



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-2012-021
)	
KUNI'S ENTERPRISES, INC.,)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF LAW,
Petitioner,)	AND ORDER GRANTING
vs.)	RESPONDENT'S MOTION TO
)	DISMISS OR IN THE ALTERNATIVE
MICHAEL R. HANSEN, DIRECTOR OF)	FOR SUMMARY JUDGMENT
THE DEPARTMENT OF BUDGET AND)	
FISCAL SERVICES, CITY AND)	
COUNTY OF HONOLULU,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING RESPONDENT'S MOTION
TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. INTRODUCTION

On June 27, 2012, Kuni's Enterprises, Inc. ("Petitioner"), filed a request for administrative review of Respondent Michael R. Hansen, Director of the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") June 20, 2012 denial of Petitioner's June 6, 2012 protest. The matter was thereafter set for hearing and a Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 9, 2012, Respondent filed a motion to dismiss or in the alternative for summary judgment. Petitioner filed its memorandum in opposition to Respondent's motion on July 13, 2012.

On July 17, 2012, Respondent's motion came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Petitioner was represented by its attorney, Isaac Keahi Smith, Esq. and Respondent was represented by its attorneys, Geoffrey M. Kam, Esq. and Amy R. Kondo, Esq.

Having heard the argument of counsel, and having considered the motion, memoranda, affidavits and exhibits attached thereto, along with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and order granting Respondent's motion to dismiss or in the alternative for summary judgment.

II. FINDINGS OF FACT

1. In or about 2002, Respondent issued a request for bids ("Proposal No. 13878") to provide towing services within various zones for the City and County of Honolulu and the Honolulu Police Department ("HPD").

2. Under Proposal No. 13878 and the resulting contracts, the contractor was required to pay a monthly premium to the City and County of Honolulu "for the exclusive right to provide towing services in each respective zone".

3. Under Proposal No. 13878 and the resulting contracts, the City and County of Honolulu was divided into "zones".

4. Section 4 of the Specifications to Proposal No. 13878 provided as follows:

EXCLUSIVE CONTRACT.

Except as provided hereinbelow, the City will not permit any other Contractor to provide towing services covered herein within the contracted area.

The Honolulu Police Department reserves the right to call the nearest Contractor(s) available in any zone, in the event, (1) accidents may occur involving several vehicles; (2) several accidents occur at about the same time; or (3) multiple illegal parking occurs on one (1) street and the Honolulu Police Department needs access to all available equipment to remove such vehicles in any of the situations hereinabove and the Contractor within the contracted zone

is not able to handle the particular situation. Under this situation, the Contractor shall not be assessed liquidated damages as stated under Section 5, LIQUIDATED DAMAGES, of these Specifications immediately following hereinbelow. However, the Honolulu Police Department shall first verify with the Contractor as to whether said situation can be handled by the Contractor.

In the event the Contractor is called upon by HPD to assist in towing vehicles in another zone, the Contractor shall tow the vehicles to the Contractor's own storage lot in the awarded zone at the tow rate as established in Section 14, TOWING AND STORAGE RATES, of these Specifications herein.

5. On or about June 17, 2009, the State Department of Transportation ("DOT") launched its Freeway Service Patrol ("FSP") Program.

6. Among other things, the FSP Program permitted the FSP to provide crash scene support.

7. By October 2011, FSP had expanded to cover an additional portion of the H-1 Freeway, from the Vineyard Boulevard off-ramp to University Avenue.

8. FSP currently operates over approximately 23 miles of freeway, including a 15.8 mile stretch along the H-1 Freeway from Kunia Road to University Avenue, a 4.8 mile stretch along the H-201 Moanalua Freeway and 2.1 miles of the H-2 Freeway from the H-1/H-2 interchange to Ka Uka Boulevard.

9. In April 2011, Respondent issued Request for Proposals No. 404409 to provide Law Enforcement Towing Services for the City and County of Honolulu ("RFP").

10. The stated objective of the RFP was to "have one (1) Contractor to manage and/or operate towing services for the Honolulu Police Department ("HPD") throughout the island of Oahu."

11. Unlike the prior zone contracts that had been awarded under Proposal No. 13878, the RFP sought one contractor to oversee all HPD tow operations and only covered HPD-initiated tows.

12. The scope of towing services called for in the RFP involved the “towing, removal and storage of all vehicles as ordered by HPD . . .”

13. The RFP, in Section 4 of the Specifications, provided in part:

4. EXCLUSIVE CONTRACT. This contract is exclusive for HPD-initiated tow calls only. All other City Departments and individual construction projects requiring specified traffic controls shall procure tow services independent of this contract.

In addition, whenever and wherever the State of Hawaii operates a “Freeway Service Patrol,” HPD and the public shall use said Freeway Service Patrol.

Any area where the State of Hawaii operates a “Freeway Service Patrol,” or any individual City or State construction site that has its own traffic control vehicle as part of the construction contract, shall be excluded from this contract.

(Emphasis added)

14. Thereafter, Respondent issued a series of addenda in an effort to clarify the relationship between FSP and Respondent’s law enforcement tow contract. Addendum No. 2 dated June 8, 2011 referred prospective offerors to the DOT for information about the scope of FSP. Addendum No. 4 dated July 6, 2011 included a “Clarification of Freeway Service Patrol program” summary that had been provided by the DOT and which stated in part:

* * * *

The Freeway Service Patrol consists of six trucks patrolling in circuits along defined beats, which assist motorists by providing various services to stranded motorists, including . . . towing a vehicle off the freeway to designated drop zones.

* * * *

The scope of the FSP Program does not allow the towing of vehicles that have been in motor vehicle crashes or other accidents.

* * * *

(Emphasis added).

15. The RFP set June 22, 2011 as the deadline for the submission of proposals. The deadline was subsequently extended to October 31, 2011 by addendum.

16. In early October 2011, prior to the deadline for the submission of proposals in connection with the RFP, Respondent requested bids for a temporary tow contract for Zones III-IV-V for the period November 1, 2011 to April 30, 2012. Zones III-IV-V is, essentially, urban Honolulu between the Koolaus, Makapuu Point, and the South shore and bounded on the west by Alakea Street, Queen Emma Street, Huala Street, Prospect Street, and Puowaina Drive up to the overpass, then north to the Koolau Range.

17. By early October 2011, FSP was operating on a portion of the H-1 Freeway that lay in Zones III-IV-V, specifically, on H-1 between Queen Emma Street and University Avenue.

18. On October 7, 2011, Respondent requested that Petitioner provide a quote for the temporary tow contract that was described as follows:

To provide exclusive on-call towing services for Zones III-IV-V to tow away illegally parked vehicles and clearing of accident sites for the Honolulu Police Department. The term shall begin on November 1, 2011 and end on April 30, 2012, unless cancelled upon 30 days notice.

The awarded contractor acknowledges and agrees that they are currently charging current Hawaii Revised Statutes rates which are allowed under Contract No. C13878 and all other terms of Contract No. C13878 shall apply.

Award shall be to the highest responsive, responsible bidder offering the highest monthly premium payable to the City. Minimum upset price set at \$18,000.00 per month.

19. Petitioner offered to provide the temporary tow service for \$21,200.99.

20. By letter dated October 19, 2011, Respondent notified Petitioner that Petitioner had been awarded the temporary Zone III-IV-V Contract (“Zone Contract”). On October 23, 2011, Petitioner accepted the terms of the Zone Contract by signing the October 19, 2011 letter.

21. At the time Petitioner bid for and agreed to the Zone Contract, FSP had been operating for two years and had expanded into Zones III-IV-V.

22. On February 24, 2012, Petitioner, for the first time, complained that FSP was towing vehicles that should have been towed by Petitioner under Petitioner’s Zone Contract. The letter stated in relevant part:

* * * *

On two (2) occasions, our drivers followed FSP trucks that took freeway accident vehicles off the freeway. Our driver’s flagged them down and recovered those tow. We have been told, however, that FSP has delivered freeway accident towed vehicles to customer’s homes and to body and repair shops. These types of unauthorized tows were confirmed by Perry and Price on the morning on February 2, 2012, when they congratulated FSP for clearing an accident scene off the freeway, west bound, near University off.

It is our understanding that FSP does NOT have the authority to tow accident vehicles, but they ARE towing them and they are **DEPRIVING** KUNI’S of the tow and the income. FSP is not just clearing the vehicles from impeding traffic, but they are also delivering vehicles, a service that is NOT contracted for and NOT paid for in the FSP contract. In the recent RFP, the City included a printout from the State Department of Transportation indicating that, “**The scope of the FSP Program does not allow the towing of vehicles that have been in motor vehicle crashes or other incidents.**” (emphasis in original).

