



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of	)	PCY 2012-007
	)	
AMERESCO/PACIFIC ENERGY JV,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW AND
Petitioner,	)	DECISION GRANTING RESPONDENT'S
	)	MOTION TO DISMISS PETITIONER'S
vs.	)	REQUEST FOR REVIEW FILED MARCH
	)	1, 2012
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
JOHNSON CONTROLS, INC.,	)	
	)	
Intervenor.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECISION GRANTING RESPONDENT'S MOTION TO DISMISS  
PETITIONER'S REQUEST FOR REVIEW FILED MARCH 1, 2012

I. INTRODUCTION

On March 1, 2012, Ameresco/Pacific Energy JV ("Petitioner") filed a request for hearing to contest the Department of Transportation, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for a pre-hearing conference on March 8, 2012 and a hearing on March 20, 2012. The Notice of Hearing and Pre-Hearing Conference ("Notice") was transmitted to the parties by facsimile transmission and by certified mail, return receipt requested.

On March 7, 2012, a Stipulation to Allow Johnson Controls, Inc. (“Intervenor”) to Intervene was filed.

At the pre-hearing conference held on March 8, 2012, Petitioner was represented by Anna Elento-Sneed, Esq. and Zachary A. McNish, Esq. Respondent was represented by Deputy Attorney General Stella M.L. Kam, Esq. and Intervenor was represented by Mark J. Bennett, Esq. Respondent indicated that a Motion to Dismiss (“Motion”) would be filed and a hearing on the Motion was set for March 20, 2012 at 10:00 a.m. A hearing on other motions was scheduled for March 23, 2012 and the hearing on the merits was set for March 28, 2012. A Pre-Hearing order was issued on March 12, 2012.

Respondent filed its Motion on March 9, 2012. Intervenor filed its Joinder in the Motion on March 15, 2012. Petitioner filed its memorandum in opposition to Respondent’s Motion on March 16, 2012 and its opposition to Intervenor’s Joinder on March 19, 2012. On March 19, 2012, Respondent and Intervenor filed replies in support of the Motion.<sup>1</sup>

The hearing on the Motion was held on March 20, 2012. Petitioner was represented by Ms. Elento-Sneed and Mr. McNish, Respondent was represented by Ms. Kam, and Intervenor was represented by Mr. Bennett and Brandi J. Buehn, Esq. The matter was taken under advisement.

By a letter dated March 21, 2012, the Hearings Officer informed the parties that she had decided to grant the Motion and that a decision would be issued as expeditiously as possible.

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

1. In 2008, the State Procurement Office (“SPO”) issued a solicitation entitled “Energy Performance Contracting Services—Statewide, RFP-08-022-SW,” which invited interested Energy Service Companies (“ESCOs”) to submit their qualifications-based information for consideration.

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<sup>1</sup> In response to an objection by Petitioner at the hearing on the Motion, Intervenor and Respondent withdrew their reply memoranda.

2. The purpose of RFP-08-022-SW was to 1) increase the number of successful energy savings performance contracts statewide, 2) provide State and county governmental agencies the opportunity to procure services of qualified ESCOs in a timely and cost-effective way, 3) ensure minimum qualifications of ESCOs to implement successful ESPC projects and 4) offer all ESCOs the opportunity of equal access to work generated by the State and county governmental agencies.

3. The procurement for pre-qualified ESCOs concluded upon issuance of SPO Vendor List Contract No. 09-01 (“ESCO Vendor List”). Petitioner and Intervenor were included on the ESCO Vendor List as pre-qualified ESCOs.

4. The SPO did not receive any protests pursuant to Hawai'i Revised Statutes (“HRS”) § 103D-701 challenging the solicitation or the qualifications of and/or selection of the pre-qualified ESCOs pursuant to RFP 08-022-SW.

5. Agencies seeking energy saving performance contracting services are informed on page 1 of the ESCO Vendor List that they are not required to use the pre-qualified contractors from the list and “are allowed to purchase from other contractors; however, HRS chapter 103D, and the procurement rules will apply to purchases by using the applicable procurement method and its procedures, such as small purchases or competitive sealed bidding (CSB).” The ESCO Vendor List contains the instructions and requirements for agencies seeking energy saving performance contracting services through SPO’s vendor list contract.

6. In 2011, Respondent solicited ESCOs from the ESCO Vendor List for a project under Chapter 196, HRS, entitled “Invitation for Proposals, (IFP), Energy Savings Performance Contracting, Statewide Facilities, Project No. AS1060-15” (“IFP”). The cited authorities for the IFP are HRS § 36-41, HRS Chapter 196 and “any other applicable Federal, State or County law, rule or regulation.”

7. Two ESCOs from the ESCO Vendor List submitted proposals for the IFP: Petitioner and Intervenor.

8. Pursuant to the evaluation criteria, Respondent selected the highest scorer, Intervenor, as the ESCO for Project No. AS1060-15. By a letter dated January 20, 2012, Respondent informed Intervenor that:

In accordance with § 103D-303, § 36-41 and § 196 of the Hawai'i Revised Statutes, I am pleased to inform you that your firm has been selected for the above-mentioned project subject to reaching a mutual agreement on contract terms.

9. At Petitioner's request, a debriefing was held on January 26, 2012.

10. On February 2, 2012, Petitioner submitted a Protest of Award pursuant to Hawai'i Administrative Rules ("HAR") § 16-126-4 to Respondent and the SPO. The protest is against the award to Intervenor of the contract for Project No. AS1060-15. Petitioner's protest is based on the grounds that:

1. The DOT failed to accurately and fairly assess the relative merits of the competing proposals in accordance with the Evaluation Criteria set forth in the IFP. Instead, the DOT evaluated the relative qualifications and project experience of Ameresco and JCI as generally equal, despite the two companies' significant differences in performance history.

2. The DOT failed to properly evaluate and determine JCI's 'responsibility' as a contractor for a project of this scale. JCI's past performance deficiencies and defaults demonstrate that it lacks the capability to perform this project, and it is therefore not a responsible offeror.

3. The DOT deprived Ameresco of a meaningful opportunity to support its position by denying Ameresco access to the contract file.

11. By a letter dated February 22, 2012, Respondent acknowledged receipt of Petitioner's protest. The letter also states that "[t]he protest process in Hawai'i Revised Statutes (HRS) § 103D-701 does not apply to the contract award for the above subject project." The letter states in part:

However, the DOT is mindful of the issues raised in your letter and offers the following comments:

1. Establishment of SPO Vendor List Contract No. 09-01, resulting from RFP 08-022-SW, provides a list of pre-qualified ESCOs with instructions to user agencies for a secondary IFP process. During this IFP process, the responsibility as a contractor and past performance of JCI was evaluated based on the subject project, and JCI was determined qualified.

2. The IFP evaluation was comprehensive and thorough in reviewing all relevant material and submittals and the DOT stands by its scoring and evaluation of JCI's proposal.

The DOT is satisfied that JCI has the qualifications and experience for the specified project as represented in their proposal which addresses the concerns raised in your letter.

Finally, because the award is conditioned on acceptance of the investment grade audit (IGA) and execution of a guaranteed energy savings (GES) contract with JCI, we are not able to provide the requested documents regarding the contract award. Upon completion of the IGA and GES processes, all documents will be available for public disclosure.

12. On March 1, 2012, Petitioner filed a Request for Administrative Review of Respondent's February 22, 2012 decision with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH").

### III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH 96-9 (November 20, 1996).

Respondent/Intervenor's Motion to Dismiss is based on the assertion that OAH does not have jurisdiction to hear this matter because the IFP was not subject to HRS Chapter 103D.

The OAH's jurisdiction is governed by Hawai'i Revised Statutes § 103D-709(a) which provides:

**§ 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, person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701 or 103D-702.

Petitioner contends that the IFP was a solicitation of a competitive sealed proposal under HRS § 103D-303. If Petitioner is correct, then the provisions of HRS § 103D-701 relating to protests applies, which then triggers the OAH's jurisdiction pursuant to HRS § 103D-709. Respondent/Intervenor contend that Respondent's utilization of the ESCO Vendor List and the issuance of the IFP were done pursuant to HRS §§ 36-41(c) and 196-21(c) and except for the manner of advertising the solicitation, HRS Chapter 103D does not apply.

Hawai'i Revised Statutes §§ 36-41 and 196-21 provide in relevant part:

**§ 36-41 Energy retrofit and performance contracting for public facilities.** (a) All agencies shall evaluate and identify for implementation energy efficiency retrofitting through performance contracting. Agencies that perform energy efficiency retrofitting may continue to receive budget appropriations for energy expenditures at an amount that shall not fall below the pre-retrofitting energy budget but shall rise in proportion to any increase in the agency's overall budget for the duration of the performance contract or project payment term.

...

(c) Notwithstanding any law to the contrary relating to the award of public contracts, any agency desiring to enter into an energy performance contract shall do so in accordance with the following provisions:

(1) The agency shall issue a public request for proposals, advertised in the same manner as provided in chapter 103D, concerning the provision of energy efficiency services or the design, installation, operation, and maintenance of energy equipment or both. The request for proposals shall contain terms and conditions relating to submission of proposals, evaluation and selection of proposals, financial terms, legal responsibilities, and other matters as may be required by law and as the agency determines appropriate;

(2) Upon receiving responses to the request for proposals, the agency shall select the most qualified proposal or proposals any may base its determination on the basis of the experience and qualifications of the proposers, the technical approach, the financial arrangements, the overall benefits to the agency, or other factors determined by the agency to be relevant and appropriate;

(3) The agency thereafter may negotiate and enter into an energy performance contract with the person or company whose proposal is selected as the most qualified based on the criteria established by the agency[.]

**§ 196-21 Financing mechanisms.** (a) Agencies shall maximize their use of available alternative financing contracting mechanisms, including energy-savings contracts, when life-cycle cost-effective, to reduce energy use and cost in their facilities and operations. Energy-savings contracts shall include:

(1) Energy performance contracts[.]<sup>2</sup>

Except for the manner of issuing the request for proposal, nowhere in HRS §§ 36-41(c) or 196-21(c) is there a requirement that an agency comply with HRS Chapter 103D in order to enter into an energy performance contract. Although Respondent conducted a debriefing and made references to HRS Chapter 103D in correspondence to Intervenor, that did not turn the IFP into a HRS Chapter 103D solicitation.

Petitioner also argued that the phrase “notwithstanding any law to the contrary” in HRS §§ 36-41(c) and 196-21(c) does not exempt the procurement of energy performance contracts from the requirements of HRS Chapter 103D because these sections are not “contrary” to HRS Chapter 103D. The Hearings Officer rejects this argument as the Hearings Officer interprets the phrase to mean that agencies desiring to enter into energy performance contracts shall follow the provisions of HRS §§ 36-41(c) and 196-21(c) even if it is contrary to HRS Chapter 103D.

Based on the evidence presented, the Hearings Officer finds that HRS Chapter 103D does not apply to the IFP and accordingly, the OAH does not have jurisdiction to address the issues raised by Petitioner in this proceeding.

In light of the findings and conclusions above, the Hearings Officer declines to discuss or make a determination on the other issues raised by Petitioner.

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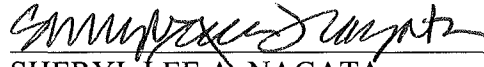
<sup>2</sup> HRS § 196-21(c) is substantially identical to HRS § 36-41(c) so it is not cited here.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss is granted and,

IT IS HEREBY ORDERED that the above-entitled matter is dismissed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, APR 17 2012.



SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs