

2004 AUG 23 P 4: 15

HEARINGS OFFICE



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

In the Matter of)	PCH-2004-10
)	
AKAL SECURITY, INC.)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS
Petitioner,)	
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
SECURITAS SECURITY SERVICES USA,)	
INC., and WACKENHUT CORPORATION,)	
)	
Intervenors.)	
_____)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. CHRONOLOGY OF CASE

On July 16, 2004, Akal Security, Inc. ("Petitioner"), by and through its attorneys Lex R. Smith, Burt T. Lau, and Thomas H. Yee, filed its Petition for Hearing to contest the denial of Petitioner's bid protest by the Department of Transportation, State of Hawai'i ("Respondent").

On July 30, 2004, Respondent, by and through its attorney Michael Q. Y. Lau, filed its Motion to Dismiss.

On August 2, 2004, Securitas Security Services USA, Inc. ("Intervenor Securitas"), by and through its attorneys Howard F. McPheeters, Gregg M. Ushiroda, and John Reyes-Burke, filed its Motion to Dismiss and Joinder in Respondent's Motion to Dismiss.

On August 4, 2004, Petitioner by and through its attorneys Lex R. Smith, Burt T. Lau, Thomas H. Yee, and Anne E. Lopez, filed its Memorandum in Opposition to Respondent's Motion to Dismiss.

On August 4, 2004, Wackenhut Corporation ("Intervenor Wackenhut") filed a substantive joinder to Respondent's Motion to Dismiss.

On August 5, 2004, Respondent's Motion to Dismiss came on for hearing before the undersigned Hearings Officer. Respondent was represented by its attorney Michael Q.Y. Lau, Esq. Petitioner was represented by its attorneys Burt T. Lau, Thomas H. Yee, and Anne E. Lopez. Intervenor Securitas was represented by its attorney John Reyes-Burke, Esq. Intervenor Wackenhut was represented by its attorney Michael C. Bird.

After reviewing and considering the pleadings and presentations of counsel, as well as the entire record of these proceedings, the Hearings Officer orally granted Respondent's Motion to Dismiss, and requested counsel for Respondent to submit a proposed order for review and adoption by the Hearings Officer.

On August 11, 2004, Respondent, by and through its attorney Michael Q.Y. Lau, submitted its proposed Finding of Fact, Conclusions of Law, and Final Order Granting Respondent's Motion to Dismiss for the Hearings Officer's review.

By letter dated August 11, 2004, Petitioner's attorney Anne E. Lopez, informed the Hearings Officer that Petitioner objected to not being permitted to review and comment on the Respondent's proposed order prior to its issuance. Alternatively, Petitioner requested that it be permitted to submit its own proposed order prior to the issuance of the Hearings Officer's order.

On August 16, 2004, Petitioner, by and through its attorneys Lex R. Smith, Burt T. Lau, and Anne E. Lopez, faxed a copy of Petitioner's proposed Findings of Fact, Conclusions of Law, and Final Order Granting Respondent's Motion to Dismiss, to the undersigned Hearings Officer.

Having reviewed and considered the pleadings and presentations of counsel, as well as the entire record of these proceedings, the Hearings Officer renders the following limited findings of fact, conclusions of law, and final order in regards to Respondent's Motion to Dismiss.

II. FINDINGS OF FACT

1. On or about September 30, 2003, Respondent issued an Invitation for Bids for furnishing security services at Hawai'i State Airports, ("September 30, 2003 IFB"). The initial deadline for the receipt of sealed bids was December 4, 2003.

2. On or about February 24, 2004, Respondent issued Addendum Number 4 to the September 30, 2003 IFB, which *inter alia*, notified bidders that the deadline for the receipt of sealed bids was postponed to June 23, 2004, at 2:00 p.m., at which time the sealed bids would be publicly opened and read.

3. On or about June 7, 2004, Respondent issued Addendum Number 5 to the September 30, 2003 IFB, which included updates in the class specifications for the positions listed in Section 2.10 of the September 30, 2003 IFB.

4. On or about June 18, 2004, Respondent issued Addendum Number 6 to the September 30, 2003 IFB, which included further amendments to certain positions listed in Section 2.10 of the September 30, 2003 IFB.

5. On June 21, 2004, at 10:04 a.m., Petitioner's Office Manager for the State of Hawai'i, received a fax transmittal from Respondent along with Addendum Number 6 to the September 30, 2003 IFB. Petitioner's Officer Manager immediately forwarded Addendum Number 6 to the September 30, 2003 IFB to Petitioner's corporate headquarters in New Mexico.

6. By letter dated June 21, 2004, Daya S. Khalsa, Senior Vice President of Petitioner, acknowledged receipt of Respondent's Addenda 1, 2, 3, 4, 5, 6, and 7, and transmitted Petitioner's sealed bid to Respondent regarding the September 30, 2003 IFB.

7. On or about June 23, 2004, the sealed bids submitted in response to the September 30, 2003 IFB were publicly opened and read. Petitioner was not the lowest bidder on any of the contracts covered by the September 30, 2003 IFB.

8. By letter dated June 30, 2004, Petitioner, by and through its attorneys Lex R. Smith and Anne E. Lopez, submitted its bid protest to Respondent. The sole basis of Petitioner's protest was that Section 2.10 of the September 30, 2003 IFB, as amended by Addenda 5 and 6, contained what Petitioner felt was a latent ambiguity. Petitioner believed that as a result of the latent ambiguity, the September 30, 2003 IFB, as amended, was defective and required a new bid.

9. By letter dated July 9, 2004, Respondent, through its Director of Transportation, informed Petitioner that Petitioner's protest was deemed untimely pursuant to Hawai'i Revised Statutes ("HRS") §103D-701(a), and therefore would not be considered in accordance with HRS §103D-701.

10. On July 16, 2004, Petitioner, by and through its attorneys Lex R. Smith, Burt T. Lau, and Thomas H. Yee, filed its Petition for Hearing to contest the denial of Petitioner's bid protest by Respondent on the following bases: a) Section 2.10 of the September 30, 2003 IFB as amended by Addenda 5 and 6, contained a "latent ambiguity"; b) Petitioner did not have a reasonable amount of time within which to file a timely protest; and c) the two lowest bidders were foreign-owned companies that may be barred from being awarded the contract.

III. CONCLUSIONS OF LAW

A. Timeliness of Petitioner's Bid Protest

In regards to the timeliness of Petitioner's bid protest filed with Respondent, the provisions of HRS §103D-701(a), state 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. Except as provided in sections 103D-303 and 103D-304, 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; 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 under section 103D-302 or 103D-303, if no request for debriefing has been made, 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).

Accordingly, the Hearings Officer finds and concludes that because Petitioner's "latent ambiguity" claim is a protest based upon the content of the September 30, 2003 IFB, Petitioner was required to have filed a protest with Respondent prior to the date set for receipt of offers, which was June 23, 2004.

Because Petitioner's bid protest was submitted to Respondent on June 30, 2004, which was subsequent to the date set for the receipt of offers to the September 30, 2003 IFB,

the Hearings Officer concludes that Petitioner's protest was not timely filed as required HRS §103D-701(a), with respect to Petitioner's protest based upon the content of the solicitation.

As such, the Hearings Officer finds and concludes that the Director of Transportation's determination that Petitioner's bid protest was untimely, was consistent with the plain language of HRS §103D-701(a).

B. Submission of Issues

In regards to the submission of additional issues, HRS §103D-709 provides the following:

§103D-709 Administrative proceedings for review. (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 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.

...

(f) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

In the light of the above-cited provisions, in order for the Hearings Officer to review Petitioner's claims that: a) Petitioner did not have a reasonable amount of time within which to file a timely protest, and b) that the two lowest bidders for the September 30, 2003 IFB were foreign-owned companies that may be barred from being awarded the contract, Petitioner must have first raised these issues in a timely bid protest to the Director of Transportation or his designee.

Because Petitioner's June 30, 2004 bid protest did not identify these issues to Respondent, the Hearings Officer must conclude that Petitioner is barred from raising these issues in the present administrative proceedings.

IV. **ORDER**

Having reviewed and considered the presentations of the parties as well as the entire record of these proceeding,

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss in the above-captioned matter, be and is hereby granted.

DATED: Honolulu, Hawai'i, **August 23, 2004**.



RODNEY A. MAILE
Senior Hearings Officer
Department of Commerce
and Consumer Affairs