection and testing services to at least four (4) organizations within the past two years. At least three (3) of these organizations must have contracted for services related to DOT required tests and **at least one of these must have been for a single employer who had at least 700 CDL drivers who were covered by the DOT drug and alcohol testing regulations.** The prospective Contractor must provide a list of these organizations.

(Emphasis added).

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<sup>1</sup> The parties stipulated that Petitioner picked up the form of the Solicitation for Bids from Respondent on May 18, 2000 and that the form of the documents that Petitioner picked up was a computer disk that contained a file of the Solicitation for Bids.

7. By letter dated June 19, 2000, Petitioner informed Respondent that it "has the qualified staff and proper State and Federal license to manage a proposal of this scope. The professional technical staff of CLH has performed the requested services for the last four years executing contracts with the County of Hawaii and County of Maui CDL drivers." The letter also stated that the "requirement for a bidder to provide service to a single employer having at least 700 CDL drivers covered by the DOT drug and alcohol testing regulations limits the bidders to **ONLY THE EXISTING CONTRACTOR** and would assume to render this as not a true bid."

8. On June 26, 2000, Respondent orally informed Petitioner that Petitioner's bid had been rejected. The rejection of Petitioner's bid was confirmed in a letter from Respondent dated June 27, 2000. The letter stated:

This is to confirm the telephone conversation of June 26, 2000, between Mr. Matthew Respicio of your firm and Mr. O.B. Hayden of the Purchasing Division, that the proposal submitted by your firm has been rejected.

Section 5(b) of the Minimum Specifications of the bid requires that in order to be qualified for award of a contract, a bidder must have provided services similar to those specified to at least four organizations, three of which must be related to DOT required tests, and at least one of which must cover at least 700 drivers. When you were asked to provide evidence of compliance with this Section, only two references were provided, and you stated that you do not perform these services for any one organization of more than 700 drivers. Therefore, because you do not meet the experience requirement of the bid, your bid has been rejected.

9. By letter dated June 28, 2000, Petitioner informed Respondent that it was protesting the IFB requirement for a bidder "to provide service to a single employer having at least 700 CDL drivers covered by the DOT drug and alcohol testing regulations," and that the requirement, "limits the bidder to **ONLY THE EXISTING CONTRACTOR OR A MAINLAND ORGANIZATION** and would assume to render this as not a true bid."

10. By letter dated August 14, 2000, Respondent denied Petitioner's protest. Respondent found that the bid requirement which was the subject of Petitioner's protest was "prepared to adequately satisfy the City's need to obtain the services of a contractor to provide drug and alcohol testing services for approximately 2,000 law enforcement officers, 1,000 firefighters, and 700 CDL drivers of the City." Respondent also noted that "your protest on the content of the bid was late, received after the date set for the receipt of offers."

11. On August 22, 2000, Respondent received a request from Petitioner for an administrative review challenging Section 5(b) of the Minimum Specifications. Petitioner's letter was treated as a request for reconsideration by Respondent.

12. By letter dated August 29, 2000, Respondent informed Petitioner that it was denying Petitioner's request for reconsideration.

13. On September 6, 2000, Petitioner filed the instant appeal with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs<sup>2</sup>.

## II. 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, Inc. v. County of Kauai, PCH-96-9 (November 20, 1996).**

Respondent asserts that it is entitled to the dismissal of the instant appeal because Petitioner's protest was untimely. In the alternative, Respondent contends that Petitioner failed to pursue its request for administrative review within the time set forth in, HRS §103D-712 and is therefore also untimely.

Hawaii Revised Statutes ("HRS") §103D-701(a) states:

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts

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<sup>2</sup> By letter dated August 29, 2000 and addressed to Respondent, Petitioner requested an administrative review pursuant to Hawaii Revised Statutes §103D-712. The letter was filed with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, on September 6, 2000.

giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract either under section 103D-302 or 103D-303, as applicable; **provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.**

**(Emphasis added).**

The foregoing section expressly requires that protests be filed within five working days after the protestor knows or should have known of the facts giving rise to the protest *and* that in any event, protests *involving the content of a solicitation* be filed prior to the date set for the receipt of offers. The former requirement has been the subject of a prior decision. In *GTE Hawaiian Telephone Company Incorporated v. Dept. of Finance, County of Maui, PCH-98-6*; the Hearings Officer stated:

