

Oneida Tribal Judicial System

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ONEIDA TRIBAL JUDICIAL SYSTEM TRIAL COURT

**HVS ADVERTISING-MARKETING,
Petitioner**

v.

**INDIAN PREFERENCE DEPARTMENT,
Respondent**

Case No.: 12-TC-130

DECISION

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers; Jean Webster, Mary Adams and Leland Wigg-Ninham, presiding.

I. INTRODUCTION

This case arises out of a dispute over the alleged failure of the Indian Preference Department to correctly apply and implement the Oneida Tribe of Indians of Wisconsin Indian Preference Laws, found at Chapter 57 of the Tribe's ordinances. Petitioner, HVS Advertising-Marketing (HVS), alleges that preference was misapplied when it sought to win a media and marketing contract offered for bid by the Oneida Bingo and Casino. Based on the evidence and arguments presented, we agree and find the Indian Preference Department failed to meet its duties and that violations of Chapter 57 have occurred. Further proceedings shall be held to determine the scope and extent of damages.

II. JURISDICTION

We have jurisdiction over this matter pursuant to Sec. 57.8-3 of the Chapter 57 which states that the Oneida Appeals Commission shall be the hearing body for disputes until such time as the Commission is empowered by the Oneida Business Committee. Under Sec. 57.8-2, acting as the Commission, we have the power to preside over hearings, interpret the law, and issue written decisions.

III. FINDINGS OF FACT

In June 2012, the Casino issued a Request for Proposal (RFP) seeking to hire a qualified firm to provide "Broadcast Production, Media Planning, Negotiation and Buying services." The Department did not review the RFP before it was issued. As of 2012, HVS had been providing these services to the Casino for about 20 years and had a contract that was scheduled to expire in September, 2012. HVS is an Indian-owned business. HVS responded to the RFP and was informed in July that it was one of three finalists for the contract. Per the RFP, the contract term would be for one year, with an option for a one-year extension held by the Casino. In August, each of the finalists gave a presentation to the Casino selection committee.

The RFP stated the successful agency would be identified on August 22, 2012 and awarded the contract on August 24, 2012. Those dates were not met. The reason for the delay was not explained to HVS. On October 8, 2012, Mr. Don Lilly, Gaming Project Manager, wrote in an email to HVS that Davis Marketing was under contract to assist the Casino with the best possible decision. Davis Marketing staff conducted interviews with the finalists during which time Davis brought up several new areas of services that were not included in the RFP. A written letter dated October 22, 2012 from Don Lilly, Gaming Project Manager, to Doug Hutchinson of HVS, informs HVS that it was not selected to enter into contract negotiations.

The Selection Committee employed a somewhat complex scoring method under which bidders were evaluated and awarded points in 36 categories based on proposal requirements listed in the RFP.

Indian preference was one of the categories. It appears different selection committee members each gave scores. The scores were then weighted and added together. HVS was given 50 points in the preference category. However, for reasons that are not entirely clear, the 50 points for preference was divided by seven and ended up contributing 7.14 points to HVS' final score.

As calculated by the Casino selection committee, HVS' score was 943.5429. The other two firms in the final three were RPM and Karma. Finalist RPM's total score was 963.2143. Finalist Karma's total score was 875.985.

Despite its requests, HVS was not given an explanation as to why it was not the successful bidder.

On October 30, 2012, HVS filed a formal complaint with the Department alleging several violations of Chapter 57. HVS submitted a two-page cover letter, a complaint form and about 40 pages of documentation with their complaint. While their complaint alleges many problems with the selection process, the crux of their allegations is that the Casino did not apply preference when selecting the winner of the marketing services RFP. HVS was the only Indian-owned business among the three finalists for the contract.

Marjorie Stevens is the Director of the Oneida Indian Preference Department. As a part of her investigation, she interviewed three Casino employees: Don Lilly, the Gaming Project Manager, Chad Fuss, Assistant Gaming General Manager and Louise Cornelius, Gaming General Manager. No one from HVS was interviewed.

By letter of December 4, 2012, Director Stevens stated that only one of the nine alleged violations were investigated, relating questions asked by Davis Marketing that were not a part of the RFP. Director Stevens' letter states no violations were found. On the basis of Ms. Stevens' finding of no violations and refusal to file a complaint in the Oneida Tribal Judicial System, HVS took matters into its own hands and this litigation ensued.

All of the exhibits introduced at trial are incorporated by reference and made a part of the findings of fact. We also adopt as additional findings #1 through #16 in Petitioner's Proposed Findings of Fact submitted on April 30, 2013.

IV. ANALYSIS AND CONCLUSIONS OF LAW

The relevant law applied here is Chapter 57 before it was amended by the Business Committee in March, 2013. Sec. 57.9-1 states that "all entities" of the Oneida Tribe, including enterprises, programs and subdivisions "shall give preference in contracting and subcontracting to Indian-owned businesses . . ." The term "shall give preference" is given some more specificity in Sec. 57.11-2 where it states: "The Indian Preference percentage to be applied to Indian-owned businesses' preferred bids for non-construction construction contracts shall be 5% across the board."

Understanding the specific meaning of these two provisions and how they apply in the real world is not immediately obvious. "Shall give preference" is easy to understand in general as choosing one over the other. If a person prefers coffee to tea, they give preference to tea. But in the context of hiring, where there are many different factors and interests involved, giving preference is not always as easy as choosing the Indian-owned business over the other non-Indian-owned businesses.

As for the phrase "5% across the board," this is more specific in some ways, but also presents a couple of problems. The phrase "across the board" is an informal figure of speech that one usually wouldn't find being used as a legal term of art. The dictionary states "across the board" means "embracing or affecting all classes or categories." (<http://www.merriam-webster.com/dictionary/across%20the%20board> last visited August 8, 2013). Also, while 5% is a specific number, not all hiring is done on the basis of points or numbers. How would 5% be applied to a job where good writing skills were a key component? The Casino's decision to use a points-based rating makes it much easier to apply the 5% across the board.

We agree with the Petitioner's interpretation and application of Sec. 57.11-2's requirement that Indian preference means giving Indian-owned businesses 5% across the board. In this case, HVS

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was rated in 36 categories and given a total score. Petitioner proposes that rather than giving HVS 50 points in one category (that in the end only contributed seven points to their score of 943.5429), HVS's total score should have been increased by 5% (after subtracting out the 50 points so it would not be double counted.) HVS's score without the preference is 936.4. Five percent of 936.4 is 46.82. Adding the 46.82 to HVS's unadjusted score of 936.4 equals 983.22. This is a reasonable application of "5% across the board" because it increases HVS's score in all 36 categories, i.e. across the board.

After properly applying the preference law, HVS's score is 983.22 which is higher than both of the other bidders. Therefore, HVS was improperly denied the contract in violation of Chapter 57.

With such a blatant violation that can be uncovered by reviewing the score sheets and applying some simple math, it's clear the Indian Preference Department did not properly investigate the selection process for this RFP.

IV. CONCLUSION AND ORDER

Despite these blatant and serious violations, we are hesitant at this time, without more information, to award a remedy. The Casino is largely responsible for the violations in this case; however, the Casino is no longer a party. The Department's violations are for a failure to carry out and properly apply its functions under the law. The passage of time and the nature of this contract, the ongoing provision of a service, make specific performance less than ideal. Straight money damages will also likely require some additional evidence. Nevertheless, even though we are not making an award at this time, we stress that we are not ruling out any remedies or type of damages.

Further proceedings shall be held on remedies and damages. We construe the Indian Preference Ordinance as giving us wide latitude to impose remedies under Sec. 57.14-5.

A hearing on the remedies and damages shall be scheduled and both parties shall be prepared to present their case at this time.

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V. DECISION

The court finds in favor of the Petitioner. A hearing on the remedies and damages shall be held on: **Wednesday, September 25, 2013 at 9:00 a.m.**