

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2012 FEB 24 P 12: 44

HEARINGS OFFICE

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

In the Matter of)	PCY-2012-2
)	
ALII SECURITY SYSTEMS, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	DECISION
)	
vs.)	
)	Senior Hearings Officer:
DEPARTMENT OF TRANSPORTATION,)	David H. Karlen
STATE OF HAWAII)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

On January 25, 2012, Petitioner Alii Security Systems, Inc., ("Petitioner" or "Alii") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCY-2011-2. Respondent was the Department of Transportation, State of Hawaii ("DOT").

On February 7, 2012, the DOT filed Respondent's Motion to Dismiss Petitioner's Request for Hearing filed January 25, 2012 or in the Alternative for Summary Judgment ("DOT's Motion"). On February 8, 2012, Alii filed Petitioner Alii Security Systems, Inc.'s

Motion for Summary Judgment (“Alii Motion for Summary Judgment”). On February 9, 2012 Alii filed Petitioner Alii Security Systems, Inc.’s Motion to Continue Hearing (“Alii’s Motion to Continue”).

Oral argument on the DOT’s Motion was held on February 15, 2012. Alii was represented by Christopher A. Dias, Esq. The DOT was represented by Deputy Attorney General Stella M. Kam, Esq.

At the conclusion of the hearing on the DOT’s Motion, the Hearings Officer orally granted the DOT’s Motion. In view of that decision, the Hearings Officer held that Alii’s Motion for Summary Judgment and Alii’s Motion to Continue were moot.. This Decision, based on the record as of the conclusion of oral argument on February 15, 2012, more fully sets forth those rulings and stands as the formal order with respect to all of the aforesaid motions.

As a result of the ruling on the DOT’s Motion, all issues in the case were resolved, and there was no need for an evidentiary hearing.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On or about July 25, 2011, the DOT issued a Request for Bids for a project entitled Furnishing Security Services for Commercial Harbor Facilities on the Island of Oahu, Job HAR-O.D. 2-11 (the “Project”).

2. Bids for the Project were opened publicly on August 25, 2011.

3. Section 3.1 of the Project specifications provided to bidders stated, in relevant part:

The award of contract, if it be awarded, will be made within sixty (60) calendar days after the opening of bids to the lowest responsive and responsible bidder whose proposal complies with all the prescribed requirements.

4. The lowest bidder was Professional Security Consultants (“PSC”) at \$1,370,773.20

5. Alii was the next lowest bidder at \$1,419,862.00

6. By letter dated November 1, 2011, the DOT informed PSC that it had been awarded the contract for the Project.¹

7. The contract was awarded more than sixty (60) days after bids were opened on August 25, 2011.

8. On November 2, 2011, the award to PSC was posted on the State Procurement Office’s website.

9. DOT had awarded Alii the prior contract for providing security services for State property at Honolulu Harbor. In 2011, the DOT decided not to extend Alii’s contract for another year and to instead put the contract for providing security services in the future out to bid.

10. Responding to a request from the DOT in late June of 2011, Alii agreed to extend its existing contract for a 6 to 9 month period while the new contract was being assembled.

¹ For purposes of this decision, there is no need to consider distinctions, if any, between PSC and Professional Security Consultants, Inc.

11. Except for the posting on the State Procurement Office’s website, the DOT did not provide notice to the rejected bidders on the Project that an award had been made.

12. Alii had not requested the DOT send notice of the award of the contract for the Project specifically to Alii (e.g., by mail or e-mail), and DOT did not commit or promise to Alii that it would send a notice of the award specifically to Alii.

13. On November 30, 2011, Alii received an anonymous telephone call advising Alii that the contract for the Project had been awarded to PSC on November 1, 2011.

14. Alii filed its procurement protest of the award to PSC with the DOT on November 30, 2011.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

1. Hawaii Revised Statutes (“HRS”) Section 103D-701(a) sets forth the time requirements for filing a procurement protest. In relevant part, it states that a written protest must be filed:

within five working days after the aggrieved persons 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 ...

(Emphasis supplied)

2. To the same effect is Hawaii Administrative Rule (HAR) Section 3-126-4(a).

3. Posting of the award on the State Procurement Office website is the required method of notice of an award. HAR §3-122-16.03(d).

4. There is no other required method of posting the award. All other methods are optional.

5. Alii is deemed to have received constructive notice of the award when it was posted on the State Procurement Office's website on November 2, 2011.

