



DEPT. OF COMMERCE AND CONSUMER AFFAIRS
OCT 16 1 50 PM '02
HEARINGS OFFICER

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

In the Matter of)	PCH-2002-10
)	
UNITED COURIER SERVICES, INC.)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	FINAL ORDER
)	
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
)	
Respondent,)	
)	
and)	
)	
C.R. DISPATCH SERVICES, INC.,)	
dba Security Armored Car & Courier)	
Service,)	
)	
Intervenor.)	
_____)	

**HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL ORDER**

I. CHRONOLOGY OF CASE

At the pre-hearing conference held in the above-captioned matter on August 5, 2002, the parties, by and through their respective attorneys, agreed to submit the legal issues in this case for disposition by the undersigned Hearings Officer via stipulated facts and pleadings.

On September 9, 2002, the parties in the above-captioned matter, by and through their respective attorneys, submitted a Stipulation as to Facts.

On September 10, 2002, United Courier Service, Inc. ("Petitioner"), by and through its attorneys James A. Nakano and Thomas J. Wong, filed its Motion for Summary Relief or Judgment.

On September 20, 2002, the Department of Education ("Respondent"), by and through its attorneys Aaron H. Schulaner and Russell A. Suzuki, filed its Memorandum in Opposition to Petitioner's Motion for Summary Relief or Judgment.

On September 20, 2002, C.R. Dispatch Services, Inc., dba Security Armored Car & Courier Service ("Intervenor"), by and through its attorneys Kenneth G. K. Hoo and Joel D. Kam, filed its Memorandum in Opposition to Petitioner's Motion for Summary Relief or Judgment.

On September 24, 2002, Petitioner, by and through its attorneys James A. Nakano and Thomas J. Wong, filed its Reply Memorandum to Respondent's and Intervenor's Memoranda in Opposition to Petitioner's Motion for Summary Relief or Judgment.

On September 27, 2002, at 2:30 p.m., the hearing on Petitioner's Motion for Summary Relief or Judgment was conducted by the undersigned hearings officer. Petitioner was represented by its attorney Thomas J. Wong. Respondent was represented by its attorney Aaron H. Schulaner, and Intervenor was represented by its attorneys Kenneth G. K. Hoo and Joel D. Kam.

Based upon the submissions of the parties, the oral arguments presented at the hearing on Petitioner's Motion for Summary Relief or Judgment, and a review of the entire record of these proceedings, the Hearings Officer hereby renders the following limited findings of fact, conclusions of law, and final order.

II. FINDINGS OF FACT

1. Petitioner is a Hawai'i corporation that provides courier and armored car services in the State of Hawai'i.

2. On November 28, 1997, the Public Utilities Commission ("PUC") issued a Certificate of Public Convenience and Necessity ("Certificate") to Petitioner which authorized Petitioner to engage in transportation by motor vehicle of general commodities over irregular routes on Oahu.

3. Intervenor is a Hawai'i corporation that provides courier and armored car

services in the State of Hawai'i.

4. On October 4, 2001, the PUC issued a Contract Carrier Permit ("Permit") to Intervenor which authorized Intervenor to engage in the following contract carrier services:¹

1. To transport mail to and from federal post offices, deeds and documents of all types and other forms of written communications, as well as money, currency, checks, drafts, securities, jewelry and similar valuable items, both between offices at different locations for the same business and for separate businesses pursuant to contracts executed and to be executed with business establishments; provided that CRDS [Intervenor] files copies of additional contracts within ten days after execution; and provided further that such contracts are bilateral, impose specific obligations upon the carrier and shipper or the person for whom the service is rendered, setting forth all terms and conditions of the transportation service. This authority is limited to the Island of Oahu.
2. To transport property by motor vehicle over irregular routes on the islands of Kauai, Maui, and Hawai'i, in the specific commodities classification, pursuant to a contract with American Savings Bank (ASB). The specific commodities to be transported are limited to the type enumerated in CRDS's contract with ASB.

