



DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS

DEC 17 10 58 AM '99

HEARINGS OFFICE

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

In the Matter of)	PCH-99-12
)	
BIG ISLAND RECYCLE & RUBBISH,)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF LAW
Petitioner,)	AND DECISION; APPENDIX "A"
)	
vs.)	
)	
COUNTY OF HAWAII,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent.)	
)	

**HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION; APPENDIX "A"**

I. CHRONOLOGY OF CASE

On October 20, 1999, Big Island Recycle and Rubbish ("Petitioner") filed its request for hearing to contest the decision by the County of Hawaii, Department of Finance ("Respondent") to deny Petitioner's protest regarding the Request for Proposals for Green Waste Composting Program for West Hawaii, July 1998 ("RFP"). The matter was set for hearing and the Notice of Hearing and Prehearing Conference was duly served on the parties.

At the prehearing conference held on November 1, 1999, and attended by Petitioner's attorney Alan H. Tuhy, Esq., and Respondent's attorney Frederick Giannini, Esq., the parties agreed that the parties would submit stipulated facts and hearing briefs in lieu of an evidentiary hearing.

Although the parties submitted their hearing briefs on November 9, 1999, they were not accompanied by stipulated facts. Accordingly, at a second prehearing conference held on November 16, 1999, the parties agreed to submit the stipulated facts as soon as possible. The parties' Stipulated Facts In Lieu of Hearing on Appeal From Denial of Protest was filed on December 1, 1999, and are attached hereto and incorporated herein as Appendix "A".

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

See Appendix "A".

III. CONCLUSIONS OF LAW

Petitioner contends that Respondent's denial of its protest on the basis that the protest failed to comply with the requirements of Hawaii Administrative Rules ("HAR") § 3-126-3 was improper. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's conduct was not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Respondent contends that Petitioner's protest letter, dated September 30, 1999, should be rejected because it: (1) should have been filed with the Chief Engineer, who was the "head of a purchasing agency" that handled the procurement, (2), was not filed in duplicate, and (3) failed to include a statement of reasons for the protest, and supporting exhibits, evidence or documents to substantiate any claims, as required HAR § 3-126-3(c).

Hawaii Administrative Rules § 3-126-3(a) provides:

§ 3-126-3 Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate within five working days after the protestor knows or should have known of the facts leading to the filing of a protest. A protest is considered filed when received by the chief procurement officer or the head of a purchasing agency. Protests filed after the five-day period shall not be considered[.]

In the case at bar, the chief procurement officer is the Director of Finance, and the head of the purchasing agency is the Chief Engineer of the Department of Public Works. While it would have been more expedient to file the protest with the Chief Engineer, whose agency was handling the procurement, Petitioner's filing of its protest with the Director of Finance complied with the provisions of HAR § 3-126-3(a).

Respondent argues that the protest was not filed in duplicate, as required by HAR § 3-126-3(a). The issue to be resolved is whether the provision in HAR § 3-126-3(a) that the protest be filed in duplicate is mandatory or directory. While the word "shall" is generally regarded as mandatory, in certain situations, it may be given a directory meaning. See, State v. Himuro, 70 Haw. 103 (1988). In Perry v. Planning Commission of Hawaii, 62 Haw. 666 at 676 (1980) the Court stated:

The crucial difference between statutes considered directory and those deemed mandatory arises from the consequences of noncompliance. A failure to follow the former is unattended by serious legal consequences; a neglect of the latter may invalidate a transaction or subject the transgressor to legal liabilities. Where there is a manifest necessity for strict compliance or a clear expectancy thereof, the provision is accorded mandatory status and the administrative agency's power to act may hinge upon precise adherence to the law. (Citations omitted).

In State v. Samonte, 83 Haw. 507 at 518 (1996), the Court adopted the policy that:

Where the directions of a statute are given merely with a view to the proper and orderly conduct of business, or relate to some immaterial matter, concerning convenience rather than substance, it is generally regarded as directory. (Citation omitted.) Furthermore, a statute is directory rather than mandatory if the provisions of the statute do not relate to the essence of the thing to be done or where no substantial rights depend on compliance with the particular provisions and no injury can result from ignoring them. (Citation and quotation marks omitted.)

The Court has also held that the word "shall" may be held to be merely directory "when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to the individual, by giving it that construction." Perry, supra, at 677.

Based on the evidence presented, the Hearings Officer concludes that the provision that the protest be filed in duplicate is directory because by giving it this construction, no advantage was lost, no right was destroyed, and no benefit was sacrificed,

either to Petitioner or Respondent. There has been no evidence presented to show that Petitioner's filing of only one copy of the protest resulted in prejudice to Respondent or that it had any adverse effect on this proceeding.

Finally, Respondent argued that the protest should be dismissed because the protest did not contain the information required by HAR § 3-126-3(c)(3) and 3-126-3(c)(4). Those sections provide:

- (c) ...The written protest shall include as a minimum the following:
 - ...
 - (3) A statement of reasons for the protest; and
 - (4) Supporting exhibits, evidence or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated[.]

In its protest, Petitioner states that the reasons for its protest are "that the party to whom the contract is proposed to be awarded is not qualified, the procuring agency did not assess the bid submitted by BIRR and the reasons for not extending the contract issued by BIRR are not founded or supported by evidence." The Hearings Officer concludes that the statement of reasons for the protest was sufficient. While supporting exhibits, evidence or documents to substantiate its claims were not submitted, and its expected availability date was not indicated, the Hearings Officer concludes that HAR § 3-126-3(c)(A) appears to be one which was promulgated with a view to the proper and orderly conduct of business concerning convenience rather than substance and therefore can be regarded as directory. See: Samonte, supra. It has not been shown that Respondent was prejudiced by the omission of those documents, and in fact, pursuant to HAR § 3-122-58, Respondent refused to release documents requested by Petitioner which Petitioner may have intended to rely on to substantiate its claims. 4

IV. DECISION

Based on the foregoing considerations, the Hearings Officer concludes that Respondent's denial of the protest on the procedural grounds discussed above was improper.

Accordingly, as stipulated by the parties, this matter is remanded to the Director of Finance and/or the Chief Engineer of the Department of Public Works for a substantive disposition of the protest.

DATED: Honolulu, Hawaii, DEC 17 1999



SHERYL LEE A. NAGATA
Administrative Hearings Officer
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DEPARTMENT OF COMMERCE
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DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of)	PHC-99-12
)	
BIG ISLAND RECYCLE & RUBBISH,)	STIPULATED FACTS IN LIEU OF
)	HEARING ON APPEAL FROM DENIAL
Petitioner,)	OF PROTEST
)	
vs.)	
)	
COUNTY OF HAWAII,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent.)	

**STIPULATED FACTS IN LIEU OF HEARING ON APPEAL
FROM DENIAL OF PROTEST**

IT IS HEREBY STIPULATED by and between the Petitioner and the Respondent, through their attorneys of record, that the following facts shall be taken as established for purposes of disposition of the Petitioner's appeal from the denial of its protest, and such stipulation shall be submitted to this tribunal in lieu of an evidentiary hearing which may otherwise be required pursuant to the Procurement Code or regulations relating thereto.

1. The Petitioner is a Hawaii Corporation and is authorized to do business in the State of Hawaii.

2. The Petitioner was awarded a contract to conduct a green waste composting project with the county of Hawaii by a written

agreement dated February 15, 1999 which, after supplemental agreements with the County, expired by its terms on September 30, 1999.

3. The Petitioner received the Request for Proposals for Green Waste Composting Program for West Hawaii which is submitted as Exhibit "A" (hereinafter the "RFP").

4. The Petitioner submitted a bid for the RFP in writing within the time and pursuant to the terms of the RFP.

5. The Petitioner's bid was rejected, and the notice of rejection is a letter dated September 21, 1999 which is submitted as Exhibit "B".

6. The Petitioner received Exhibit "B", and thus notice of the rejection of its bid, on Saturday, September 25, 1999.

7. The Petitioner is an aggrieved party by reason of having its bid rejected under the RFP.

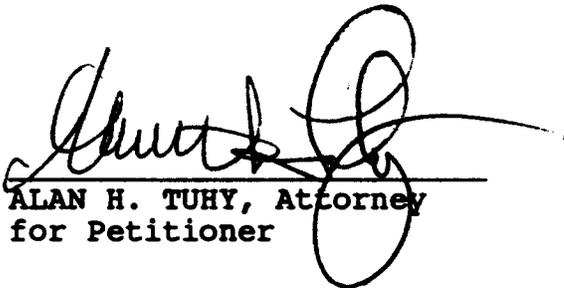
8. The Petitioner filed its protest with the Director of Finance by faxing a letter to the Director of Finance and a copy to the Department of Public Works dated September 30, 1999, a copy of which is submitted as Exhibit "C". This letter was sent by facsimile on September 30, 1999 and the original sent by mail the same date to the Director of Finance and the Department of Public Works so that the Director received duplicate copies of the protest.

9. The head of the department of the Director of Finance is Mr. Harry Takahashi; Mr. Takahashi is the chief procurement officer for the County of Hawaii as that term is used in HAR §3-126-3.

10. Mr. Takahashi was requested by the Department of Public Works to administer the contract to be awarded under the RFP; Mr. Takahashi was requested by the Department of Public Works to make a determination that the award of the contract was necessary despite the pendency of two protests in the best interests of the County, as required by HAR §3-126-5; a true copy of the Memorandum dated October 21, 1999 reflecting this request is submitted as Exhibit "4".

11. The Exhibits marked "A" through "E" submitted by the Respondent and the Declaration of Richard Walton with Exhibits "1" through "3" are true and accurate copies of the originals, executed by the parties so indicated and are what they purport to be; each of those exhibits are admissible in determining the present protest.

IT IS SO STIPULATED:


ALAN H. TUHY, Attorney
for Petitioner


FREDRICK GIANNINI, Attorney
for Respondent

COUNTY OF HAWAII
DEPARTMENT OF PUBLIC WORKS
25 AUPUNI STREET, ROOM 202
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MEMORANDUM

DATE: October 21, 1999

TO: Harry Takahashi
Finance Director

FROM: Robert K. Yanabu 
Chief Engineer

RE: RFP – Green Waste Composting Program for East and/or West
Hawaii – April, 1999

We have received separate protests to the awarding of both East and West Hawaii programs. Both protests were received prior to the execution of contract with the awardee. Because of the nature of the services to be provided and the related concerns of public health issues, we consider this to be a situation of public exigency. Therefore, pursuant to § 3-126-5 of the Hawaii Administrative Rules, we request your approval to proceed with the execution of the contracts prior to resolution of the protests, so that services may be continued, in the best interests of the County.

cc: Managing Director
Corporation Counsel
SWD
ADM

EXHIBIT "4"