



DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS
Jul 26 2 03 PM '02
HEARINGS OFFICE

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

In the Matter of

WAIKIKI WINDRIDERS/HAWAIIAN)	PCH-2002-9
OCEAN'S WAIKIKI,)	
)	HEARINGS OFFICER'S FINDINGS
Petitioner,)	OF FACT, CONCLUSIONS
)	OF LAW, AND DECISION
vs.)	GRANTING RESPONDENT'S
)	MOTION TO DISMISS
DEPARTMENT OF BUDGET AND)	PETITIONER'S REQUEST FOR
FISCAL SERVICES, CITY AND)	ADMINISTRATIVE REVIEW
COUNTY OF HONOLULU,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION GRANTING RESPONDENT'S MOTION TO
DISMISS PETITIONER'S REQUEST FOR ADMINISTRATIVE REVIEW

This matter having come on for hearing before the undersigned Hearings Officer on July 23, 2002; Amy R. Kondo, Esq. appearing for Respondent Department of Budget and Fiscal Services, City and County of Honolulu ("Respondent"); and Arthur S.K. Fong, Esq. appearing for Petitioner Waikiki Windriders/Hawaiian Ocean's Waikiki ("Petitioner"); and after due consideration of the motion and memoranda filed by the parties and their arguments in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Decision.

I. FINDINGS OF FACT

1. In or about March 2002, Respondent issued two invitations for bids ("IFBs"), in conjunction with Beach Services Concession Stands #1 and #3 at Kuhio Beach Park in Honolulu.

2. The IFBs required prospective bidders to file a Notice of Intention to Bid with Respondent by May 17, 2002.

3. By letter dated May 20, 2002 to Petitioner, Respondent advised that Petitioner's application to bid for the beach concessions did not meet the minimum qualification requirements set forth in the IFBs. The letter also advised that Petitioner may request a hearing on its disqualification in accordance with §28-2.3 of the Revised Ordinances of Honolulu.

4. Pursuant to Petitioner's request, a hearing was held on May 22, 2002 before the Deputy Director of the Department of Budget and Fiscal Services. Respondent's determination that Petitioner was not qualified to bid was affirmed following the hearing.

5. Nevertheless, Petitioner submitted bids in response to both IFBs. The bids were opened on or about May 24, 2002.

6. By letter dated June 19, 2002, Respondent informed Petitioner that its bids had been rejected in accordance with §28-2.6 of the Revised Ordinances of Honolulu because Respondent had determined that Petitioner did not meet certain experience requirements set forth in the IFBs.

7. By letter dated June 21, 2002 to Respondent, Petitioner protested the rejection of Petitioner's bids pursuant to Hawaii Revised Statutes ("HRS") §103D-701. The protest was supplemented by letter dated June 24, 2002 from Petitioner's attorney.

8. By letter dated June 27, 2002 to Petitioner's attorney, Respondent informed Petitioner that Respondent was upholding its decision to disqualify Petitioner's bids and stated that HRS Chapter 103D was inapplicable to concession contracts.

9. Petitioner filed the present appeal to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, on July 2, 2002.

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. *RCI Environmental, Inc. v. Timothy Johns, et al.*, PCH-2000-10 (January 2, 2001); *GMP*

Associates, Inc. v. Board of Water Supply, City and County of Honolulu, PCH-2001-5 (June 18, 2001).

In bringing this motion to dismiss, Respondent contends that because this dispute involves the solicitation of bids for *concession contracts*, the Hearings Officer lacks jurisdiction over this matter. Petitioner, on the other hand, argues that while the solicitations involve concession contracts, those contracts also constitute “procurement contracts”, and are therefore subject to the provisions of HRS Chapter 103D. Thus, according to Petitioner, the Hearings Officer is vested with jurisdiction to hear this appeal pursuant to HRS §103D-709.

HRS §103D-102(a) provides in part:

This chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance

“Procurement” is defined as “buying, purchasing, renting, leasing, or otherwise acquiring good, service, or construction.” HRS §103D-104.

According to Petitioner, since concession contracts involve the delivery of services, those contracts also constitute “procurement contracts”. Moreover, Petitioner alleges that the language in HRS §103D-102(a) - “consideration for the contract . . . which the *State receives or is owed*” – refers to concession contracts where “the monies that are received from these . . . contracts will be received or is owed to the City and County of Honolulu”

In 1993, the Legislature enacted HRS Chapter 103D (“Code”). To a large extent, the Code was based upon the American Bar Association’s Model Procurement Code for State and Local Governments (“Model Code”). *Standing Committee Report No. S8-93, 1993 Senate Journal, at 39.* Not surprisingly, HRS §103D-102(a) incorporated most of the language used in §1-104(2) of the Model Code. Like §1-104(2), HRS §103D-102(a) provided that the Code would “apply to every expenditure of public funds irrespective of their source” . . . “under any contract”.

In 1995, HRS §103D-102(a) was amended to its present version. Although the amendment deleted “every expenditure of public funds irrespective of their source”, the

underlying legislative history gives no indication that the Legislature sought to expand the application of the Code to cases other than those involving the expenditure of public funds. Rather, it suggests that the purpose of the Bill (H.B. 1834) was merely to “clarify and streamline the provisions [of the Code] to achieve the objectives of cost-effectiveness and accountability which prompted its adoption.” *Standing Committee Report No. 811, 1995; House Journal.*

These considerations lead the Hearings Officer to conclude that the Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that *involve the expenditure of public funds* as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts, or earnings, “any of which the State receives or is owed; in-kind benefits; or forbearance”. According to this interpretation, the language in HRS §103D-102(a) upon which Petitioner relies (“consideration for the contract . . . which the State receives or is owed”), was intended to clarify the *source of the funds* used by the procuring agency as consideration for the contract rather than to expand the application of the Code to include concession contracts.

This interpretation is buttressed by the fact that HRS §103D-111 specifically provides that “[a]ny provisions of chapter 103 not inconsistent with this chapter shall apply to the procurement of all goods, services, and construction under this chapter”. The fact that the Code does not include a similar provision for HRS Chapter 102 strongly implies that the application of the Code is limited to the solicitation and awarding of procurement contracts involving the expenditure of public funds.¹

Petitioner points out that concession contracts are not among the contracts specifically exempted from the requirements of the Code under HRS §103D-102(b). According to Petitioner, this supports its argument that the Legislature intended to subject concession contracts to the Code’s requirements. The Hearings Officer disagrees.

A closer inspection of HRS §103D-102(b) reveals that all of the contracts listed in that section involve contracts for the acquisition of a good, service or construction *and* the expenditure of public funds as consideration for those contracts. As such, HRS §103D-102(b) is consistent with the conclusion that only procurement contracts involving the

¹ HRS Chapter 103 relates to and is entitled, “Expenditure of Public Money and Public Contracts”.

expenditure of public funds are governed by the Code. Moreover, it follows that because the Code does not apply to concession contracts, there was no need to “exempt” those contracts under HRS §103D-102(b).

There is no dispute that the contracts at issue here are concession contracts that do not involve the expenditure of public funds by Respondent. Consequently, the Hearings Officer must conclude that the solicitation of those contracts are not subject to the requirements of HRS Chapter 103D and accordingly, the Hearings Officer lacks jurisdiction over this appeal.

III. DECISION

Accordingly, based upon the above findings of fact and conclusions of law, Respondent’s Motion to Dismiss Petitioner’s Request for Administrative Review is granted and the above-entitled matter is hereby dismissed; each party to bear its own attorney’s fees and costs.

DATED at Honolulu, Hawaii: JUL 26 2002



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