In determining whether Petitioner filed its protest within the required period, the Hearings Officer is mindful of the purpose of the HRS Chapter 103D and its implementing rules “to promote economy, efficiency, and effectiveness in the procurement of goods and services.” (citations omitted). Moreover, it is significant to note that R9-101.03.1 of the Recommended Regulations for the American Bar Association’s Model Procurement Code for State and Local Governments (footnote omitted) suggests a 14-day period within which to file protests rather than the shorter 5-day period provided in HAR §3-126-3(a). It is also noteworthy that although the Recommended Regulations in an Editorial Note suggest that “[j]urisdictions may wish to allow consideration of protests filed after [14 days] for good cause shown”, no such exception was included in HAR §3-126-3. **These considerations underscore the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. Those considerations also support the notion that government is entitled to know, with some degree of certainty, when cases may be brought and when they may not. The accomplishment of these objectives requires strict adherence to time**

**constraints for the initiation and prosecution of protests  
(footnote omitted).**

**(Emphasis added).**

Presumably, these same considerations led the Legislature in 1999 to amend HRS §103D-701(a) to add the requirement that protests based upon the content of the solicitation be filed prior to the date set for the submission of offers<sup>3</sup>. The amendment was obviously designed to provide the government agency with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. Indeed, the possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date.

Here, even assuming that Petitioner’s June 19, 2000 letter constituted a protest<sup>4</sup>, this “protest” was filed well after the date set for the submission of the bids (June 5, 2000), contrary to HRS §103D-701(a). Petitioner does not dispute that its protest was filed after the date set for the receipt of the bids. Instead, Petitioner argues that it substantially complied with HRS §103D-701(a) by filing its protest only 14 days after the date set for the receipt of the bids and that in any event, Respondent has not been prejudiced by the delay.

Public bidding statutes, however, must be construed with sole reference to the public good and must be rigidly adhered to in order to guard against favoritism, improvidence, extravagance and corruption. See *N.E.R.I. Corp. v. New Jersey Highway Authority*, 686 A.2d 328 (N.J. 1996); *TEC Electric, Inc. v. Franklin Lakes Board of Education*, 665 A.2d 803 (N.J. Super. 1995). Consequently, strict compliance with public bidding guidelines is generally required. *TEC Electric, Inc., supra. In Superior Oil Company v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969), cited with approval in *State v. Weisz & Sons, Inc.*, 713 P.2d 176 (Wyo. 1986), the court emphasized the importance of strict

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<sup>3</sup> “Your Committee is in support of this measure [S.B. 1101] as a means of promoting greater efficiency in procurement procedures.” SCRep. 223 (Senate Journal 1999).

<sup>4</sup> Petitioner asserts that its June 19, 2000 letter to Respondent constituted its first protest of the requirement included in the Minimum Specifications that bidders must have provided collection and testing services to a single employer having at least 700 CDL drivers covered by the DOT drug and alcohol testing regulations. On the other hand, Respondent contends that the June 28, 2000 letter it received from Petitioner constituted Petitioner’s protest. For purposes of this motion, the Hearings Officer construes the June 19, 2000 letter as Petitioner’s protest.

compliance with bidding requirements and quoted with approval from an opinion of the comptroller general:

The strict maintenance of the competitive bidding procedures required by law is infinitely more in the public interest *than obtaining a pecuniary advantage in individual cases by permitting practices which do violence to the spirit and purpose of the law . . .* (emphasis in original). 409 F.2d at 1119-1120.


These considerations lead the Hearings Officer to conclude that strict rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute's underlying purpose<sup>5</sup>. The Hearings Officer further concludes that Petitioner failed to submit its protest within the time constraint of HRS §103D-701(a) and the protest is therefore untimely. Accordingly, Petitioner's protest is not entitled to a substantive review.

Alternatively, Respondent contends that Petitioner's request for administrative review was untimely. However, in light of the Hearings Officer's conclusion that the protest was untimely, the resolution of this issue is unnecessary for a full disposition of this matter.

### III. FINAL ORDER

Accordingly, based upon the above findings of fact and conclusions of law, Respondent's Motion to Dismiss Appeal is granted and the above-entitled matter is hereby dismissed.

DATED at Honolulu, Hawaii: OCT 17 2000

  
CRAIG H. UYEHARA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

<sup>5</sup> In any event, it does not appear that Petitioner substantially complied with HRS §103D-701(a). Substantial compliance is determined by ascertaining whether the statute has been followed sufficiently such that the intent for which it was adopted is carried out. *State v. Villeza, 85 Haw. 258 (1997)*. Petitioner's filing of its "protest" at least 14 days after the bids were submitted defeats the very purpose for which the statute was intended.