Kuni’s pays for the right to do **ALL** HPD tows within its Zones and to obtain the income from the tow services,

mileage and storage. Accident tows are considered HIGH ticket tows because of the time the vehicle remains in the storage lot with insurance and repair issues. Kuni's has calculated those tows and the income therefrom into our determination of the premium we offered to the City before we issued our bid. At this time, we feel we are being CHEATED out of that income.

* * * *

Since this particular tow contract is temporary and the problem will likely NOT be resolved by the time the contract is either extended or terminated, we suggest that the City reduce the monthly premium for Zones III, IV and V to \$18,000.00.

* * * *

23. Upon investigation by Respondent, neither HPD nor the DOT could confirm Petitioner's claim.

24. On or about March 5, 2012, the DOT informed Respondent:

HDOT's FSP policy is to provide traffic control for vehicles involved in motor vehicle collisions. If requested by HPD, and if possible, FSP would relocate the vehicle to the right shoulder. It is against HDOT's policies to tow to customer's homes, repair or body shops for any reason.

* * * *

25. By letter dated March 8, 2012, Respondent informed Petitioner that it could not substantiate Petitioner's claims and asked Petitioner to provide specific details "so that we may properly investigate these allegations."

26. Respondent proceeded to evaluate the proposals submitted in response to the RFP and called for the submission of Best and Final Offers by March 9, 2012.

27. By letter dated March 30, 2012, Petitioner, through its attorney, described two incidents in which Petitioner claimed it almost lost tows to FSP. In both incidents, HPD and DOT records showed that Petitioner was called to provide tow services and towed the vehicles after FSP had moved the vehicles to a safer location.

28. On April 19, 2012, Petitioner agreed to extend the temporary Zone Contract on the same terms notwithstanding its expressed concerns about the amount of business it was allegedly losing to FSP.

29. On April 24, 2012, Respondent approved a call for a Second Best and Final Offer to address the FSP issue raised by the Clarification of Freeway Service Patrol program that had been attached to Addendum No. 4 of the RFP. As a result, Addendum No. 13 was issued on May 7, 2012 and provided in pertinent part:

* * * *

MODIFICATION

Please delete “Clarification of Freeway Service Patrol Program” attached in Addendum No. 4. Any questions on the FSP, please contact the State of Hawaii, Department of Transportation, Highways Division/Traffic Branch, 601 Kamokila Boulevard, Room 602, Kapolei, Hawaii 96707, telephone number (808) 692-7676.

Please remove and replace item No. 4, Exclusive Contract, of the Specifications with the following:

“4. **EXCLUSIVE CONTRACT.** The contract is exclusive for HPD-initiated tow calls only. All other City Departments and individual construction projects requiring specified traffic controls shall procure tow services independent of this contract.

If FSP is available, HPD may use FSP to tow vehicles to safe off-freeway locations or out of the lanes of traffic. Once FSP has moved a vehicle to a safe off-freeway location or out of the lanes of traffic, the Contractor shall have the exclusive right to HPD-initiated tow calls from that point.”

The Contractor must account for any impact related to the FSP on their offer and the City will not make any premium adjustment related to actions by the FSP program.

2ND BEST AND FINAL OFFERS

Pursuant to Section 5.7 of the RFP's Instructions to Offerors, Priority-Listed Offerors are invited to submit their 2nd Best and Final Offers ("BAFO2").

Please submit BAFO2 by **2:00 p.m. HST on MAY 14, 2012**, to the Office of the Division of Purchasing, Department of Budget and Fiscal Services, City Hall, 530 South King Street, Room 115, Honolulu, Hawaii 96813.

* * * *

30. Addendum No. 13 invited Priority-Listed Offerors to submit their Second Best and Final Offers on May 14, 2012.

31. Petitioner did not file a protest prior to May 14, 2012.

32. On May 14, 2012, Respondent wrote to Petitioner explaining the results of its investigation:

* * * *

After investigating your issues, the City has determined that all departments involved are following the proper protocol and the City will continue to call Kuni's for the exclusive rights in Zones III, IV, and V with the continuation of the extension.

* * * *

33. The letter was sent by certified mail; however, it went unclaimed and Respondent resent the letter to Petitioner and its counsel on June 13, 2012.

34. Petitioner wrote to Mayor Peter Carlisle on May 11, 2012 about the FSP issue. Respondent replied in a letter sent on May 15, 2012:

* * * *

After meeting with the State of Hawaii, Department of Transportation (HDOT), Addendum No. 13 was issued for Proposal No. RFP-CSD-404409 (RFP) (to provide Law Enforcement Towing Services) to delete the summary of

the Freeway Service Patrol (FSP) because some of the information provided was inaccurate. The FSP Program's role is to provide assistance to the Honolulu Police Department (HPD), Honolulu Fire Department (HFD) and Emergency Medical Services (EMS) with crash scene support and will do so only as directed by the HPD, HFD or EMS Division.

* * * *

The information provided by HDOT to the City about the FSP program set forth in Addendum No. 4 was inaccurate. As a result, the City addressed this issue by issuing Addendum No. 13 that states, "If FSP is available, HPD may use FSP to tow vehicles to safe off-freeway locations or out of the lanes of traffic. Once FSP has moved a vehicle to a safe off-freeway location or out of the lanes of traffic, the Contractor shall have the exclusive right to HPD-initiated tow calls from that point."¹

* * * *

35. Petitioner wrote to the DOT regarding the FSP issue. The DOT's April 30, 2012 reply stated: "We have investigated your complaint of the FSP and found that our Contractor, Telvent has been consistent with the terms of our contract."

36. Second Best and Final Offers were opened on May 14, 2012. Leeward Auto Wreckers, Inc.'s ("Leeward Auto Wreckers") Second Best and Final Offer stated its understanding of the FSP issue as follows:

* * * *

FSP are not there to compete with contractors with the city but to aid in clearing the freeways quicker. Leeward Auto Wreckers has anticipated that HPD will use FSP for certain situations. FSP will only tow these vehicles off to a safe place and any accidents will still have HPD involved which the contractor has the exclusive right from that point on.

* * * *

¹ Hawaii Administrative Rule §3-122-53(d)(2) provides that if during discussions there is a need for any substantial clarification or change in the request for proposals, the request for proposals "shall be amended by an addendum to incorporate the clarification or change."

37. On May 30, 2012, Respondent posted a letter of conditional award to Leeward Auto Wreckers.

38. Petitioner submitted its Protest on June 6, 2012. The Protest was based on the following claims:

* * * *

1. The City has failed, neglected and refused to properly investigate the problem of the Freeway Service Patrol being ordered by HPD, HFS and EMS to remove the traffic accident and traffic hazard vehicles from the freeways. This severe and substantial loss of tows affects both RFP Contractors and the City Tow Contractor's presently providing towing services. The large volume of tows lost directly affects revenue flow and resulting income therefrom. This problem has only recently been discovered and reported to the city. (See letter from City dated March 8, 2012).

2. The City has misled Contractor when it stated that this contract is exclusive for HPD initiated calls only. In fact the contract is NOT exclusive. According to the Addendum No. 13, issued May 7, 2012, Contractor is secondary to the Freeway Service Patrol on ALL freeway tows. When FSP initiates a tow from the freeway, often the City Tow Contractor is never even called, thus losing the tow completely. (See Addendum No. 13).

3. The City misinformed Contractor in attaching FSP Policy and a DOT Memorandum to the RFP stating that FSP Program does not allow the towing of vehicles that have been in motor vehicle crashes or other incidents. Subsequently, the City appears to have backed off from the policy and in fact is authorizing HPD to order accident vehicles to be towed by FSP. This complete turn around of the City's position regarding freeway accident tows validates Kuni's allegation that loses of tows have been proven but the city has failed to make proper financial adjustments therefore. (See DOT Memorandum, which was attached to the RFP).

4. The City further misled Contractor when it reiterated in writing that HPD is fully cognizant of the fact that FSP is not authorized to tow accident vehicles intimating that HPD was in fact compliant with said policy. (See letter from City dated March 8, 2012).

5. The City failed, neglected and refused to cancel, suspend or postpone the RFP pursuant to Section 5.5, when it issued Addendum 13, which significantly changed the nature of the procurement and substantially reduced the number of tows for Contractor and ultimately negatively affecting Contractor's revenue and income.

6. The City failed, neglected and refused to make any adjustment to the monthly premium even when presented with substantial and significant evidence of present losses. (See paragraph 19, General Terms and Conditions, RFP).

* * * *

39. Respondent denied the protest by letter dated June 20, 2012.

40. Petitioner filed the instant Request for Review on June 27, 2012.

41. Performance of the contract has been stayed pending the outcome of this dispute.

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.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer 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 made pursuant to HRS §§ 103D-310, 103D-701 or 103D-702. The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate.

