DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

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| In the Matter of | ) | PCH-95-1 |
| | ) | |
| MAKAKILO RETROFIT | ) | FINDINGS OF FACT, |
| PILOT PROJECT, | ) | CONCLUSIONS OF LAW |
| | ) | AND DECISION |
| Petitioner. | ) | |
| | ) | |

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

## I. CHRONOLOGY OF CASE

By a letter dated January 11, 1995, William W. Milks, attorney for Jordan & Company ("Petitioner") submitted a request to the Director of Finance of the City and County of Honolulu ("Respondent") for an administrative hearing to contest the rejection of Petitioner's bid to coordinate, furnish and install water conserving fixtures in thousands of Makakilo residences as part of a pilot project to assess the effectiveness of these water saving devices. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") § 103D-709 and Hawaii Administrative Rules ("HAR") § 3-126-42.

On January 17, 1995, Russell W. Miyake, Director of Finance, City and County of Honolulu, transmitted Petitioner's request for hearing to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii.

The matter was set for hearing, and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. The hearing scheduled for February 1, 1995 was continued to February 16, 1995 by agreement of the parties.

On February 15, 1995, Petitioner's attorney informed Respondent and the Hearings Officer that Barbara Jordan, proprietor of Petitioner and its principal witness, was confined to a Florida hotel room with an acute back injury, and was therefore unable to attend the hearing scheduled for the next day. Accordingly, Petitioner requested that the hearing occur no sooner than February 27, 1995. Respondent did not agree to continue the hearing.

On February 15, 1995, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer. Petitioner was represented by Mr. Milks. Respondent was represented by T. Lowell Wolf, Deputy Corporation Counsel. Prior to the hearing on the merits, Petitioner moved to continue the hearing, citing the unavailability of Ms. Jordan. Respondent opposed the motion and moved to dismiss this matter on the basis that Petitioner had failed to prosecute his request for hearings relief. After reviewing and considering the arguments presented at the hearing, the Hearings Officer granted Petitioner's Motion and rescheduled the hearing to March 1, 1995.

On March 1, 1995, the hearing was reconvened by the undersigned Hearings Officer. Ms. Jordan appeared on behalf of Petitioner and Petitioner was represented by its attorney Mr. Milks. Charles Katsuyoshi, Purchasing Administrator, Department of Finance, City and County of Honolulu, and Howard Tanaka, Project Manager, Water Conservation Section, Board of Water Supply, City and County of Honolulu ("BWS") appeared on behalf of Respondent, and Respondent was represented by its attorney, Mr. Wolf.

On March 10, 1995, the parties filed their respective post-hearing memoranda and proposed findings of fact, conclusions of law and decision.

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

1. The Makakilo Retrofit Pilot Project, Job No. 95-6 ("Project") went out for competitive bid on June 14, 1994 by an Invitation for Bids ("IFB"). The objective of the solicitation was to coordinate, furnish and install ultra-low flush toilets, low flow showerheads and faucet aerators in approximately 3,335 homes in Makakilo. The BWS will collect data from these homes in order to assess the effectiveness of the water saving devices. (Respondent's Proposed Findings of Fact No. 1, modified).

2. Although the Project was determined to be a construction project, a standard provision in the Revised General Provisions of Construction Contracts for the City and County of Honolulu, which required that bidders have a Hawaii contractor's license was deleted from the IFB because Howard Tanaka, Project Manager of the BWS, determined that bidders did not have to be Hawaii licensed contractors as long as the subcontractor installing the fixtures had the proper Hawaii contractors license. Accordingly, mainland-based service providers experienced in the design and implementation of water conservation programs were invited to submit bids. (Petitioner's Proposed Findings of Fact No. 1, modified, and Respondent's Proposed Findings of Fact No. 2, modified).

3. Section 3.1 of the IFB, entitled "SCOPE OF WORK" provides:

> SCOPE OF WORK. The vendor shall provide the following:
>
> 1) Coordinate and schedule the installation of water conserving fixtures in the homes described in Section 2.

