



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of	)	PCH-2005-7
	)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND ORDER GRANTING
vs.	)	IN PART AND DENYING
	)	IN PART RESPONDENT'S
MARY PATRICIA WATERHOUSE,	)	MOTION FOR SUMMARY
DIRECTOR, DEPARTMENT OF BUDGET	)	JUDGMENT
AND FISCAL SERVICES, CITY AND	)	
COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	
_____	)	

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER GRANTING IN PART  
AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On August 26, 2005, Stoneridge Recoveries, LLC ("Petitioner"), filed a request for administrative review of the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") August 22, 2005 decision to deny Petitioner's July 8, 2005 protest. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On October 10, 2005, Respondent filed a motion for summary judgment. Petitioner filed its response to the motion on October 18, 2005 and Respondent filed a reply brief on October 24, 2005.

On November 17, 2005, Respondent's motion came on for hearing before the undersigned Hearings Officer with Mark S. Kawata, Esq. appearing for Petitioner and Amy R. Kondo, Esq. appearing for Respondent. After considering the argument of counsel in light of the

files herein, and good cause appearing therefrom; the Hearings Officer renders the following findings of fact, conclusions of law, and order.

## II. FINDINGS OF FACT

1. In or about February 2005, Respondent issued an invitation for bids designated as Bid Proposal No. 14591 for Towing Services for Zone III-IV-V (“IFB”).<sup>1</sup> According to the IFB, bids would be received up to February 28, 2005.

2. By letter dated February 25, 2005, Petitioner submitted a protest in connection with the IFB. As a result of the protest, Respondent issued Addendum No. 2 to the IFB postponing the February 28, 2005 bid opening time and date indefinitely.

3. By letter dated April 7, 2005, Respondent denied Petitioner’s protest and on April 14, 2005, Petitioner filed a request for administrative review of Respondent’s denial. This matter was designated as PCH-2005-5.

4. In or about May 2005, Petitioner withdrew its request for administrative review in PCH-2005-5.

5. On May 6, 2005, Respondent issued Addendum No. 3 to the IFB which, among other things, rescheduled the bid opening time and date to May 20, 2005.

6. On or about May 18, 2005, Respondent received a letter from Brian Kunishige, President of Oahu Auto Service Inc. (“Oahu Auto Service”). The letter provided in part:

This letter is to notify the City and County of Honolulu that discrepancies/conflicts exist in the referenced proposal and the Revised Ordinance of Honolulu. The first noted discrepancy is on page 19 of the Specifications, Section 34, Unclaimed Vehicles. The second to the last paragraph states that “In the event the unclaimed vehicles clear auction process without any buyer, the City will pay the Contractor for the unclaimed vehicles in accordance with Section 35 herein. **The contractor shall then immediately dispose of the vehicle as a junk in accordance with Section 342H of HRS** (Emphasis added).

This is in direct violation of Section 15-13.10, Authority to Dispose of Unclaimed Vehicles, Revised Ordinances of Honolulu which states in part “In the event that no bid is received, the director of finance shall offer such vehicle to the division of automotive equipment services of the city and county for its use or salvage; **and in the event said division rejects such offer, the director of finance shall dispose of such vehicle at the expense of the city and county.**” (Emphasis added).

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<sup>1</sup> The IFB includes a comprehensive set of Specifications.

I know that the present tow zone contractors are not disposing of the unclaimed vehicles in accordance with the specifications. Most of them are giving the vehicles away and many of the vehicles are ending up on the streets as derelicts or abandoned whereby costing the city more money. What is most significant is that the city is violating its own ordinance.

What is also concerning is that it can significantly affect the bid if seriously factored in by the bidders. The bid amount would be significantly low since the contractor has to pay the DOH permitted contractor over \$150 for each vehicle for disposal. In fact, it may result in the city paying the contractor instead of the contractor paying a monthly premium.

Another discrepancy that I want to point out is the location of the storage lot. Since the storage location is now permitted to be outside of the zones but the boundary of the zone is unchanged, a bidder who has a lot outside of the zones would have a significant advantage since he can bid higher due to increased revenues from more mileage plus an additional extended 10 minutes of response time. This is unfair and favors bidders that have lots outside the zones. Therefore the playing field is not even and is a disadvantage to a contractor possessing a storage lot within the zones. I would request that the mileage only be charged up to the boundary of the zones.