In bringing this motion, Respondent points out that Petitioner's protest is based, to a large extent, on claims raised by Petitioner concerning Petitioner's *current Zone Contract*, over which the Hearings Officer lacks jurisdiction. Indeed, under HRS Chapter 103D, the Hearings Officer is not authorized to hear contractual disputes. *Roberts Hawaii School Bus, Inc. v. DOE; PCH-2003-25 (November 7, 2003)(construing HRS §§103-709(a), 103D-701, and 103D-709 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 process while reserving exclusively to the courts the power to preside over contract disputes)*. Thus, to the extent that Petitioner's protest is based on claims arising from its Zone Contract with Respondent, those claims are dismissed².

The protest was apparently also based on the modification to the RFP established by Addendum No. 13. At oral argument, Petitioner clarified and explained that its protest was essentially based on the replacement of Item No. 4 of the Specifications with the following provision:

If FSP is available, HPD may use FSP to tow vehicles to safe off-freeway locations or out of the lanes of traffic. Once FSP has moved a vehicle to a safe off-freeway location or out of the lanes of traffic, the Contractor shall have the exclusive right to HPD-initiated tow calls from that point."

According to Petitioner, the foregoing provision is inconsistent with FSP policy and is therefore unlawful. In its protest, Petitioner also complained that Respondent misled Petitioner when it stated that its Zone Contract was exclusive for HPD initiated calls only but that according to Addendum No. 13, Petitioner is secondary to the FSP on all freeway tows; that Respondent misinformed Petitioner by attaching information provided by the DOT stating that the FSP Program does not allow the towing of vehicles involved in crashes but "backed off from the policy" (presumably by issuing Addendum No. 13) and "in fact is authorizing HPD to order accident vehicles to be towed by FSP"; and that Respondent failed to postpone the RFP when it issued Addendum No. 13 "which significantly changed the nature of the procurement . . ."

Respondent, on the other hand, points out that because all of those claims are based on Addendum No. 13, the protest was based on the content of the solicitation and, accordingly, Petitioner was required to submit its protest prior to the date set for the submission of the offers. And since Addendum No. 13 invited Priority-Listed Offerors to submit Second Best and Final Offers on May 14, 2012, Petitioner was required to submit its protest prior to the date set for the receipt of those offers on May 14, 2012. The Hearings Officer agrees.

HRS §103D-701(a), expressly requires protests to be filed within five working days after the aggrieved party knew or should have known of the facts giving rise to the protest *and*, in any event, prior to the date set for the receipt of offers where the protest is based on the content of the solicitation. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); Ludwig Construction v. County of Hawaii, PCX-2009-6 (December 21, 2009)*. The requirement was designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services; PCH 2000-8*. Moreover, in construing HRS §103D-701(a), this Office has consistently held that the accomplishment of the underlying objectives of HRS Chapter 103D requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc., v. County of Maui, PCH 98-6 (December 9, 1998)*. See also, *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget and Fiscal Services, PCH-2000-8 (October 17, 2000)(strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute’s underlying purpose); CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007)*.

² For instance, it its protest, Petitioner complains that Respondent has “failed, neglected and refused to make any adjustment to the monthly premium even when presented with substantial and significant evidence of present losses”, and that “loses[sic] of tows have been proven but the city has failed to make proper financial adjustments therefore.”

Here, the facts giving rise to Petitioner's protest were known or should have been known by Petitioner by May 7, 2012 when Addendum No. 13 was issued. Furthermore, because Petitioner's protest was based on Addendum No. 13 and the modification established by that addendum, the protest was undoubtedly one based on the content of the solicitation. As such, the protest should have been filed, at the latest, prior to May 14, 2012 - the date set for the receipt of Second Best and Final Offers, regardless of whether Petitioner knew or should have known of the basis for its protest. Based on these considerations, the Hearings Officer concludes that Petitioner's June 6, 2012 protest was late.

IV. DECISION

Based on the foregoing findings and conclusions, the Hearings Officer concludes that there are no genuine issues of material fact and Respondent is entitled to a ruling in its favor as a matter of law. Accordingly, Respondent's motion to dismiss or in the alternative for summary judgment is granted and this matter is hereby dismissed. Each party shall bear its own attorney's fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: AUG - 3 2012



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs