



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2003 NOV -7 P 12: 20

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

In the Matter of	)	PCH-2003-25
)	
ROBERT'S HAWAII SCHOOL	)	HEARINGS OFFICER'S
BUS, INC.,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Petitioner,	)	AND FINAL ORDER
	)	GRANTING RESPONDENT'S
vs.	)	MOTION TO DISMISS OR IN
	)	THE ALTERNATIVE FOR
DEPARTMENT OF EDUCATION,	)	SUMMARY JUDGMENT
STATE OF HAWAII,)	
)	
Respondent.)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER GRANTING RESPONDENTS' MOTION
TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. INTRODUCTION

On August 28, 2003, Robert's Hawaii School Bus, Inc. ("Petitioner"), filed a request for an administrative hearing to contest Respondent Department of Education, State of Hawaii's ("Respondent") August 21, 2003 denial of Petitioner's August 14, 2003 protest concerning Respondent's Invitation for Bids Nos. E04-001, E04-002, E04-003, E04-004, and E04-005. Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On September 22, 2003, Respondent filed the instant motion to dismiss or in the alternative for summary judgment. On October 1, 2003, Petitioner submitted a memorandum in opposition to the motion.

The motion came before the undersigned Hearings Officer on October 7, 2003. Petitioner was represented by David A. Nakashima, Esq. and Mei-Fei Kuo, Esq. Respondent was represented by Aaron H. Schulaner, Esq. and Christian H. Butt, Esq.

Having reviewed and considered the motion, memoranda, declarations and exhibits attached thereto and the argument of counsel, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order.

II. FINDINGS OF FACT

1. In or about March 1998, Respondent awarded to Petitioner Contract Nos. 44274, 44282, 44309, and 44315 for the furnishing of school bus services for certain specified routes on the island of Oahu (“1998 Contracts”).

2. The 1998 Contracts consisted of six-year multi-term contracts.

3. Pursuant to the terms of the 1998 Contracts, the contracts “may be extended for an additional two years by mutual agreement, provided that the parties may agree to extend the contract for an additional two years thereafter.”

4. By letters dated May 5, 2003, Respondent informed Petitioner that:

The “Term of Contract” section of the Special Provisions . . . and Section 302A-407 of the Hawaii Revised Statutes provides for extension of this contract for two years upon mutual agreement between the State and the Contractor.

This is to notify you that the State does not desire to extend the subject contract beyond the initial six-year term. . . .

* * * *

5. The 1998 Contracts are currently set to expire on June 30, 2004.

6. By letter dated May 20, 2003 to Respondent, Petitioner requested “a detailed explanation as to why we will not be allowed to extend the above-listed contracts for two years. To our knowledge, contractors have never been denied such a request in the past.” (emphasis in original).

7. In or about July 2003, Respondent issued Invitation for Bids Nos. E04-001, E04-002, E04-003, E04-004 and E04-005, to provide “Student Bus Transportation Services” on the island of Oahu (“Solicitation”). According to the terms of the Solicitation, bids “will be received up to and opened at 2:00 p.m. (HST) on August 22, 2003.”¹

8. The Solicitation sought bids for the furnishing of student bus transportation services for the same routes covered by the 1998 Contracts.

¹ On or about July 25, 2003, Respondent issued Addendum A to IFB Nos. E04-001, E04-002 and E04-003 revising the bid opening date from August 13, 2003 to August 22, 2003.

9. By letter dated August 6, 2003 but received by Petitioner on August 8, 2003,

Respondent explained that:

The second paragraph of the TERM OF CONTRACT section of the Special Provisions states “Further, as provided in Section 296-46.1 of the Hawaii Revised Statutes (HRS), the contract may be extended for an additional two years by mutual agreement.” Subject to the terms of the contract, there is no obligation or expectation on the part of either party to enter into this additional period. The Department, in its discretion, has determined not to extend these contracts at this time.

* * * *

10. By letter dated August 14, 2003 to Respondent, Petitioner submitted a “Protest regarding Contract Nos. 44274, 44282, 44309, and 44315.”²

11. By letter dated August 19, 2003 to Respondent, Petitioner requested confirmation that the Solicitation “is stayed pursuant to our August 14, 2003 Protest Letter and H.R.S. §103D-701(f).”

12. By letter dated August 21, 2003 to Petitioner’s attorneys, Respondent denied the protest.

13. The bids submitted in response to the Solicitation were opened on August 22, 2003 and the resulting contracts have been awarded.

14. On August 28, 2003, Petitioner filed a request for administrative review of Respondent’s August 21, 2003 denial of its protest.

15. On September 22, 2003, Respondent filed the instant motion.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

In seeking the dismissal of this action, Respondent first asserts that the Hearings Officer lacks jurisdiction over this matter because the controversy involved here does not arise from an “award of a contract” and is therefore not “protestable” under HRS §103D-701(a). Petitioner, on the other hand, argues that the improper termination of the 1998 Contracts is “inextricably tied to the subsequent July 23, 2003 solicitation of bids on the routes previously serviced by Roberts.” According to Petitioner, “[b]ut for the DOE’s termination of Robert’s contracts, it would not be

² Petitioner’s August 14, 2003 letter “protested” Respondent’s decision not to extend the 1998 Contracts. For purposes of this motion, the Hearings Officer construes Petitioner’s protest as including the July 2003 Solicitation.

necessary to solicit bids for replacement services.” Therefore, Petitioner reasons that this matter is properly before the Hearings Officer pursuant to HRS §103D-709.

HRS §103D-709(a) states as follows:

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 or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701 or 103D-702.³

HRS §103D-701(a) provides in relevant part:

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 giving rise thereto

(Emphasis added).

HRS §103D-709 limits the Hearings Officer’s authority to a review of the agency’s determination of timely protests brought “in connection with the solicitation or award of a contract.” HRS §103D-703, on the other hand, provides a comprehensive procedure for the resolution of contract and breach of contract controversies:

(a) This section applies to controversies between a governmental body and a contractor which arise under, or by virtue of, a contract between them, including, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

* * * *

³ HRS §103D-310 (Responsibility of offerors) and 103D-702 (Authority to debar or suspend) are inapplicable here.

(e) The decision under subsection (c) shall be final and conclusive unless the contractor commences a *judicial action* in accordance with section 103D-711.

* * * *

(Emphasis added).

Construing the foregoing provisions with reference to each other leads to the obvious conclusion that the legislature intended to limit the authority of the Hearings Officer to review claims arising directly from the solicitation process⁴ while reserving exclusively to the courts the power to preside over contract disputes⁵. This conclusion is consistent with the fact that HRS Chapter 103D severely limits the Hearings Officer's ability to fashion an appropriate remedy in a given case.⁶

Here, it is uncontroverted that the dispute between the parties arises primarily from Respondent's determination not to extend the 1998 Contracts for an additional two years. As Petitioner's counsel acknowledged, the "genesis" of this action is based upon Respondent's alleged wrongful termination of the contracts. Indeed, the resolution of this issue would require interpreting the 1998 Contracts and determining whether Respondent's actions constituted a contract breach. Accordingly, the Hearings Officer concludes that the present action can only be characterized as a controversy "between a governmental body and a contractor which arise[s] under, or by virtue of, a contract between them", and as such, is governed by HRS §103D-703. Mindful that administrative agencies are tribunals of limited jurisdiction and only have adjudicatory jurisdiction conferred on them by statute, the Hearings Officer further concludes that this office lacks jurisdiction over this

⁴ The solicitation process includes, but is not limited to, specifications preparation, bid solicitation, award, and disclosure of information marked confidential in the bid or offer.

⁵ Nothing in HRS §103D-703 suggests an intent by the legislature to provide the Hearings Officer and the circuit courts with concurrent jurisdiction over contract disputes.

⁶ See HRS §§103D-706 (Remedies prior to an award) and 103D-707 (Remedies after an award). In this case, the parties appear to agree that the contracts resulting from the Solicitation ("2003 Contracts") have already been awarded. Hence, even if Petitioner was allowed to proceed to an administrative hearing and prevailed on its claim that the 1998 Contracts were wrongfully terminated, the Hearings Officer would be limited to ratifying or terminating the 2003 Contracts. Moreover, HRS §103D-704 provides that "the remedies provided for in this part . . . shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract . . ." Consequently, an application of the bid protest procedures to the instant controversy may lead to the absurd result of precluding Petitioner from pursuing any claim it may have for damages or other legal or equitable relief in a court of competent jurisdiction. As the *Carl* Court noted, "[t]he Procurement Code has . . . been declared by the addition of the 'exclusive remedy' provision, HRS § 103D-704." *Carl Corp. v. State*, 85 Haw. 431 (1997).

dispute. *TIG Insurance Company v. Kauhane, et al.*, 101 Hawaii 311 (2003); *Stoneridge Recoveries, LLC v. City and County of Honolulu*; PCH-2003-5 (June 26, 2003).

