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HEARINGS OFFICE

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

In the Matter of	)	PCH-96-2
	)	
ELITE TRANSPORTATION	)	FINAL ORDER GRANTING
COMPANY, INC.,	)	RESPONDENT'S MOTION TO DISMISS
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
STATE OF HAWAII, DEPARTMENT	)	
OF TRANSPORTATION,	)	
	)	
Respondent.	)	

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FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

This matter having come on for hearing on January 30, 1997, with Respondent represented by Lane T. Ishida, Esq., and Petitioner represented by David J. Gierlach, Esq., to consider Respondent's Motion to Dismiss, which moved that the Petitioner's protest be dismissed for the Hearings Officer's lack of jurisdiction over the matter in dispute. The Hearings Officer, having reviewed the pleadings of the parties and having considered the arguments of counsels in light of the entire record in this matter hereby renders the following Findings of Fact, Conclusions of Law and Final Order.

II. FINDINGS OF FACT

1. By letter dated September 15, 1995, addressed to the Board of Land and Natural Resources, State of Hawaii ("BLNR"), Respondent,

requested and received approval to advertise a request for proposal for the purpose of providing nonexclusive right and obligation to operate taxicab services at the Honolulu International Airport, Honolulu, Island of Oahu.

2. Respondent, pursuant to the authorization received from the BLNR issued a request for proposal entitled REQUEST FOR PROPOSAL DOCUMENTS RELATING TO THE OPERATION OF THE TAXICAB SERVICES AT HONOLULU INTERNATIONAL AIRPORT, HONOLULU, ISLAND OF OAHU, and designated LEASE NO. DOT-A-96-0006 ("RFP Lease No. DOT-A-96-0006"), by advertising the same in the Honolulu Advertiser on October 5, 6, and 7, 1995. The deadline for submission of proposals was set at 2:00 p.m., November 6, 1995.

3. By letter dated December 11, 1995, Respondent notified SIDA of Hawaii, who had submitted a proposal, that it was the successful awardee of the Taxi Management Contract for Honolulu International Airport, Island of Oahu, Lease No. DOT-A-96-0006 ("Contract Lease No. DOT-A-96-0006").

4. By letter dated December 15, 1995, Petitioner, who also submitted a proposal, filed a protest with Respondent objecting to the award of Contract Lease No. DOT-A-96-0006 to SIDA of Hawaii.

5. By letter dated December 18, 1995, the Manager, Honolulu International Airport, on behalf of the Airports Division, Oahu District, Department of Transportation, State of Hawaii, acknowledged Petitioner's protest of the award of contract for taxi management at Honolulu International Airport and informed Petitioner that pursuant to Hawaii Revised Statutes ("HRS") § 102-2(b), the bidding requirements of HRS § 102-2 did not apply to concessions or space on public property set aside for operation of ground transportation services at airports.

6. By letter dated January 5, 1996, addressed to Respondent, Petitioner notified Respondent that it appealed Respondent's decision stated in its letter of December 18, 1995, and requested an administrative hearing

pursuant to Hawaii Administrative Rules ("HAR") Chapter 126, Subchapter 5, Administrative Proceedings for Review, which implemented the provisions of HRS Chapter 103D, Hawaii Procurement Code ("Procurement Code").

7. By letter dated January 25, 1996, Respondent informed SIDA of Hawaii that its proposal on RFP Lease No. DOT-A-96-0006 could not be accepted "due to legal inconsistencies", and that Contract Lease No. DOT-A-96-0006 that had been awarded to SIDA of Hawaii was thereby rescinded.

8. The contract which was the subject of the request for proposal granted the successful contractor the nonexclusive right to operate a taxicab management service at the Honolulu International Airport. In consideration therefor the successful contractor was required to pay Respondent an amount that was calculated upon the gross receipts of taxicab trip fees for taxicab service that originated from the airport. The assessment was to be at a rate of \$1.25 for each taxicab trip dispatched in response to a request by a customer seeking taxicab services originating at the Honolulu International Airport.

9. Under the terms of RFP Lease No. DOT-A-96-0006 the contractor was required to provide the general public with taxi service originating at the Honolulu International Airport by utilizing both its own and the independent fleet of taxicabs that met standards of service established by Respondent .

10. Respondent was not obligated to pay for the contractor's performance of Contract Lease No. DOT-A-96-0006.

11. Respondent was obligated to provide and maintain facilities at the Honolulu International Airport for the contractor's operation of the taxicab service program. These included such things as providing traffic control officers to assist the contractor in enforcing State rules and regulations, providing and maintaining staging or holding areas and curb side areas reserved for taxicabs awaiting customers, providing and installing an automatic vehicle

identification system if deemed necessary by the State, and providing dedicated radio frequencies for use by the contractor on the airport premises.

12. The fulfillment of these obligations by Respondent required Respondent to make certain acquisitions which were subject to the provisions of the Procurement Code.

### III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition of a matter may be granted where there is no genuine issue as to any material fact when the inferences to be drawn from the record are reviewed in the light most favorable to the party opposing the motion, and, the moving party is entitled to judgment as a matter of law. Hulsman v. Hemmeter Dev. Corp., 65 Haw 58 (1982). The Hearings Officer concludes that there is no genuine issue of any material fact presented in this matter.

Respondent contended in its Motion to Dismiss that the Hearings Officer lacked jurisdiction to address Petitioner's request for administrative hearing filed pursuant to provisions of the Procurement Code, since such provisions did not invest the Hearings Officer with jurisdiction to review protests relating to a request for proposal for a concession contract solicited pursuant to provisions of HRS Chapter 102, Concession On Public Property.

Hearings officers appointed by the Director, Department of Commerce and Consumer Affairs, pursuant to HRS § 103D-709(a):

... have jurisdiction to review and determine de novo any requests 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 under sections 103D-310, 103D-701, or 103D-702.

The Procurement Code governs all procurement contracts entered into by governmental bodies without regard to the form of the consideration that is given by the governmental body in the procurement of any good, service or

construction. HRS § 103D-102. The primary question to be determined here is whether RFP Lease No. DOT-A-96-0006 was for the procurement of any good, service or construction.

The term "procurement" is defined in HRS § 103D-104 as "buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction." (Emphasis added) Consequently, government contracts that are issued for the acquisition or obtaining of any good, service or construction for governmental purposes must comply with the provisions of the Procurement Code. ✓ On the other hand the provisions of Chapter 102, HRS, Concession On Public Property, were intended to be applicable to government contracts issued for the purpose of granting concessions on public property. In this regard, the term "concession" is defined in HRS § 102-1 as "the grant to a person of the privilege to conduct operations which are essentially retail in nature, involving the sale of goods, wares, merchandise, or services to the general public ...." (Emphasis added)

Petitioner asserted that the purpose of RFP Lease No. DOT-A-96-0006, which concerned the operation of taxicab services on the premises of the Honolulu International Airport, was to acquire the contractor's management service for governmental purpose and the expenditure of funds to acquire goods, services and construction to discharge Respondent's obligations under the contract. Respondent, however, contended, that the purpose of RFP Lease No. DOT-A-96-0006 was not to acquire or obtain goods, services or construction, but to grant a concession, which consisted of the privilege to operate a taxicab service to serve the general public on property set aside at the Honolulu International Airport for that purpose.

Petitioner in support of its proposition referred to the provisions of RFP Lease No. DOT-A-96-0006, which by its Instructions To Proposers, Item 8, Description Of The Services Desired, provided:

This request for proposal is being issued in order to secure the services of a management entity which will oversee the operation of an open, walk-up

taxi system at the airport. It is the interest of the State that taxi services be of high quality to meet the requirements of the travelling public in a manner which will be representative of the best level of service available in our local visitor industry.

In conjunction with such activities, the operator will be required to perform or provide the following types of services:

....

The organization selected to manage the airport program will be expected to work closely with the State, airport tenants, other ground transportation providers, and all participating taxi drivers in the operation of the system to assure that a high degree of quality service is provided at all times.

Although the foregoing appears to support Petitioner's assertion that RFP Lease No. DOT-A-96-0006 was issued to acquire management services in the operation of a walk-up taxi system at the Honolulu International Airport, a close review of the terms of RFP Lease No. DOT-A-96-0006 revealed that in neither the Instructions To Proposers portion nor in Appendix B General Terms And Conditions of the contract to be executed with the successful offeror, was there a provision or reference to any consideration passing from Respondent to the contractor for the latter's "management services." Instead, the successful contractor who was granted the privilege to operate the taxicab management services on the Honolulu International Airport premises became obligated to pay Respondent an amount calculated upon the gross receipts of taxicab trip fees from all taxicab trips originating from the airport, assessed at the rate of \$1.25 for each trip dispatched in response to a customer's request for taxicab service. It is apparent from the foregoing that the purpose of RFP Lease No. DOT-A-96-0006 was to grant a privilege for a consideration and not to acquire management services per se. The management service that the contractor would perform would be incidental to the contractor's conduct of its business of the retail selling of taxicab services to the general public and to conduct such business in a

manner that met the high standard of service required by the terms of Contract Lease No. DOT-A-96-0006.

Respondent's expenditure of funds to acquire goods, services or construction in discharging its obligations under Contract Lease No. DOT-A-96-0006 did not require that the funds expended be paid to the taxicab service contractor. Contrary to Petitioner's assertion, the logical and reasonable interpretation of the terms and conditions of the contract would be that the provisions contemplated Respondent's expenditure of funds to acquire such goods, services and construction to be accomplished by entering into separate ancillary procurement contracts processed pursuant to the provisions of the Procurement Code.

The situation presented in this matter was no different than a situation wherein a landlord enters into a business lease agreement with a shopkeeper, and the landlord agrees to remodel, refurnish and/or maintain the rented premises in a certain condition for the benefit of the shopkeeper/tenant in consideration for the payment of rent.


In summary, the Hearings Officer concludes that RFP Lease No. DOT-A-96-0006, relating to the operation of taxicab services at the Honolulu International Airport was not a contract for the procurement of good, service or construction that would be subject to the provisions of the Procurement Code, but, was, instead, a contract to grant a concession and was governed by the provisions of HRS Chapter 102. Consequently, the Hearings Officer further concludes that since the provisions of the Procurement Code were inapplicable to the subject request for proposal a hearings officer designated pursuant to provisions of the Procurement Code, had no jurisdiction to review Petitioner's protest of RFP Lease No. DOT-A-96-0006, a request for proposal concerning a contract to grant a concession.

Accordingly, Respondent's motion to dismiss for lack of jurisdiction by the Hearings Officer should be granted.

IV. FINAL ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, for good cause shown, Respondent's motion to dismiss is granted, and IT IS HEREBY ORDERED that the above-entitled matter is dismissed.

DATED: Honolulu, Hawaii, MAY 21 1997

  
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GEORGE M. NAKANO  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs