



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2003 MAR 17 P 12: 15

HEARINGS OFFICE

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

In the Matter of)	PCH-2002-19
)	
HARRY MARX)	HEARINGS OFFICER'S FINDINGS
CHEVROLET/CADILLAC,)	OF FACT, CONCLUSIONS OF LAW
)	AND DECISION; APPENDICES "A" & "B"
Petitioner,)	
)	
vs.)	
)	
COUNTY OF MAUI,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On December 30, 2002, the Office of Administrative Hearings, Department of Commerce and Consumer Affairs received a letter dated December 27, 2002 from Monte Medeiros, Municipal and Government Sales, Harry Marx Chevrolet/Cadillac ("Petitioner") requesting a hearing to contest the rejection of its bid submitted in response to the Invitation for Bids, IFB #02-03/P-24, issued by the County of Maui ("Respondent").

At the prehearing conference on January 9, 2003, which was attended by Warren Bell, on behalf of Petitioner and Moana Ramaya, Esq., on behalf of Respondent, the parties agreed that this matter could be resolved without an evidentiary hearing, as the facts were not in dispute. Accordingly, the Respondent was ordered to file a Motion for Summary Judgment, and a hearing on the Motion was scheduled for February 7, 2003. Respondent filed

its Motion on January 22, 2003. Petitioner's Memorandum in Opposition to the Motion was filed on February 4, 2003. Respondent's Reply to Petitioner's Memorandum was filed on February 6, 2003.

On February 7, 2003, a hearing on the Motion was held by the undersigned Hearings Officer. Petitioner was represented by Mr. Medeiros and Mr. Bell. Respondent was represented by Tracy Fujita Villarosa, Esq. Because of some confusion over the procedures agreed to at the prehearing conference, Petitioner did not submit all the evidence and arguments it wished to make with its Memorandum in Opposition to Respondent's Motion. Accordingly, over Respondent's objection, Petitioner was allowed to present additional exhibits and arguments at the hearing.

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 recommended order.

II. FINDINGS OF FACT

1. Respondent issued an Invitation for Bids ("IFB") to procure two (2) 4x2, ½-ton pickup trucks with extended cab for the Department of Parks and Recreation, County of Maui (IFB #02-03/P-24).

2. Number 18 of the Special Provisions states:

Bidder shall meet the requirements of Section 437-2, Motor Vehicle Industry Licensing Act, Hawaii Revised Statutes, unless exempted. A space is provided in the offer form for the license number issued by the State of Hawaii.

3. Petitioner is not licensed as a motor vehicle dealer in the State of Hawaii. However, Petitioner is a franchised General Motors dealer in California, and licensed in the State of California, California license number 156-91-57-9.

4. Petitioner submitted a bid in response to the IFB. Petitioner proposed to provide two 2003 Chevrolet CC15753 at a cost of \$20,894.00 per vehicle.

5. In the space where the bidder was to identify its State of Hawaii Motor Vehicle Dealer License No., Respondent identified MVB-379-2 as its license number, and referred to an attachment. The attachment explained that Petitioner was a franchised dealer in California, and that as an "out of state bidder" and to comply with HRS § 437-2, they would be using the Cutter Automotive Group and their license number. The attachment further

explained that the General Motors Franchise Dealer on Maui was the Cutter Automotive Group, and to comply with the General Motors Franchise Dealer Agreement, Cutter Automotive Group would provide all warranty and service needs of the General Motors vehicles. The Offer Form and Attachment are attached hereto and incorporated herein by reference as Appendix "A".

6. At bid opening on December 20, 2002, it was determined that Petitioner was the lowest bidder.

7. By a letter dated December 20, 2002, Respondent notified Petitioner that it was rejecting its bid as being non-responsive because Petitioner did not hold a valid State of Hawaii dealer license and because there was no evidence that Cutter Automotive Group had agreed to allow Petitioner to use its license to sell vehicles in the State of Hawaii. The letter also states:

The County of Maui urges you to either:

1. Obtain a license under HRS Chapter 437 prior to submitting any more bids.
2. File a complaint with the Department of Commerce and Consumer Affairs.
Failure to do so may result in our returning future bids to you unopened.

A copy of this letter is attached hereto and incorporated herein by reference as Appendix "B".

8. Mr. Medeiros was orally advised by Respondent that no protest was available to them, and Petitioner's only appeal of their bid rejection was to the Department of Commerce and Consumer Affairs ("DCCA").

