



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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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.