Alternatively, Respondent contends that even if the Hearings Officer has jurisdiction over Petitioner's "protest", this action must be dismissed because the "protest" was not filed until August 14, 2003, more than five working days after Petitioner received Respondent's May 5, 2003 letter notifying Petitioner that "the State does not desire to extend the subject contract beyond the initial six-year term." Petitioner, on the other hand, contends that it knew or should have known of the facts giving rise to its protest only after it received Respondent's August 6, 2003 letter on August 8, 2003. Consequently, Petitioner reasons that its August 14, 2003 protest was timely. However, because the Hearings Officer has concluded that it lacks jurisdiction over this matter, it is unnecessary to decide this alternative argument.⁷

IV. ORDER

Based on the foregoing considerations, Respondent's Motion to Dismiss or in the alternative for Summary Judgment is granted and this matter is hereby dismissed.

Dated at Honolulu, Hawaii: NOV - 7 2003



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

⁷ Petitioner also asserted that the filing of the instant motion prior to the presentation of the evidence is prohibited by Hawaii Administrative Rule ("HAR") §16-201-38. Such motions, however, are authorized by HAR §§3-126-51 and 3-126-52.



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2004 MAR 23 A 11:19

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

In the Matter of	)	PCH-2004-3
)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S FINDINGS
	)	OF FACT, CONCLUSIONS OF
Petitioner,	)	LAW, AND ORDER GRANTING
vs.	)	PETITIONER'S MOTION FOR STAY
	)	OF FURTHER SOLICITATION OF
CITY AND COUNTY OF HONOLULU,	)	TEMPORARY CONTRACT
DEPARTMENT OF BUDGET AND)	
FISCAL SERVICES,)	
)	
Respondent.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING PETITIONER'S MOTION
FOR STAY OF FURTHER SOLICITATION OF TEMPORARY CONTRACT

I. INTRODUCTION

On March 3, 2004, Stoneridge Recoveries, LLC ("Petitioner"), filed a request for administrative review of the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") February 27, 2004 decision not to extend Petitioner's temporary contract to provide towing services for towing zones designated as Zone 111-IV-V. On March 8, 2004, Petitioner filed an amended request for administrative review of Respondent's (1) March 5, 2004 denial of Petitioner's February 23, 2004 protest and (2) March 5, 2004 substantial interest determination made pursuant to Hawaii Revised Statutes ("HRS") §103D-701(f). The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On March 8, 2004, a pre-hearing conference was convened in this matter. Following the conclusion of the pre-hearing conference, Petitioner filed a motion for a stay of

further solicitation of temporary contract. On March 9, 2004, the Hearings Officer issued a Pre-Hearing Order. Among other things, the order confirmed that the hearing would commence as previously scheduled on March 12, 2004 but would be limited to addressing the propriety of Respondent's March 5, 2004 substantial interest determination. Because the motion raised factual issues, the proceeding was converted to a contested case hearing.

On March 11, 2004, Respondent filed a motion to quash a subpoena that had been served upon Ivan M. Lui-Kwan by Petitioner.

The hearing commenced on March 12, 2004 and was concluded on March 15, 2004. Petitioner was represented by Mark S. Kawata, Esq. Respondent was represented by Amy R. Kondo, Esq. At the commencement of the hearing, the Hearings Officer heard argument on Respondent's motion to quash subpoena. After considering the argument of counsel in light of the records and files herein along with the applicable law, the Hearings Officer granted the motion.

Prior to the conclusion of the hearing, the Hearings Officer invited Respondent's counsel to supplement Petitioner's Exhibit 19 by the close of business on March 16, 2004. On March 16, 2004, Respondent submitted additional documents which the Hearings Officer shall receive as a part of Exhibit 19.¹

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Between February 5, 2003 and March 5, 2004, Petitioner provided towing services for Respondent for an area designated as Zone III-IV-V. Respondent initially made an "emergency award" to Petitioner to provide the subject towing services for a 3-month period from February 5, 2003 through May 5, 2003 ("Agreement").

2. Respondent thereafter extended the Agreement five consecutive times. Each extension of the Agreement was for a term of 2 months. The final extension of the Agreement expired after March 5, 2004.

¹ All of the documents comprising Exhibit 19 relate to complaints lodged against Petitioner regarding the towing services it provided for the City.

