



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

In the Matter of	)	PDH 2014-007
	)	
AMEL TECHNOLOGIES, INC.,	)	HEARINGS OFFICER'S FINAL ORDER
	)	GRANTING RESPONDENT'S MOTION
Petitioner,	)	TO DISMISS
	)	
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
KYA DESIGN GROUP,	)	
	)	
Intervenor.	)	

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HEARINGS OFFICER'S FINAL ORDER  
GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On May 2, 2014, AMEL Technologies, Inc. ("Petitioner") by and through its President Melek Yalcintas filed a request for an administrative hearing to contest the Department of Transportation, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. The pre-hearing conference was set for May 8, 2014 and the hearing was scheduled for May 22, 2014.

On May 5, 2014, KYA Design Group, by and through its attorney Maria Y. Wang, Esq. filed a Motion to Intervene. On May 7, 2014, KYA Design Group filed a Motion to Dismiss and a Response to Petitioner's request for hearing. Respondent, by and through its attorney Laura Y. Kim, Esq. filed a response to Petitioner's request for hearing on May 7, 2014. On May 8, 2014, Petitioner filed a Motion to Hold Request for hearing filed May 2, 2014.

At the pre-hearing conference on May 8, 2014, which was attended by Dr. Melek Yalcintas and Dr. Abidin Kaya for Petitioners, Ms. Kim for Respondent and Lex R. Smith, Esq. for KYA Design Group, the parties agreed that a hearing on the Motion to Intervene would be held on May 13, 2014. The parties also agreed that motions would be filed by May 12, 2014, memoranda in opposition to the motions would be filed on May 15, 2014 and reply memoranda could be filed by May 16, 2014. A hearing on the motions filed was scheduled for May 19, 2014.

On May 12, 2014, Respondent filed a Motion for Summary Judgment. On May 13, 2014, Petitioner filed a Motion to Hold Request for Hearing filed May 2, 2014 and Dismiss KYA Design Group and DOT Motion to Dismiss the Hearing.

On May 13, 2014, the hearing was held on the Motion to Intervene. Petitioner was represented by Dr. Kaya, KYA Design Group was represented by Ms. Wang and Respondent was represented by Ms. Kim. The matter was taken under advisement. An Order Granting Motion to Intervene was issued on May 13, 2014.

On May 15, 2014, the Hearings Officer sent a letter to the parties asking them to address the issue of whether a protest or cash bond was required. Responses were due by 10:00 a.m., May 19, 2014. On May 16, 2014, Petitioner filed a response addressing the bond issue. On May 19, 2014, Intervenor filed a memorandum regarding Petitioner's failure to submit a bond and confirmed Petitioner's position that the bond requirement did not apply to solicitations for professional services. On May 19, 2014, Respondent filed a Joinder to Intervenor's memorandum.

On May 16, 2014, Intervenor filed a Reply in Support of its Motion to Dismiss and a joinder to Respondent's Motion for Summary Judgment. On May 18, 2014, Petitioner faxed its Motion to Hold Request for Hearing filed on May 12, 2014 and May 16, 2014.

On May 19, 2014, a hearing on the Motion to Dismiss and Motion for Summary Judgment was conducted by the undersigned Hearings Officer. Petitioner was represented by Dr. Kaya. Respondent was represented by Ms. Kim and Intervenor was represented by Ms. Wang. The matter was taken under advisement. By a letter dated May 20, 2014, the parties were notified that Intervenor's Motion to Dismiss was granted and that a written decision would be issued on or before June 16, 2014.

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 final order granting the Motion to Dismiss.