2) Provide a contact person and phone number for the contact person to coordinate any follow-up work which includes but is not limited to responding to complaints and responding to faulty installation for a period of one (1) year following the completion of the project.

3) In those single-family and multi-family homes that elect to have their homes refitted with water conserving fixtures, furnish and install the following:

a) Ultra-low flush toilet(s)...

b) Kitchen faucet aerator(s)...

c) Lavatory faucet aerator(s)...

d) Low-flow showerhead(s)...

4. Petitioner submitted a bid dated September 20, 1994. Petitioner did not have a Hawaii contractor's license at the time it submitted the bid. However, Petitioner's subcontractor, Action Plumbing, did have the proper contractor's license. (Respondent's Proposed Findings of Fact No. 3, modified).

5. The bids were opened on September 22, 1994. Petitioner's bid was the lowest bid submitted. In a telephone conversation with Barbara Jordan, Principal of Respondent, Mr. Tanaka, after confirming that the numbers in the bid were correct, stated that Petitioner was the "apparent low bidder" and that Ms. Jordan would be receiving the contract documents. According to Ms. Jordan, this conversation took place on September 27, 1994. (Respondent's Proposed Findings of Fact No. 3, modified).

6. After his conversation with Ms. Jordan, Mr. Tanaka prepared the award letter and requested that the contract documents be prepared. However, before Mr. Tanaka could send the award letter and contract

documents to Petitioner, Respondent received a bid protest from Alliance American Fire Protection, Inc. ("Alliance").

7. The Director of Finance received Alliance's bid protest on September 29, 1994. The protest complained that under HRS Chapter 444, a bidder for a construction project must possess a Hawaii contractor's license, and that therefore, the first three low bidders do not meet the requirements of the contractor's licensing laws. (Respondent's Proposed Findings of Fact No. 4, modified).

8. After receiving Alliance's bid protest, Mr. Tanaka called the Department of Commerce and Consumer Affairs, and spoke to June Kamioka, Executive Officer of the Contractors License Board. After explaining the scope of work required by the IFB, Mr. Tanaka was advised by Ms. Kamioka that a licensed bidder was required. Thereafter, by a memorandum dated October 12, 1994, Kazu Hayashida, Manager and Chief Engineer of the BWS requested advice from the Department of the Corporation Counsel, City and County of Honolulu. Mr. Hayashida believed that the BWS had three options: (1) award the contract to the lowest bidder because the bidder was not required to be a Hawaii licensed contractor, (2) award the contract to the lowest bidder who is licensed in Hawaii or (3) rebid the project.

9. Respondent, acting on advice of its counsel, determined that an award under the solicitation would violate HRS Chapter 444, and rejected all bids. Respondent also revised the IFB for a subsequent solicitation. (Respondent's Proposed Findings of Fact No. 5, modified).

10. By a letter dated November 7, 1994, the BWS informed Respondent that all bids had been rejected "because the contract documents does [sic] not meet the requirements of Chapter 444, Hawaii Revised Statutes (HRS). Chapter 444, HRS requires that we award construction contracts to bidders who have a contractor's license from the State of Hawaii. (Respondent's Proposed Findings of Fact No. 6, modified).

11. By a letter dated November 22, 1994, Ms. Jordan, on behalf of Petitioner, submitted a letter of protest. Petitioner claimed that it had entered into a contract with Respondent as a result ~~as a result~~ of a telephone conversation with Mr. Tanaka. (Respondent's Proposed Findings of Fact No. 7, modified).

12. By a letter dated December 9, 1994, Respondent informed Petitioner that it affirmed the BWS's rejection of all bids because the successful bidder, as a party to the contract, was undertaking and accepting responsibility for building improvements that required a contractor's license within the purview of Chapter 444, HRS.

13. By a letter dated December 22, 1994, Petitioner submitted a formal request for reconsideration to Respondent.

14. By a letter dated January 11, 1995, Petitioner requested an administrative hearing pursuant to HAR § 3-126-42.

15. Mr. Tanaka does not have authority to award a construction contract to Petitioner. (Respondent's Proposed Findings of Fact No. 8).