3. The Agreement and subsequent extensions of the Agreement expressly incorporated the terms of Bid Proposal No. 13878 – Revised, including the specifications, special provisions and general terms of that proposal.

4. On February 18, 2004, Respondent, through Earl Goro, orally notified Petitioner that it would not be extending the Agreement beyond March 5, 2004.

5. By letter dated February 20, 2004, Respondent notified Oahu Auto Service, Inc. (“Oahu Auto”) that Respondent “desires to make an emergency award” to Oahu Auto to provide the required towing services for Zone III-IV-V for the two-month period beginning March 6, 2004. The letter included a space for Oahu Auto’s signature.

6. On February 23, 2004, Petitioner filed a protest of Respondent’s apparent decision not to extend the Agreement. The protest was hand-delivered to Respondent. Apparently, a second protest was filed by Petitioner on or about March 3, 2004 on the same grounds.

7. On February 23, 2004, Oahu Auto executed the February 20, 2004 letter agreement it had received from Respondent. Oahu Auto executed the letter agreement a few hours after Petitioner’s protest had been received by Respondent.

8. By letter dated February 27, 2004, Respondent notified Petitioner that it would not be extending the Agreement and that Respondent had instead selected Oahu Auto to provide the required towing services for the two-month period beginning March 6, 2004.

9. On March 3, 2004, Petitioner filed with the Office of Administrative Hearings, a request for review of Respondent’s decision as set forth in the February 27, 2004 letter.

10. On March 5, 2004, Respondent denied Petitioner’s February 23, 2004 and March 3, 2004 protests and issued a written determination that the award of the two-month contract for towing services to Oahu Auto was necessary to protect substantial government interests.

11. Respondent’s March 5, 2004 substantial interest determination was reviewed, approved and signed by Christopher A. Diebling (“Diebling”), Respondent’s deputy director. Ivan M. Lui-Kwan (“Lui-Kwan”), Respondent’s Director and Chief Procurement Officer, was not involved in this determination.

12. Oahu Auto has been providing the subject towing services from March 6, 2004 to the present.

13. On March 8, 2004, a pre-hearing conference was convened in this matter by the undersigned Hearings Officer. The parties agreed that the March 12, 2004 hearing would be limited to addressing Respondent's March 5, 2004 substantial interest determination. On March 9, 2004, a pre-hearing order was issued which, among other things, confirmed the scope of the March 12, 2004 hearing.

14. On March 8, 2004, Petitioner filed its Motion for Stay of Further Solicitation of Temporary Contract.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

In bringing this motion, Petitioner challenges Respondent's March 5, 2004 determination that the award of the two-month contract for towing services to Oahu Auto without delay is necessary to protect substantial government interests. That determination was made pursuant to HRS §103D-701(f):

In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract *until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.*

(Emphasis added).

The general rule established by HRS §103D-701(f) is that a timely protest halts solicitation and contract activities until the protest is resolved. By maintaining the status quo during the pendency of a protest, violations of the procurement code can be rectified before the work on the contract has proceeded so far that effective remedies, for the protestor and the public, are precluded by expense and impracticality. *Carl Corp. v. DOE, 946 P.2d 1 (1997)*. Because HRS Chapter 103D ("Procurement Code") shortens deadlines for filing protests and applications for review and expedites the administrative hearings

process, the delay contemplated is minimal, generally a few months. *Carl Corp.; supra.* Nevertheless, there are situations, where a delay of several months before a contract may be awarded would have serious repercussions on the continuation of essential State functions. It is in these situations that the solicitation or award is allowed to proceed, *upon a written determination that "the award of the contract without delay is necessary to protect the substantial interests of the State."*² *Carl Corp.; supra.* That determination must not only be in writing but must also specifically identify the State interests involved and articulate why it is necessary for the protection of those interests that the contract be awarded without delay. *Carl Corp.; supra.* Moreover, the procurement officer's consideration of the merits of the protest has no place in the "substantial interest" determination required by HRS §103D-701(f). *Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997).* Thus, in order to prevail on its motion, Petitioner must establish by a preponderance of the evidence that it filed a timely protest³ and that Respondent's subsequent substantial interest determination was not justified or was otherwise improper.