9. Respondent's letter was mailed to Petitioner on December 23, 2003, and Petitioner received this letter on December 27, 2002. The Office of Administrative Hearings, DCCA received Petitioner's request for hearing on December 30, 2002.

10. In February 1999, the Department of Water Supply, County of Maui, awarded Petitioner a contract to furnish and deliver three vehicles to the Department of Water Supply. Petitioner was not licensed as a motor vehicle dealer in the State of Hawaii, although Special Provision number 12 provided that the bidder must meet the requirements of Section 437, Motor Vehicle Industry Licensing Act, Hawaii Revised Statutes, unless exempted.

11. Article 5.2.1 of The Standard Provisions of General Motors Corporation's Dealer Sales and Service Agreement states:

Dealer agrees to maximize customer satisfaction by providing courteous, convenient, prompt, efficient and quality service to owners of Motor Vehicles, regardless of from whom the Vehicles were purchased. All service will be performed and administered in a professional manner and in accordance with all applicable laws and regulations, this Agreement, and the Service Policies and Procedures Manual, as amended from time to time.

III. CONCLUSIONS OF LAW

A motion for 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 (Hearings Officer's Final Order November 20, 1996).

Respondent's Motion for Summary Judgment is based on assertions that: (1) the DCCA does not have jurisdiction to hear this matter because Petitioner did not file a protest after its bid was rejected and (2) Petitioner's bid was properly rejected because it is not licensed in the State of Hawaii as a motor vehicle dealer pursuant to Hawaii Revised Statutes ("HRS") Chapter 437.

Jurisdiction

It is not disputed that Petitioner did not file a protest to the chief procurement officer or its designee, as specified in HRS § 103D-701. However, the bid rejection letter Petitioner received from Respondent informed Petitioner that it should either obtain a license under HRS Chapter 437 or file a complaint with the DCCA, and that failure to do so may result in future bids being returned unopened. Petitioner argued that it relied on Respondent's oral and written representations when it filed its request for hearing with the DCCA.

In *Matt's Transmission Repair, Inc. v. Department of Budget and Fiscal Services, City and County of Honolulu, et al.*, Civil No. 01-1-3242-11; 01-1-3309 (Consolidated) (First Circuit Court, May 2, 2002) the agency erroneously instructed a protestor that an appeal must be filed within seven days of *receipt* of the denial letter when the statute provided that the time for appeal is seven days from the date of *issuance* of the letter. The Circuit Court held that the agency was estopped from arguing that the appeal was untimely

when the appeal was received within seven days of receipt of the letter but not seven days from the issuance of the letter. The Court further stated that a dismissal of the request for hearing would constitute a denial of the protestor's right to due process of law. Accordingly, the Hearings Officer concludes that Respondent is estopped from claiming that the DCCA does not have jurisdiction to hear this matter, as Petitioner's failure to file a protest was the direct result of Respondent's erroneous instruction to file a complaint with the DCCA rather than to file a protest.

Compliance with HRS Chapter 437

Respondent also argued that Petitioner's bid was properly rejected because Petitioner did not have a Hawaii motor vehicle dealer's license. Petitioner contends that its bid should not have been rejected because it is exempt from complying with HRS Chapter 437 and because the licensing requirement is a violation of Petitioner's constitutional rights under Article I, Section 8 of the United States Constitution.¹

Hawaii Revised Statutes § 437-2 states in relevant part:

§ 437-2 Licenses. (a) No person shall engage in the business as or serve in the capacity of, or act a motor vehicle dealer, motor vehicle salesperson, or motor vehicle auction or otherwise engage in the business of selling or negotiating for the purchase of motor vehicles in this State without being licensed as provided in this chapter. A license issued under this chapter shall authorize the holder to engage in the business or activities permitted by the license, only in the county for which the license is issued.

(e) Notwithstanding any provisions of this chapter, the authority of any state or county agency to purchase motor vehicles for state or county use from any dealer licensed under this chapter shall not be limited or conditioned. Any dealer licensed under this chapter may sell vehicles to any state or county agency.

It is not disputed that Petitioner is not licensed as a motor vehicle dealer in the State of Hawaii. However, Petitioner contends that it is exempt, pursuant to the language in the IFB which states that the bidder shall meet the requirements of HRS § 437-2, unless exempted, and cited

¹ The Hearings Officer will not address this issue as she does not have the authority to rule on the constitutionality of a statute. See, *HOH Corp. v. Motor Vehicle Industry Licensing Board*, 69 Hawaii 135, 736 P.2d 1271 (1987).

as “established precedence” of their exemption the fact that Respondent purchased vehicles from Petitioner in the past.

Petitioner has not identified any provision of HRS Chapter 437, or any other law which provides that an out of state, licensed (in California) franchised dealer who submits bids on IFB’s issued by Respondent (or any other state or county agency) for the purchase of motor vehicles is exempt from the requirement that it be a licensed motor vehicle dealer in the State of Hawaii. In addition, Respondent does not have the authority to grant exemptions to the licensing requirements contained in HRS Chapter 437. Accordingly, the Hearings Officer finds that Petitioner must be licensed as a motor vehicle dealer in the State of Hawaii in order for Respondent to purchase vehicles from it, and therefore, concludes that Respondent’s rejection of Petitioner’s bid was not improper. Respondent’s erroneous purchase of vehicles from Petitioner in 1999 cannot be cited as precedent, and is not a valid reason for non-compliance with HRS Chapter 437.

Petitioner also argued that its status as a franchise dealer and the franchise dealer sales and service agreement protect Respondent’s rights because the local franchise dealer is required to honor warranties and make repairs even though the vehicles were not purchased from the local franchise dealer. However, HRS Chapter 437 does not exempt franchise dealers (even those who are licensed in other jurisdictions) from licensure.


Lastly, Petitioner argued that the requirement for licensure was anti-competitive and unnecessarily restrictive. These arguments concern matters of policy and are not within the purview of this hearing.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent’s Motion for Summary Judgment is granted and,

IT IS HEREBY ORDERED that the above-entitled matter is dismissed.

DATED: Honolulu, Hawaii, MAR 17 2003_____.



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

TWO (2) 4x2, 1/2-TON PICKUP TRUCKS WITH EXTENDED CAB

F.O.B.: WAILUKU COUNTY PUBLIC WORKS BASEYARD

YEAR: 2003 MAKE & MODEL: CHEVROLET CC15753

COST PER PICKUP TRUCK	\$ <u>20,894⁰⁰</u>	INC.
NET TOTAL OUTRIGHT PURCHASE PRICE FOR (2) PICKUP TRUCKS WITH EXTENDED CAB	\$ <u>41,788⁰⁰</u>	Excise TA

DEDUCTIVE OPTION: (cost per vehicle)

RUSTPROOFING \$ (250⁰⁰)

DELIVERY SHALL BE MADE WITHIN 90 CALENDAR DAYS FROM THE "NOTICE TO PROCEED" ISSUED BY THE DIRECTOR OF FINANCE.

EPA ESTIMATED MPG:

<u>17</u>	CITY
<u>20</u>	HIGHWAY
<u>18</u>	AVERAGE



MARK OF EXCELLENCE
AWARD WINNER

MONTE G. MEDEIROS
COMMERCIAL SALES PROFESSIONAL

HARRY MARX CHEVROLET
CADILLAC
720 BEARCAT CT.
MILROY, CA 95020

PHONE (408) 842-9301
FAX (408) 846-0947
TOLL FREE (877) 292-MARX

copy

The undersigned shall acknowledge receipt of any addendum issued by the Department of Finance by recording in the spaces below the date of receipt.

Addendum No. 1 N/A

Addendum No. 3 N/A

Addendum No. 2 N/A

Addendum No. 4 N/A

Respectfully submitted,

HARRY MARX CHEV.
NAME OF FIRM**

Monte Medeiros
SIGNATURE OF BIDDER**

6720 BEARCAT CT.
ADDRESS OF FIRM

MONTE MEDEIROS
PRINT OR TYPE NAME OF BIDDER

408 842-9301 408 846-0947
TELEPHONE & FACSIMILE NUMBER

COMM. TRUCK MGR.
PRINT OR TYPE TITLE OF BIDDER

12-17-02
DATE SIGNED

MVB-379-2
STATE OF HAWAII MOTOR VEHICLE
DEALER LICENSE NO. (SEE ATTACHMENT) ①

941558295
FEDERAL ID/SOCIAL SECURITY NO.
(FEDERAL ID No. for Partnerships and Corporations only)

HAWAII STATE GENERAL EXCISE TAX LICENSE NUMBER 20110356

PLEASE SPECIFY TYPE OF ORGANIZATION:

INDIVIDUAL _____ PARTNERSHIP _____ CORPORATION X

STATE OF INCORPORATION: HAWAII _____

OTHER _____ PLEASE SPECIFY

** If Corporation, please attach to this page your corporate seal; also evidence of the authority of this officer to submit a bid on behalf of the corporation. Such authority must be in the form of a corporate resolution. Give also the names and addresses of the officers of the corporation.

(SEAL)

HARRY MARX CHEVROLET

December 18, 2002

**DIRECTOR OF FINANCE
COUNTY OF MAUI
WAILUKU, MAUI, HAWAII**

RE: IFB #02-03/P-24

WE ARE A FRANCHISED DEALER IN THE STATE OF CALIFORNIA.

**AS PART OF OUR DEALER AGREEMENT WITH GENERAL MOTORS
WE CAN ENTER INTO CONTRACTS WITH FEDERAL, STATE AND
MUNICIPAL GOVERNMENT AGENCIES.**

**THE GENERAL MOTORS FRANCHISE DEALER ON THE ISLAND OF
OF MAUI IS THE "CUTTER AUTOMOTIVE GROUP".**

**AS AN "OUT OF STATE BIDDER" AND TO COMPLY WITH
HRS 437-2 WE WILL BE USING THE "CUTTER AUTOMOTIVE
AUTOMOTIVE GROUP", AND THEIR LICENSE NUMBER.
(STATE OF HAWAII LICENSE #MVB-379-2).**

**TO COMPLY WITH GENERAL MOTORS FRANCHISE DEALER
AGREEMENT "THE CUTTER AUTOMOTIVE GROUP"
WILL PROVIDE ALL WARRANTY AND SERVICE NEEDS OF THESE
GENERAL MOTORS VEHICLES.**

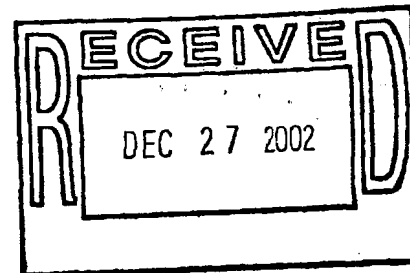
**WE COMPLY WITH THE NEWEST PROCUREMENT CODE, HRS,
CHAPTER 103-D, ANY RULES AND REGULATION AND POLICY
DIRECTIVES ISSUED WITH RESPECT TO CHAPTER 103-D AND
ANY AMENDMENTS THEREOF.**

**AS AN "OUT OF STATE BIDDER" WE MEET ALL OF YOUR
GENERAL TERMS AND CONDITIONS OF CONTRACTS FOR
SUPPLIES, MATERIAL, EQUIPMENT AND SERVICE FOR
COUNTY OF MAUI. SECTION (2.30)**



COUNTY OF MAUI
DEPARTMENT OF FINANCE

200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793



December 20, 2002

Monte Medeiros
Harry Marx Chevrolet/Cadillac
6720 Bearcat Ct.
Gilroy, CA. 95020

Dear Mr. Medeiros,

Re: IFB No. 02-03/P24 - Furnishing and Delivery of two (2) 4x4 ½ ton pickup truck

The County of Maui is rejecting your bid as being non-responsive in accordance with Section 3-122-97 of the Hawaii Administrative Rules, for the following reasons:

1. It is the position of the County of Maui that all vehicles dealers must hold a dealer license from the State of Hawaii in accordance with HRS Chapter 437. The County of Maui continues to have no evidence that Harry Marx Chevrolet holds a valid State of Hawaii dealer license.
2. There is no evidence that the Cutter Automotive Group has agreed to allow you to use their license number to sell vehicles in the State of Hawaii. Even if there were, the legality of "borrowing" a license is questionable, and we most likely would require that the contract be issued to the same entity as the license holder.

The County of Maui urges you to either:

1. Obtain a license under HRS Chapter 437 prior to submitting any more bids.
2. File a complaint with the Department of Commerce and Consumer Affairs.

Failure to do so may result in our returning future bids to you unopened. Thank you for your cooperation. If you have any questions, please feel free to call Greg King, Purchasing Agent, at 270-7488.

Sincerely,

A handwritten signature in black ink, appearing to read "Wesley Lo".

Wesley Lo
Director of Finance

c: Ken Bissen, Department of Water Supply
Mark Au, State Ombudsman Office