16. Respondent did not issue a notice to proceed to Petitioner, and Petitioner did not commence work on the Project. (Respondent's Proposed Findings of Fact Nos. 10 and 11, modified).

17. Petitioner's daughter, the project manager, affirmatively responded when she was instructed to relocate to Hawaii for a seven-month stint. Petitioner incurred at least $5,000.00 in the bid preparation process, up to and including the submission of the bid, including such factors as compensation for her time expended, facsimile transmissions, long distance phone calls, soliciting and confirming quotations from suppliers, and conducting correspondence and negotiations with the subcontractor. (Petitioner's Proposed Findings of Fact Nos. 8 and 11, modified).

18. Petitioner has been in business for four years and is in the environmental services business. Ms. Jordan has administered numerous

contracts on behalf of government agencies for whom she has been employed, and has also operated as a private contractor on behalf of public entities. (Petitioner's Proposed Findings of Fact No. 10, modified).

## III. CONCLUSIONS OF LAW

Petitioner contends that it is entitled to reimbursement for costs incurred with the solicitation because the rejection of all bids occurred after the contract was awarded to Petitioner. In the alternative, Petitioner contends that it should be awarded the contract because Respondent's rejection of its bid was improper because the Project was exempt from HRS Chapter 444 pursuant to HRS § 444-2(10). In order to prevail, Petitioner has the burden of proving by a preponderance of the evidence that Respondent's conduct was not in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract.

Based on the evidence presented, the Hearings Officer concludes that: (1) the contract was not awarded to Petitioner; (2) it was not improper for Respondent to reject all bids because the solicitation was in violation of HRS Chapter 444, and (3) Petitioner is not entitled to an award of the contract and/or costs incurred with the solicitation.

Hawaii Revised Statutes § 103D-302(h) provides in part:

> **§103D-302 Competitive sealed bidding.**
>
> . . .
>
> (h) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids[.]

Petitioner contends that Mr. Tanaka's conversation with Petitioner constituted an award of the contract. However, HRS § 103D-302(h) specifically

requires that a contract be awarded by written notice. Accordingly, the Hearings Officer concludes that the contract was not awarded to Petitioner, and consequently that Petitioner is not entitled to costs it incurred in connection with the solicitation.

Petitioner also contends that a Hawaii contractor's license was not required because the scope of work required by the IFB involved more than construction work, and therefore fell within the exemption provided in HRS § 444-2(10) which states:

> **§ 444-2 Exemptions.** This chapter shall not apply to:
>
> . . .
>
> (10) Any public works project that requires additional qualifications beyond those established by the licensing law and which is deemed necessary and in the public interest by the contracting agency.

Based on the evidence presented the Hearings Officer concludes that Petitioner did not prove by a preponderance of the evidence that the Project required "additional qualifications beyond those established by the licensing law..." While Petitioner appears to be experienced in performing the work described in the IFB, the Hearings Officer finds that Petitioner failed to prove that its experience was so specialized or extraordinary that it constituted "additional qualifications beyond those established by the licensing laws". Accordingly, the Hearings Officer concludes that Respondent's rejection of Petitioner's bid was proper, and consequently, Petitioner is not entitled to an award of the contract.

Lastly, pursuant to HRS § 103D-706, and HAR 3-126-37, solicitations that are determined to be in violation of law prior to an award must be either cancelled or revised to comply with the law. Accordingly, the Hearings

Officer concludes that Respondent acted properly by rejecting all bids and revising the IFB for resolicitation.

## IV. DECISION

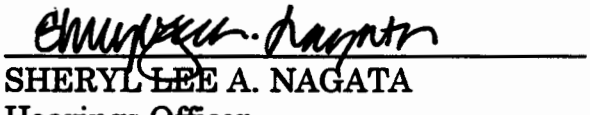
Based on the foregoing, it is hereby ordered that:

1. Respondent's rejection of Petitioner's proposal is affirmed;

2. Respondent may proceed with the public procurement for the Project; and

3. All parties bear their own respective attorney's fees, costs, and expenses.

DATED: Honolulu, Hawaii, March 17, 1995.



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