## II. FINDINGS OF FACT

1. On August 19, 2013, Respondent posted a Notice to Providers of Professional Services seeking qualified architectural and/or general engineering firms to provide services for the "HNL Sustainable Management Plan" project at Honolulu International Airport, State Project No. AO1014-01 ("Project"). Responses were due on September 20, 2013. Responses were to be evaluated by the following criteria:

Experience and professional qualifications relevant to the project – 35%

Past performance on projects of similar scope for public agencies or private industry, including corrective actions and other responses to notices of deficiencies – 33%

Capacity to accomplish the work in the required time – 32%

The Notice also stated that Respondent, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252) and the Regulations of the U.S. Department of Transportation (Title 49, Code of Federal Regulations Part 21) issued pursuant to such Act, hereby notified all firms that it "will affirmatively ensure that the contract entered into pursuant to this advertisement will be awarded without discrimination on the grounds of race, color, national origin or sex."

2. Eleven firms timely responded to the Notice. Intervenor was ranked first and Petitioner was ranked third. By a letter dated November 8, 2013, Intervenor was notified that

it had been selected for the project subject to reaching a mutual agreement on fees and contract terms.

3. The contract was awarded to Intervenor on December 27, 2013. The award was posted on January 2, 2014.

4. According to the Quick Reference: Posting Procurement Awards, Notices and Solicitations, which was attached to the State Procurement Office's Procurement Circular No. 2010-01 dated June 15, 2010, awards regarding professional services should be posted within seven (7) days after notice of award.

5. On January 27, 2014, Respondent and Intervenor executed a contract for the Project.

6. On January 27, 2014, Petitioner emailed Respondent stating that it had not received notification from Respondent and asked whether the Project was still under consideration. Respondent emailed a response stating that a consultant for the Project had been selected and unfortunately, Petitioner was not selected. Petitioner was informed that the award had been posted on the website and the contract was in the process of being executed. Petitioner was also informed that Respondent intended to notify the other consultants of their non-selection after the contract is executed because if the contract is not executed, Respondent would need to start negotiations with the next ranked consultant. Respondent notified Petitioner of its non-selection on February 21, 2014.

7. On January 27, 2014, Petitioner asked for a debriefing with Respondent.

8. The debriefing was held on February 4, 2014 and was concluded on February 25, 2014. Petitioner was not told that Respondent had signed a contract with Intervenor on January 27, 2014.

9. By a letter dated March 3, 2014, Petitioner protested the award to Intervenor. This letter states in part:

I am writing this letter:

1. To ask you and other officials to end the ongoing Hawaii DOT's discrimination against women and minorities, and
2. To protest the subject award as my company was evaluated unfairly both professionally and technically. The falsely adapted evaluation system for professional qualifications unfairly awards the contract to very same companies all the time! The falsely adapted system discriminates firms

(sic) that do not have prior experience with DOT-A regardless the firm's professional and technical qualification for the required services.

...

We must note for the record that we have nothing against KYA Design Group or InSynergy Engineering, Inc. However, we state that there are other qualified firms need (sic) opportunities.

In short, we respectfully demand the following:

1. Eliminate discrimination against minority and women owned business immediately
2. Create opportunity for DBE firms to compete (sic) equally and fairly
3. Cancel the awarded project and reevaluate the qualifications of AMEL for the subject contract.

10. By a letter dated April 24, 2014, which was issued on April 25, 2014, Respondent denied Petitioner's protest. This letter states in part:

Nevertheless we have reviewed your claims of discrimination. Based on our review, we have found no purposeful or intentional discrimination on the basis of race, ethnicity, or gender, and no disparate treatment by the DOT based on AMEL being all women or minority owned.

...

Even if your claims of discrimination are substantiated (which the DOT denies), the authority of the hearings officers appointed by the director of the Hawaii Department of Commerce and Consumer Affairs ("DCCA") does not extend to the ability to 'eliminate discrimination against minority and women owned businesses.'

...

AMEL has submitted its complaint to the wrong forum. Any person who believes that the DOT has failed to comply with its obligations under 49 CFR Part 26 must file a written complaint with, in this case, the Operating Administration's Office of Civil Rights of the Federal Aviation Administration ('FAA').

...

AMEL ranked third...AMEL lacks standing to protest any contract award...Protestors who do not have a realistic expectation of being selected do not qualify as an aggrieved protestor. AMEL does not have a realistic expectation of being selected.

...

The award to KYA Design Group was posted on December 27, 2013. AMEL did not ask for a debriefing until January 27, 2014. Hawaii Administrative Rules § 3-122-70 requires a written request for debriefing to be made within three working days after the posting of the award of the contract. AMEL failed to do so. AMEL's protest is untimely.

11. On May 2, 2014, Petitioner filed a request for administrative review of Respondent's denial of its protest with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("DCCA").

### 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).

Intervenor's Motion is based on the assertion that Petitioner's protest of its non-selection was untimely because it did not ask for a debriefing within three working days after the award of the contract was posted. Petitioner asserts that because Respondent granted a debriefing, its protest is timely because it was filed within five business days after the close of the debriefing.

Hawaii Revised Statutes ("HRS") § 103D-304(k) provides:

**§ 103D-304 Procurement of professional services.**

...

(k) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement

officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing was completed.

Hawaii Administrative Rules (“HAR”) § 3-122-70 provides:

**§ 3-122-70 Debriefing.** (a) The purpose of a debriefing is to inform providers of professional services the basis for non-selection.

- (1) A written request for a debriefing shall be made within three working days after the posting of the award of the contract.
- (2) Debriefing shall be held by the procurement officer or designee, to the maximum extent practicable, within seven working days; provided the procurement officer or designee may determine whether or not to conduct individual or combined debriefings.
  - (b) A protest by the requestor submitted pursuant to section 103D-701, HRS following a debriefing shall be filed within five working days, as specified in section 103D-304(k), HRS.

The evidence presented showed that the award for the Project was posted on January 2, 2014 and accordingly, pursuant to HRS § 103D-304(k) and HAR § 3-122-70, any request for debriefing should have been filed by January 7, 2014. However, because Respondent granted Petitioner’s January 27, 2014 request for a debriefing, Petitioner argues that its protest is timely because the protest was filed within five working days after the debriefing was completed. Based on the evidence presented, the Hearings Officer finds that Petitioner’s protest is untimely as Petitioner’s request for debriefing was not made within three working days after the posting of the award of the contract. Respondent’s granting of Petitioner’s late request for a debriefing does not give Petitioner the basis to file a protest because Petitioner cannot rely on HRS § 103D-304(k) and HAR § 3-122-70 as the basis for filing a protest if it did not comply with the initial requirement of filing a request for debriefing within three working days after the posting of the award of the contract. This conclusion is consistent

with the Procurement Code's purpose of "expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance." *GTE Hawaiian Telephone Company, Incorporated v. Department of Finance, County of Maui*, PCH 98-6 (December 9, 1998).

Petitioner also argued that Respondent deliberately did not tell Petitioner that it had not been selected or have a standard policy on how to inform bidders or offerors that they were not selected and that the State Procurement Office's website was set up in a way that made it difficult to determine if an award was issued for a project. Even assuming that these arguments have a basis in fact, it is Petitioner's responsibility to determine if an award has been posted for projects it has submitted proposals for, and Respondent is not required to send nonselected providers notices. *See, Alii Security Systems, Inc. v. Department of Transportation, State of Hawaii*, PCY 2012-2 (February 24, 2012). In *Alii*, the protestor made arguments similar to those being made in the case at bar and those arguments were found to be unconvincing. Accordingly, the Hearings Officer concludes that Petitioner's protest was untimely and DCCA does not have jurisdiction to hear this matter.

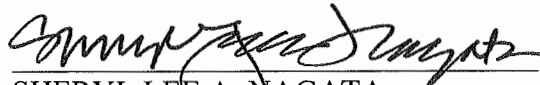
In light of the findings and conclusions above, the Hearings Officer declines to discuss or make determinations on other issues raised by Petitioner. The granting of Intervenor's Motion to Dismiss renders Respondent/Intervenor's Motion for Summary Judgment moot.

#### IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Intervenor'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, JUN 9 - 2014.

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