6. Accordingly, the Petitioner's protest was not timely filed under the terms of HRS §103D-701(a).

7. Petitioner argues that the Hearings Officer should not reach the timeliness issue because there was allegedly no award in the first place. According to Petitioner, the failure to make an award within sixty days of the opening of bids makes the award in question void. The Hearing Officer does not agree with Petitioner's argument:

a. The Hearings Officer accepts the DOT's explanation made at the hearing that the provision in Specification 3.1 is for the benefit of the DOT in holding bidders to their prices for sixty days and is for the benefit of the low bidder who is not required to hold its prices longer than sixty days.

b. Petitioner has not cited any language in the specifications that makes the award of a contract void if it is made after the sixty period has expired.

c. Even if it is assumed, solely for the purposes of argument, that the contract award is void because it was made after the sixty day period expired, a protester must still file a protest within five working days

after the posting of the award. The statute in question, HRS 103D-701(a), does not distinguish between void and voidable contracts or any actions in connection with the awards. It states that protests of any award must be filed within that five working day limit.

8. Petitioner further argues that the circumstances herein justify an exception to the five working day timeliness rule in HRS §103D-701(a). There is no such exception in the Procurement Code. It should be noted that the American Bar Association's Model Procurement Code, upon which Hawaii's Procurement Code is based, contained a suggestion that jurisdictions may wish to consider extending the time for filing a protest "for good cause shown." When passing Hawaii's Procurement Code, the Legislature clearly chose not to adopt such a suggested provision. GTE Hawaiian Telephone Co., Inc. v. County of Mau, PCH 98-6 at page 11. This underscores the significance of the lack of any exception to the filing deadline that is authorized by statute..

9. Petitioner nevertheless argues that there should be an equitable exception in this case, even though the Procurement Code does not allow exceptions, because the late filing was caused by the DOT itself. Alii points to no direct affirmative action by DOT personnel related to this procurement that allegedly caused the late filing. Instead, Alii alleges that the sixty day provision in Specification Section 3.1 is one that "lulls another into a false sense of security." Alii Memorandum in Opposition to Respondent's Motion, filed February 14, 2011, at page 10. The Hearings Officer rejects this argument:

a. Alii knew or should have known that the award would be posted when made. Any detrimental reliance on Specification Section 3.1 was unwarranted.

b. It was unreasonable for Alii to assume that it did not have to check the postings on the State Procurement Office website after the sixty day period expired. This would be true in general for all bidders. However, it was particularly true in Alii's case because it was the present contract holder, and its contract had been extended only until the procurement in question in this proceeding had been concluded. Alii, therefore, had a particularly keen interest in knowing whether or not it would continue on its extended contract or whether it would be replaced. Nevertheless, at no time between October 25, 2011 and November 30, 2011 did Alii make any inquiries to the DOT about any award for the Project or about the status of Alii's extended contract.

c. Estoppel against the State is not favored, especially when limitations periods are involved. Only under extraordinary circumstances beyond Alii's control which made it impossible for Alii to file a timely protest could create a viable estoppel claim. Garner v. State, 122 Haw. 150, 159-160, 223 P.3d 215, 224-225 (Haw. App. 2009). In that case, circumstances far worse than alleged in this case, namely repeated assertions over many years to thousands of substitute teachers, were not sufficient to equitably toll the statute of limitations. In this case, there are no extraordinary circumstances that made it impossible for Alii to timely file a protest, and Alii's estoppel claim must fail.

10. Alii also asserts that the DOT violated the duty of good faith contained in HRS §103D-101, and that this alleged failure to act in good faith resulted in Alii missing the time limit for filing its protest. The Hearings Officer rejects this argument.

a. Alii alleges it was bad faith to not send the notice of award by letter, fax, or e-mail. Alii Memorandum in Opposition to DOT's Motion, filed February 14, 2012, at page 9. All of these methods are optional. The duty of good faith does not include an

obligation to do more than what is required in this procurement. While Alii alleges that it would be preferable to send additional notices, in and of itself the duty of good faith did not require such additional notices.

b. Alii's allegation that posting the award on the SPO website was not "effective," because it was unreasonable or unrealistic to expect a bidder to constantly check the website is an allegation not supported by any facts. Furthermore, because the DOT did what was allowed by the RFB, this is a challenge by Alii to the terms of the RFB and is untimely because not made before the bids were submitted. HRS §103D-701(a).

c. The fact Alii received written notices in the past on a few other procurements creates no obligation on the part of the DOT to send a written notice in this particular case. (Alii never cites any authority for its allegation in this regard).

d. Alii alleges that the DOT intended to keep Alii in the dark about the award when it was issued. Alii's allegations in this regard, at pages 10 and 11 of its Memorandum in Opposition to the DOT's motion are not supported by any credible facts or reasonable inferences from credible facts. Government officials are presumed to act in good faith. That presumption stands unless there is irrefragable proof to the contrary. Irrefragable proof is equated with evidence of some specific intent to injure, in this case, Alii. Savantage Financial Services, Inc. v. United States, 595 F.3d 1282, 1288 (C.A. Fed. 2010). There is no evidence here that is sufficient to prevent summary judgment being entered against Alii. Furthermore, since there was a way for Alii to find about the award, i.e., the SPO website, no alleged bad faith action actually prevented Alii from learning about the award.

11. HAR §3-126-4 governs the content of a protest of an award and provides in section (b)(1) that the protest be filed "in accordance with section 3-126-3(c) and (d) as well

as with supporting exhibits, evidence, or documents to substantiate the protest.” Section 3-126-3(c), in turn, requires a “statement of reasons” and supporting documentation. The bid protest letter from Alii contained no supporting documentation, exhibits, or evidence whatsoever.

12. In addition, the five conclusory allegations, which constitute the complete protest, provide no information about the basis of the protest. In total, they state:

- a. Lack of good faith;
- b. Lack of adequate notice;
- c. Lack of meaningful opportunity to participate in the bid process;
- d. Arbitrary and improper selection of bid winner;
- e. and for other valid reasons under the law.

13. The procurement protest process under HRS Chapter 103D is designed to provide a prompt resolution of protests. The process is decidedly not the same as standard civil litigation in Circuit Court with notice pleading and extensive provisions for discovery to determine the basis of a complaint’s allegations. There is, for example, no pre-hearing discovery in a procurement protest. The procuring agency is not required to discover the meaning or content of a protest—HAR §3-126-4 puts the burden on the protestor to sufficiently notify the agency of the basis of the protest. With its purely vague and conclusory allegations in Alii’s protest letter, coupled with the complete lack of any explanatory documentation, Alii totally failed to comply with HAR 3-126-4.

14. The failure to comply with HAR §3-126-4 when submitting its written procurement protest on November 30, 2011, is an independent ground for dismissal of Alii’s procurement protest herein.

15. Submission for the first time of information, arguments, and/or documentation in Alii's request for an administrative hearing, filed January 25, 2012, does not correct Alii's failure to comply with HAR §3-126-4. Alii has failed to exhaust its administrative remedies with respect to this new material. This failure includes, but is not limited to, the new allegations that PSC was not a responsible or responsive bidder.

16. The Hearings Officer's jurisdiction is limited by HRS §103D-709(h), which provides:

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 other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer.

17. Accordingly, there is no jurisdiction in this proceeding to hear and determine the new claims contained in Alii's request for administrative hearing dated January 25, 2012.

18. In addition, Alii's claim in its request for hearing dated January 25, 2012, that the DOT engaged in misconduct because it did not grant Alii an extension on its previous DOT contract is a contract dispute. There is no jurisdiction in a procurement protest to consider claims of breach of contract or contract disputes. Roberts Hawaii School Bus, Inc. v. DOE, PCH 2003-25 (November 7, 2003).

19. Summary judgment is appropriate because the record herein shows that there are no genuine issues as to any material fact and that the DOT is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, were viewed in the light most favorable to Alii. Koga Engineering & Construction, Inc. v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010). The DOT is entitled to have its motion granted.

IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

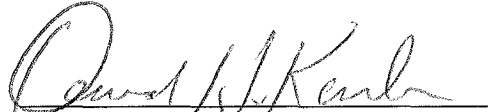
- a. The Department of Transportation's Motion is granted as stated above.
- b. Alii's procurement protest was not timely under HRS §103D-701(a) and its procurement protest is dismissed for lack of jurisdiction.
- c. In addition, Alii's procurement protest failed to comply with the requirements of HAR §3-126-4 and is therefore dismissed on that basis as well.
- d. To the extent that Alii is claiming that PSC is not a responsible and/or responsive bidder, those claims are also dismissed for lack of jurisdiction due to Alii's failure to exhaust required administrative remedies.
- e. To the extent Alii is seeking resolution of contract disputes with the DOT concerning Alii's existing or recently expired contract with DOT, those claims are also dismissed for lack of jurisdiction.
- f. Alii's Motion for Summary Judgment and Alii's Motion to Continue are denied as moot.

g. The DOT's denial of Alii's procurement protest is affirmed, and Alii's Request for Administrative Hearing herein is dismissed.

h. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

FEB 24 2012

DATED: Honolulu, Hawai'i, _____.



DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce
and Consumer Affairs