Stipulation as to Facts, Exhibit 2.

5. By letter dated January 30, 2001, Paul Shigenaga, Administrative Director of the PUC, informed Joel D. Kam, Esq.:

This responds to your letter dated January 19, 2001, in which you inquire whether C.R. Dispatch Service, Inc., dba Security Armored Car (C.R. Dispatch) [Intervenor], under Permit No. 618-P, has the authority to: (1) enter into contracts with new customers without having to file applications with the Commission [PUC] to authorize each such new contract; and (2) whether the foregoing authority to enter into new contracts extends to shippers of money, currency, checks, drafts, securities, jewelry, and similar valuable items on the Island of Oahu.

Upon review, commission staff finds that under the authority granted by Decision and Order No. 1501, filed on March 29, 1966, in MCB Case No. 369, and the extension of that authority granted by Decision and Order No. 2155, filed On February 29, 1968, in MCB Case No. 673, C.R. Dispatch is authorized to transport mail to and from federal

¹ Also attached to Exhibit 2 of the Stipulation as to Facts is a copy of Intervenor's PUC permit No. 618-P which appears to have been issued in 1973.

post offices, deeds and documents of all types and other forms of written communications, as well as money, currency, checks, drafts, securities, jewelry, and similar valuable items, both between offices at different locations for the same business and for separate businesses pursuant to contracts executed and to be executed with business establishments; provided that C.R. Dispatch files copies of additional contracts within ten days after execution; and provided further that such contracts are bilateral, impose specific obligations upon the carrier and shipper or the person for whom the service is rendered, setting forth all terms and conditions of the transportation service. This authority is limited to the island of Oahu. If C.R. Dispatch files new contracts with the Commission consistent with Decision and Order Nos. 1501 and 2155, C.R. Dispatch need not file a new application for each new contract. If, in this regard, commission records show that there is no such contract on file for a particular business, shipper, or entity, then C.R. Dispatch is not authorized to provide services under Permit No. 618-P to that particular business, shipper, or entity. [Emphasis provided]

Stipulation as to Facts, Exhibit 3.

6. On May 9, 2002, Respondent issued an Invitation to Bid (“IFB”) E02-47 to provide courier pick up and delivery services for Respondent. The contract would be for the twelve (12) month period beginning July 1, 2002 until June 20, 2003. As to a bidder’s qualifications, SC 1-2 of IFB E02-47 originally stated as follows:

Prior to award, successful bidder must be registered with and authorized by the Public Utilities Commission as a common carrier capable of rendering services similar to that specified herein. In the absence of PUC authorized common carriers, the DOE reserves the right to contract with a company authorized as a contract carrier.

Stipulation as to Facts, Exhibit 4.

7. On May 15, 2002, Respondent issued Addendum A to IFB E02-47 which deleted the previous bidder qualifications set forth in SC 1-2 of IFB E02-47. The Addendum A to IFB E02-47 revised the bidder’s qualifications as follows:

At the time of bidding, bidder must be licensed by the PUC and shall submit with his bid a copy of his “Certificate of Public Convenience and Necessity.”

Stipulation as to Facts, Exhibit 5.

8. On May 16, 2002, Respondent issued Addendum B to IFB E02-47 which

amended the language for bidder's qualifications by stating as follows:

At the time of bidding, bidder must be licensed by the PUC
and shall submit with his bid a copy of his PUC Authorization.

Addendum B also amended page SC 1-2 by stating that, "PUC Authorization (Includes Certificates, Permits, etc.)." Stipulation as to Facts, Exhibit 6.

9. On May 17, 2002, Petitioner, by and through its President Kenneth Lam, filed a letter of protest with Respondent, protesting the language of Addenda A and B:

Dear Mr. Kajikawa:

I am writing this letter to protest and to plead for your immediate intervention in the Invitation for Bids No. E02-47, which is being handled by Ms. Sharon Cambra.