Petitioner contends that Respondent failed to make a written determination that specifically identified the governmental interests involved and articulated why it was necessary for the protection of those interests that the contract be awarded without delay. Respondent's substantial interest determination was set forth in a March 5, 2004 memorandum from Dennis A. Kamimura, Respondent's Licensing Administrator, to Lui-Kwan. The letter states in its entirety:

We request that you make a written determination that the award of the emergency contract for vehicle towing services for Tow Zone III-IV-V to Oahu Auto Service, Inc. is necessary to protect the substantial interests of the City and County of Honolulu.

The current emergency contract for vehicle towing services with Stoneridge Recoveries, LLC, for Tow Zone III-IV-V (urban Honolulu area from downtown Honolulu to Makapuu Point) will be expiring on March 5, 2004, at

² In making a substantial interest determination, a finding that substantial State interests are "involved", is not sufficient to allow the agency to proceed with the contract despite the protest. Rather, such a determination must be in writing and specifically identify the State interests involved and articulate why it is necessary for the protection of those interests that the contract be awarded without delay. *Carl Corp.; supra.*

³ There is no dispute here that Petitioner's protests were timely filed.

12:00 midnight. Vehicle towing services for the tow zone are required for towing vehicles that are involved in accidents, are not operational and are hazards to public safety, are parked in vehicle tow away zones, or are blocking driveways or fire hydrants. The City solicited bids in year 2002 for a 60-month contract. However, Stoneridge Recoveries, LLC, protested the rejection of its bid to the Department of Commerce and Consumer Affairs (DCCA). The decision by DCCA on the protest by Stoneridge Recoveries, LLC, is pending. Stoneridge Recoveries, LLC, also filed a protest dated February 23, 2004 on the City's emergency award to Oahu Auto Service, Inc.

Notwithstanding the protest filed by Stoneridge Recoveries, LLC, dated February 23, 2004, pursuant to §103D-701(f) of the Hawaii Public Procurement Code, the chief procurement officer is permitted to make a written determination that the award of the contract without delay is necessary to protect substantial interests of the City.

Therefore, we recommend that the City proceed without delay with the award of the contract made on an emergency basis for a two-month period beginning March 6, 2004 to Oahu Auto Service, Inc., because Oahu Auto Service, Inc. is currently the only vendor that has a vehicle storage lot within Tow Zone III-IV-V adequate in size to accommodate storage of all vehicles towed within the zone. A contract award to Oahu Auto Service, Inc. will protect the substantial interests of the City by allowing motorists whose vehicles are towed from within the tow zone, to retrieve their vehicles from a vehicle storage lot located within the tow zone instead of traveling a greater distance at greater towing costs to retrieve their vehicles from a vehicle storage lot outside of Tow Zone III-IV-V.

In addition, the Honolulu Police Department and the Division of Motor Vehicle, Licensing and Permits have already made arrangements for vehicles requiring towing services to be towed by Oahu Auto Service, Inc. beginning March 6, 2004 and a delay or stay of this emergency contract with Oahu Auto Service, Inc. will result in substantial disruption with the procedures of the Honolulu Police Department's Dispatch Office, Patrol Districts, and Traffic Division.

We also believe that as a matter of fairness the award of a contract for vehicle towing services made on an emergency basis should be distributed among vendors qualified to provide the services.

From Respondent's letter, it appears that the substantial interest determination was based upon four considerations: (1) the need for towing services within the zone; (2) the savings that would be realized by motorists in having a vehicle storage lot within the zone; (3) the disruption that would result from having to transfer the towing duties back to Petitioner; and (4) a preference for distributing the towing services contract to other qualified vendors. Of these considerations, only the need for towing services constitutes a substantial interest. As the commentary to the ABA Model Code §9-101, which is substantially identical to HRS §103D-701(f), explains:

In general, the filing of a protest should halt the procurement until the controversy is resolved. In order to allow *essential governmental functions to continue*, Subsection (6) provides that the [State] may proceed with the solicitation or award of the contract, despite the protest, upon a determination in writing by the Chief Procurement Officer or the head of the Purchasing Agency that such action is necessary. It is expected that such a determination will occur only in those few circumstances where it is necessary to protect a substantial interest of the [State].”

(Emphasis added).

While Respondent's interests in reducing motorist's costs in retrieving their vehicles, “spreading the business around” to other vendors, and avoiding any disruption that may result in transferring the towing duties back to Petitioner, may represent legitimate goals, none of those interests amounts to an essential governmental function.⁴ Moreover, according to the evidence, the cost savings that would allegedly result from having the towing services provided by Oahu Auto would, at best, be nominal.⁵

On the other hand, the need for towing services under the circumstances of this case does amount to an essential function and a substantial government interest.