\* \* \* \*

7. On May 19, 2005, Respondent issued Addendum No. 4 to the IFB informing prospective bidders that the “bid opening time and date, scheduled for “2:00 p.m. on May 20, 2005” is hereby postponed indefinitely.”

8. By letter dated July 1, 2005, Respondent informed Oahu Auto Service of its intent to “issue an addendum to the bid proposal document” making the following changes:

1. In the event no bid is received for an unclaimed vehicle, the City shall dispose of such vehicle at the expense of the City.
2. Mileage only may be charged from the scene of pick-up to the boundary of the tow zones.

9. On July 1, 2005, Respondent issued Addendum No. 5 to the IFB. Among other things, Addendum No. 5 made the following changes:

- a. Rescheduled the bid opening time and date to 2:00 p.m. on July 22, 2005;

b. Amended the term of the agreement to run from September 1, 2005 to July 31, 2007;

c. Revised subsection c of Section 14 of the Specifications, "TOWING AND STORAGE RATES" to add the following limitation regarding the mileage chargeable to storage lots located outside of the tow zone boundaries:

The mileage charge specified herein shall apply to the towing distance from the pickup point of the vehicle to the storage lot for the contracted zone or to a location as directed by the owner/driver of the vehicle, whichever distance is greater, provided that the storage lot is located within the tow zone boundaries as described in Section 2, DESCRIPTION OF TOWING SERVICE AREAS, of the Specifications. In the event the storage lot is located outside of the tow zone boundaries as described in Section 2 of the Specifications, but within the storage lot designated boundaries as described in Section 10, STORAGE LOT, of the Specifications, the mileage charge shall be limited up to the tow zone boundaries, and not to the location of the storage lot, unless the owner/driver of the vehicle directs the Contractor to tow the vehicle outside of the tow zone boundaries. Mileage charge shall not be for a round trip.

d. Replaced the last two paragraphs of Section 34 of the Specifications, UNCLAIMED VEHICLES, which set forth the process by which unclaimed vehicles are disposed of, either by sale to a private party, salvaging or recycling vendor, or the towing contractor, or by disposal as a junk, with the following language:

In the event the unclaimed vehicles clear the auction process without any buyer, the City will pay the Contractor for the unclaimed vehicle in accordance with Section 35 herein and the City shall be responsible for removing and disposing of the vehicle.

10. By letter dated July 8, 2005, Petitioner lodged a protest with Respondent concerning the IFB and Addendum No. 5.

11. By letter dated August 22, 2005, Respondent denied Petitioner's July 8, 2005 protest.

12. On August 26, 2005, Petitioner filed the instant request for administrative review of Respondent's denial of Petitioner's July 8, 2005 protest.

### 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.

According to Petitioner, this action is based on the following claims:

1. The liquidated damages provision of the IFB, as set forth in Section 5 of the Specifications, is unfair to prospective bidders insofar as it lacks a process that allows bidders to contest the assessment of such damages;
2. The Specifications, as amended, favors Oahu Auto Service over all other prospective bidders insofar as it disallows mileage charges beyond the tow zone;
3. Respondent acted in bad faith in amending the Specifications to disallow mileage charges beyond the tow zone; and
4. Respondent's revision of Section 34 of the Specifications that "[i]n the event the unclaimed vehicles clear the auction process without any buyer, the City will pay the Contractor for the unclaimed vehicle in accordance with Section 35 herein and the City shall be responsible for removing and disposing of the vehicle", is contrary to Hawaii Revised Statutes Chapter 103D.

At the commencement of the hearing, Petitioner withdrew the claim premised upon Respondent's revision of Section 34 of the Specifications. The motion proceeded as to the remaining three claims.