Your department has issued two addendums dated May 15, 2002 and May 16, 2002 to the said IFB in the name of promoting open competition and fairness. To the contrary, these addendums will only do just the opposite and may possibly result in violation of laws.

By issuing these addendums, your department has invited Contract Carriers to compete with Common Carriers for the same bid absence the pre-qualification process as specified in Hawaii Administrative Rules (HAR), Section 3-122-116. The consequence is to allow Contract Carriers to inspect our price which we must filed [sic] at the PUC before bid opening and subsequently charge low enough rate to win the bid. This is a clear violation of Independent Price Determination, HAR, Section 3-122-192.

I believe these addendums which are reversed from the Attorney General's approved decision in 1999 may violate Hawaii Revised Statutes, Section 271-27, Unlawful Operation. It states "Any person, whether carrier, shipper.... or any officer, employee who knowingly solicits ... discrimination in violation of any provisions of this chapter.... or knowingly and wilfully assists ... to obtain transportation of ...properly....for less than the applicable rate....., shall be deemed guilty of a misdemeanor."

We strongly believe that the current conditions are not conducive to a fair and open competition as the DOE proclaims to promote and is counter productive to the public interest. Therefore, we hereby request and anxiously urge that the current bidding requirements be immediately amended to include a pre-qualification process with respect to the PUC authorization requirement. Or, the successful bidder shall be clearly defined to be the holder of a common carrier certificate before the bid opening in order to comply with the intent of the law and to create a level playing field to promote a fair and truly open competition for all the qualified bidders.

We therefore request you reconsider your decision or at least have the Attorney General of the State of Hawaii review this matter and the validity of the addendums.

Stipulation as to Facts, Exhibit 7.

10. On or about May 20, 2002, both Petitioner and Intervenor were prepared to submit bids in response to IFB E02-47 as amended by Addenda A and B, and attended the bid opening, but were informed by Respondent that bids would not be accepted as a result of a protest which had been filed.

11. By letter dated May 29, 2002, Mr. Dennis Kajikawa, Procurement Specialist with the DOE, informed Mr. Lam:

Upon receipt of your protest of Addendum A and B for IFB E-02-47 (Provide Courier Services on Oahu) an investigation was conducted.

The allegation that Addendum A and B for IFB E-02-47 is in violation with Chapter 271-27, HRS is unfounded. The IFB requires that the bidder submit a copy of a PUC Authorization with the bid.

The pre-qualification of bidders was not exercised in this IFB, therefore Section 3-122-116, HAR is not applicable.

Offer page, OF-1 of the IFB E-02-47, meets the requirement of §3-122-192, HAR.

Consequently, the protest is denied.

Stipulation as to Facts, Exhibit 8.

12. On June 7, 2002, Petitioner, by and through its President Kenneth Lam, filed a request for reconsideration of the denial of the protest on the grounds that (a) use of the term "PUC Authorization" as used in Addendum B is unlawfully vague and ambiguous and (b) the resulting bid process violates H.R.S. Chapter 271 and the PUC rules and regulations relating to motor carriers. Petitioner's request for reconsideration concluded:

We request reconsideration of the protest denial decision. We submit that PUC authorization only include those with common carrier license or that they will be given first consideration. A contract carrier on the other hand cannot have PUC authorization since a contact carrier has no contract with the DOE for this contract has never been awarded.

Stipulation as to Facts, Exhibit 9

13. By letter dated July 10, 2002, Patricia Hamamoto, Superintendent of the DOE, informed Mr. Lam and Petitioner that Petitioner's request for reconsideration was being

denied. Superintendent Hamamoto's letter stated in relevant part:

Upon careful review of documents submitted from United Courier Service, Inc., correspondence from Mr. Nakayama, IFB E02-47, and amendments to IFB E02-47, I am denying your request for reconsideration. The documents presented do not support that the Department of Education's amendments to the IFB E02-47 are in violation of the statutes cited in the reconsideration.

Stipulation as to Facts, Exhibit 10.

14. On July 15, 2002, Petitioner filed a notice of administrative appeal, and this case followed.

15. Except for the allegations by Petitioner at issue in this proceeding, IFB E02-47, as amended by Addenda A and B, is valid in all respects and complies with all applicable requirements under the laws of the State of Hawai'i.

16. The bids received by Respondent in response to IFB E02-47, as amended by Addenda A and B, have not been opened pending the results of this hearing.

III. CONCLUSIONS OF LAW

As an initial matter, the Hearings Officer would note that procedurally, the only matter pending for disposition is the Petitioner's Motion for Summary Relief or Judgment. However, the parties clearly expressed their collective intent to have the entire matter submitted for disposition on the basis of the Stipulation as to Facts, along with the Petitioner's Motion for Summary Relief or Judgment, and the respective memoranda in opposition to Petitioner's motion.

The parties have stipulated that the only issues to be decided by the Hearing Officer in this proceeding are the issues raised by the Petitioner in its May 17, 2002 letter of protest (Exhibit 7) and its June 7, 2002 request for reconsideration (Exhibit 9), which are:

1. Whether Addenda A and B of IFB E02-47 regarding the qualifications of bidders, violate the provisions of Hawai'i Administrative Rules ("HAR") §3-122-116 relating to the conditions for pre-qualification of suppliers;
2. Whether Addenda A and B of IFB E02-47 regarding the qualifications of bidders, violate HAR §3-122-192 relating to independent price determination;
3. Whether the use of the term "PUC Authorization" as used in Addendum B is unlawfully vague and ambiguous; and

4. Whether the resulting bid process of IFB E02-47 as amended by Addenda A and B, violates HRS Chapter 271 and the PUC rules and regulations relating to motor carriers.

A. Prequalification of Suppliers - HAR §3-122-116

The first issue presented is whether Addenda A and B of IFB E02-47 regarding the qualifications of bidders violate the provisions of HAR §3-122-116 relating to the conditions for prequalification of suppliers.

HAR §3-122-116 states:

§3-122-116 Conditions for prequalification of suppliers.

Prequalification of suppliers for particular types of goods, services, and construction shall be allowed under the following conditions:

- (1) To limit a solicitation to those vendors who meet statutory or licensing requirements applicable to the solicitation;
- (2) To minimize the time necessary to verify vendor qualifications which otherwise would jeopardize timely award of contracts.

A clear reading of HAR §3-122-116 reflects that prequalification of suppliers is permitted, but is not required. The relative merits of invoking the provisions of HAR §3-122-116 is not an appropriate matter for the Hearings Officer to determine in this matter.

Consequently, the Hearings Officer agrees with the determination made by Mr. Kajikawa in his letter to Mr. Lam dated May 29, 2002, in which Mr. Kajikawa succinctly states, "The pre-qualification of bidders was not exercised in this IFB, therefore Section 3-122-116, HAR is not applicable."

B. Independent Price Determination - HAR §3-122-192

The next issue is whether Addenda A and B of IFB E02-47 regarding the qualifications of bidders, violate HAR §3-122-192 relating to independent price determination.

HAR §3-122-192 states:

§3-122-192 Independent price determination. Every solicitation shall provide that by submitting an offer, the offeror certifies that the price submitted was independently arrived at without collusion.

Although the Hearings Officer is cognizant of the potential situation argued by Petitioner, based solely upon the stipulated facts submitted by the parties, the Hearings Officer concludes that there is no evidence to prove or even suggest that any of the bids submitted in response to IFB E02-47 were in violation of HAR §3-122-192.

C. Use of the Term “PUC Authorization”

The third issue to be determined is whether the use of the term “PUC Authorization” as used in Addendum B is unlawfully vague and ambiguous.