⁴ The fact that Respondent's March 5, 2004 substantial interest determination was not made until some eleven days after the protest had been filed also belies Respondent's characterization of these interests as substantial ones.

⁵ According to the evidence, Oahu Auto's vehicle storage lot was only about 1/10 of a mile closer than Petitioner's lot.

According to the evidence, such services are required to, among other things, remove vehicles that are involved in accidents, obstruct driveways, block fire hydrants, and otherwise pose public safety hazards. Thus, the dispositive question here is whether Respondent's determination articulated why it was necessary for the protection of that interest that the contract be awarded to Oahu Auto without delay.

In *Carl Corp., supra*, the court determined that "performance of the Ameritech contract without delay was *not* necessary to maintain library automation services" where another vendor was available to provide the required services on a monthly basis:

Keith Fujio, who was employed by the Library as the Director of the Management Information Branch and the Administrative Services Officer, with responsibility for administration of contracts, all purchases, and payroll, was called as a witness by the Library. On cross-examination by CARL, he testified that his staff had communicated with DRA "and the indication we were given [was that,] because of all these subsequent problems that arose, they would still support us on a month-to-month extension agreement." He further testified that the maintenance contract with DRA renews automatically from year to year if both parties agree to all the terms and that his understanding was that DRA was willing to continue providing services. . . . Therefore, although the State may have a substantial interest in continuing library automation services, award of the contract to Ameritech without delay was not necessary to protect that interest, and CARL proved as much by a preponderance of the evidence.

Likewise, in this case, the award of the contract to Oahu Auto without delay was not necessary since, according to the evidence, Petitioner was willing to continue providing the towing services it had already been providing for the last 13 months.⁶ Consequently, the Hearings Officer concludes that Petitioner has proven by a preponderance of the evidence that the awarding of the emergency contract to Oahu Auto pending resolution of Petitioner's protest was not necessary to protect a substantial government interest.

⁶ To the extent Respondent argues that Petitioner was not qualified to continue providing the towing services because it had received a number of complaints over the last 13 months it had the contract, the Hearings Officer finds that argument to be unpersuasive. According to the evidence, even though Petitioner received in excess of 40 complaints, there was no indication that Respondent sought to terminate its emergency contract with Petitioner because it considered Petitioner to be unqualified.

Petitioner also contends that Respondent's substantial interest determination must fail for the additional reason that Diebling's authority to make that determination had not been properly delegated to him. This alternative argument, however, need not be addressed in light of the Hearings Officer's conclusion that the awarding of the emergency contract to Oahu Auto was not necessary to protect a substantial government interest.

IV. ORDER

Based on the foregoing considerations, Petitioner's Motion for Stay of Further Solicitation of Temporary Contract is granted as follows:

1. The March 5, 2004 substantial interest determination is vacated;
2. All further solicitation and contract activities relating to the February 23, 2004 agreement between Respondent and Oahu Auto to provide towing services in Tow Zone III-IV-V, including any further performance of the February 23, 2004 agreement⁷, shall be stayed; and
3. This matter shall proceed to hearing on the merits of the case commencing on April 1, 2004.⁸

Dated at Honolulu, Hawaii: _____

MAR 23 2004



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

⁷ In discussing the stay and the remedies available under the Procurement Code, the *Carl* Court held that a timely protest halts solicitation and *contract activities* until the protest is resolved, and noted that "*the further performance on the contract has proceeded*, the more likely it is, given the applicable factors, that ratification of the contract is 'in the best interests of the State,' effectively eliminating any remedy, either to the public or the protestor, from an illegally entered contract." The Court's comments make clear that the stay applies to, and requires the halting of, any further performance on the contract. *Carl Corp. v. DOE*, 946 P.2d 1 (1997).

⁸ Although Petitioner is of the position that it should be awarded the current contract for towing services, such a remedy does not follow from the Hearings Officer's order vacating Respondent's substantial interest determination. Contrary to Petitioner's contention, HRS §103D-707 (post-award remedies) is applicable only when a "solicitation or award of a contract is in violation of the law." The question whether a violation of the law has occurred in the subject solicitation is beyond the scope of the instant proceeding. Nor does the imposition of the stay entitle Petitioner to the contract since the stay only affects the emergency procurement, award and contract to Oahu Auto. It does not affect the towing services agreement between Petitioner and Respondent which expired after March 5, 2004.