Respondent contends that Petitioner's claim that the liquidated damages provision of the IFB is unfair to prospective bidders, is untimely and should therefore be dismissed. Respondent points out and Petitioner does not dispute that the liquidated damages provision was included in the Specifications of the IFB which was issued on February 17, 2005. Therefore, according to Respondent, Petitioner should have submitted its protest over the liquidated damages provision within 5 working days, by February 25, 2005, as required by HRS §103D-701(a). In response, Petitioner argues that the "July, 2005 bid is a new and different occasion, and separate from the previous ones." Apparently, Petitioner is taking the position that the issuance of Addendum No. 5 on July 1, 2005 constituted a separate solicitation that allows Petitioner to raise the claim within 5 working days from the issuance of that addendum. The Hearings Officer can find no legal basis to support this theory, particularly since Addendum No. 5 did not change or otherwise affect the liquidated damages provision of the IFB. HRS §103D-701(a) requires that protests be submitted within five working days "after the aggrieved person knows or should have known of the facts giving rise" to the protest. Here, the undisputed facts clearly establish that Petitioner knew or should have

known of the basis for this claim in February 2005 but did not raise it until July 8, 2005.

Consequently, this claim is time-barred.

Respondent also seeks summary judgment as to Petitioner's bad faith claim and claim that the Specifications, as amended by Addendum No. 5, unfairly favors Oahu Auto Service. Petitioner is apparently arguing that the change to the Specifications made by Addendum No. 5 which disallows mileage charges beyond the tow zone is unduly restrictive or otherwise contrary to Hawaii Administrative Rule ("HAR") §3-122, Subchapter 3; and that Respondent, through an employee, Charles Katsuyoshi, recklessly disregarded clearly applicable laws and rules in making that change. See HAR §3-126-36(c). In support of those claims, Petitioner alleges that (1) less than 2 days after receiving the May 18, 2005 letter from Oahu Auto Service, Respondent cancelled the May 20, 2005 bid opening and subsequently issued Addendum No. 5 which, among other things, disallows mileage charges beyond the tow zone; and (2) Respondent issued Addendum No. 5 even though it was aware that no prospective bidder except Oahu Auto Service had a storage lot within the applicable tow zone.

After careful consideration of the record, the Hearings Officer concludes that a genuine issue of material fact exists as to whether the disallowance of the mileage charges beyond the tow zone boundary, as set forth in Addendum No. 5, is consistent with HAR §3-122, Subchapter 3. On the other hand, Petitioner has failed to demonstrate specific facts to support its charge that Katsuyoshi<sup>2</sup> was involved to any extent with the preparation or issuance of Addendum No. 5. Rather, Petitioner's allegations of bad faith are wholly speculative and insufficient to raise a genuine issue of material fact for hearing. Accordingly, Respondent's motion is granted as to Petitioner's bad faith claim and denied as to the claim that the disallowance of mileage charges beyond the tow zone is contrary to HAR §3-122, Subchapter 3.

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<sup>2</sup> Petitioner's claim, as set forth in its protest, that Respondent acted in bad faith was based upon and limited to Katsuyoshi's alleged "role in the solicitation and change to specifications":

- (E) Stoneridge believes that the instant facts demonstrate bad faith. In order to get to the heart of the matter Stoneridge recommends and requests that the City conduct an investigation into Katsuyoshi's role in the solicitation and change to specifications. To the extent that Katsuyoshi participated at all, any findings or changes should be invalidated.

During oral argument, Petitioner's counsel attempted to enlarge the scope of its bad faith claim by asserting, for the first time, that the claim was not necessarily limited to the actions of Katsuyoshi but also, may be based upon the actions of other, unidentified City employees. In order for the Hearings Officer to review this claim, Petitioner must have first raised the issue in a timely protest. Because it failed to do so, Petitioner is barred from raising this issue here. See *Akal Security, Inc. v. Dept. of Transportation*, PCH-2004-10 (August 23, 2004). See also, *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH-98-6 (December 9, 1998)(the government is not required to assume or speculate as to the basis for a protest). Petitioner's last minute attempt to enlarge its claim also evidences the speculative nature of that claim.

IV. ORDER

Based on the foregoing considerations, Respondent's Motion for Summary Judgment is granted as to the liquidated damages and bad faith claims and denied as to Petitioner's claim that the disallowance of mileage charges beyond the tow zone is contrary to HAR §3-122, Subchapter 3.

Dated at Honolulu, Hawaii: DEC - 6 2005.



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