Addendum B to IFB E02-47 indicates that, “At the time of bidding, bidder must be licensed by the PUC and shall submit with his bid a copy of his PUC Authorization.” This requirement is further clarified by the amendment to page SC 1-2 of IFB E02-47 which states, “PUC Authorization (Includes Certificates, Permits, etc.).”

The Hearings Officer concludes that the use of the term “PUC Authorization” as used in Addendum B and the amendment to page SC 1-2 of IFB E02-47, is not unlawfully vague and ambiguous. Instead, the use of the term “PUC Authorization” reflects Respondent’s intent to defer to the PUC regulatory process to ultimately determine whether a bidder is qualified to provide the services set forth in IFB E02-47.

HRS Chapter 271 and the PUC Rules

The final issue to be determined is whether the resulting bid process of IFB E02-47 as amended by Addenda A and B, violates HRS Chapter 271 and the PUC rules and regulations relating to motor carriers.

The Hearings Officer would note that the only evidence of the PUC’s interpretation of HRS Chapter 271 and the PUC rules and regulations, is the January 30, 2001 letter from Paul Shigenaga, Administrative Director of the PUC. In his January 30, 2001 letter, Mr. Shigenaga clearly states that Intervenor was authorized to provide certain services, provided that:

1. Intervenor filed copies of the additional contracts with the PUC within ten (10) days after execution;
2. Such contracts were bilateral, impose specific obligations upon the carrier and shipper or the person for whom the service is rendered, setting forth all terms and conditions of the transportation service;

3. This authority was limited to the Island of Oahu; and
4. As long as Intervenor files the new contracts with the PUC, consistent with Decision and Order Nos. 1501 and 2155, the Intervenor was not required to file a new application for each new contract.

On the other hand, Mr. Shigenaga's letter also stated that Intervenor was not authorized to provide services under Permit No. 618-P to any business, shipper, or entity for which a contract was not appropriately filed with the PUC.

Because there is no evidence to the contrary, the Hearings Officer must conclude that the Petitioner did not prove by a preponderance of the evidence that the resulting bid process of IFB E02-47 as amended by Addenda A and B, violates HRS Chapter 271 and the PUC rules and regulations relating to motor carriers.

IV. FINAL ORDER

The Petitioner's assertions notwithstanding, the ultimate qualifications of the bidders for IFB E02-47 are not matters to be determined by this hearing. Nor would it be appropriate for the Hearings Officer to take issue with, or make declaratory rulings regarding the PUC's interpretation of HRS Chapter 271 and the PUC's own rules and regulations relating to motor carriers.

Instead, HRS §103D-709(f) requires that the hearings officer 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. In that context, in conjunction with the Stipulation as to Facts, the Hearings Officer finds the arguments of the Respondent and Intervenor to be persuasive.

Accordingly, for the reasons set forth above, the Hearings Officer orders that Petitioner's Motion for Summary Relief or Judgment, be and is hereby denied.

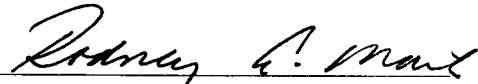
Pursuant to the parties' desire to have this matter adjudicated, the Hearings Officer finds and concludes that:

1. Addenda A and B of IFB E02-47 regarding the qualifications of bidders, does not violate the provisions of HAR §3-122-116 relating to the conditions for prequalification of suppliers;

2. Addenda A and B of IFB E02-47 regarding the qualifications of bidders, do not violate the provisions of HAR §3-122-192 relating to independent price determination;
3. the use of the term "PUC Authorization" as used in Addendum B is not unlawfully vague and ambiguous; and
4. the resulting bid process of IFB E02-47 as amended by Addenda A and B, does not violate HRS Chapter 271 and the PUC rules and regulations relating to motor carriers.

OCT 15 2002

DATED: Honolulu, Hawai'i, _____.



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