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

In the Matter of)	PCH-2008-7
)	
ALOHACARE,)	HEARINGS OFFICER’S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION GRANTING RESPONDENT’S
)	MOTION TO DISMISS; APPENDIX “A”
vs.)	
)	
DEPARTMENT OF HUMAN SERVICES,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

HEARINGS OFFICER’S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION GRANTING RESPONDENT’S MOTION TO DISMISS

I. INTRODUCTION

On May 23, 2008, AlohaCare (“Petitioner”) filed its request for administrative hearing to contest the Department of Human Services, 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.

On May 28, 2008, Respondent filed a Motion to Dismiss AlohaCare’s Appeal and Request for Hearing for Lack of Jurisdiction (“Motion”). On May 30, 2008, Petitioner filed an Amended Appeal and Request for Hearing. At the pre-hearing conference held on June 2, 2008, the parties agreed to waive the statutory requirement that the hearing begin within 21 days from receipt of the request for hearing and stipulated to rescheduling the hearing set for June 13, 2008 to a date mutually convenient to all parties. The hearing on the Motion was set for June 13, 2008.

By a letter dated June 4, 2008 from Respondent, the Hearings Officer was notified that the parties were available for hearing on July 8 or 9, 2008, and that Petitioner was willing to reschedule the hearing on the Motion due to Respondent's scheduling conflict. Accordingly, on June 5, 2008, the Hearings Officer issued a Notice of Rescheduled Hearing and Hearing on Respondent's Motion to Dismiss, rescheduling the hearing to July 9, 2008 and the hearing on the Motion to June 23, 2008. On June 17, 2008, Petitioner filed a memorandum in opposition to Respondent's Motion, and on June 20, 2008, Respondent filed a reply to Petitioner's memorandum in opposition to the Motion. A hearing on the Motion was held on June 23, 2008. Petitioner was represented by Edward C. Kemper, Esq. and Respondent was represented by Lee-Ann N.M. Brewer, Esq. The matter was taken under advisement.

By a letter dated June 25, 2008, the Hearings Officer informed the parties that she had decided to grant the Motion and directed Respondent to prepare proposed findings of fact, conclusions of law and decision for her review. On July 3, 2008, Respondent filed the requested proposed findings of fact, conclusions of law and decision and it is attached hereto and incorporated herein by reference as Appendix "A". On July 8, 2008, Petitioner filed a memorandum in opposition to the findings of fact and conclusions of law. On July 10, 2008, Respondent filed a response to Petitioner's memorandum in opposition to the findings of fact and conclusions of law.¹

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 decision.

II. FINDINGS OF FACT

The Hearings Officer adopts Findings of Fact numbers 1-8 as provided in Appendix "A".

¹ Petitioner argued that the Hearings Officer could only "make a legal determination that it has no jurisdiction and issue a simple order attesting to that conclusion." In addition to the authorities cited by Respondent, the Hearings Officer would note that Hawai'i Administrative Rules § 3-126-57(a) provides: "[w]here the case has

III. CONCLUSIONS OF LAW

The Hearings Officer adopts the Conclusions of Law as provided in Appendix "A".

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss is granted and,

IT IS HEREBY ORDERED that the above-entitled matter is dismissed.

DATED: Honolulu, Hawaii, JUL 16 2008.

/s/ SHERYL LEE A. NAGATA

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

been contested and the decision is adverse to any party, the decision shall be accompanied by separate findings of fact and conclusions of law."

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DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

STATE OF HAWAII

ALOHACARE,

Petitioner,

vs.

DEPARTMENT OF HUMAN SERVICES,
STATE OF HAWAII;

Respondent.

No. PCH-2008-7

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION; CERTIFICATE OF
SERVICE

Administrative Hearings Officer:
Sheryl Lee A. Nagata

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION

I. INTRODUCTION

On May 23, 2008, AlohaCare (Petitioner) by and through its attorney Edward C. Kemper, Esq. filed an appeal and request for hearing to contest the decision of the Chief Procurement Officer dated May 19, 2008 relating to a protest filed by Petitioner when

APPENDIX "A"

Petitioner unsuccessfully bid on a Request for Proposals (RFP) issued by the Department of Human Services (Respondent).

On May 28, 2008, Respondent filed its Motion to Dismiss AlohaCare's Appeal and Request for Hearing for Lack of Jurisdiction (Motion). Petitioner filed an Amended Appeal and Request for Hearing on May 30, 2008.

At the pre-hearing conference held on June 2, 2008, the parties agreed to waive the statutory requirement that the hearing begin within 21 days from receipt of the request for hearing and stipulated to rescheduling the hearing set for June 13, 2008 to July 9, 2008. Additionally, the hearing on the Motion was rescheduled from June 13, 2008 to June 23, 2008.

Petitioner filed its Memorandum in Opposition to Motion to Dismiss on June 17, 2008 and Respondent filed its Reply to Petitioner's Memorandum in Opposition to Motion to Dismiss on June 20, 2008.

A hearing on the Motion was conducted on June 23, 2008. Petitioner was represented by Mr. Kemper and Respondent was represented by Deputy Attorney General Lee-Ann Brewer. Following argument of counsel, the matter was taken under advisement. By letter dated June 25, 2008, the Hearings Officer notified the parties that she intended to issue Findings of Fact, Conclusions of Law, and Decision and Order granting Respondent's Motion, and as a result, the July 9, 2008 hearing date was taken off the calendar.

Having reviewed and considered the evidence and arguments presented, together with the record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision and order.

II. FINDINGS OF FACT

1. To the extent that any of these Findings of Fact are Conclusions of Law, they are to be so construed.

2. Unless otherwise indicated, the following findings of Fact have been proven to be more probably true than not true.

3. Petitioner was an unsuccessful bidder on a Request for Proposals (RFP) No. RFP-MQD-2008-006 entitled QUEST Expanded Access (QExA) Managed Care Plans to Cover Eligible Individuals Who are Aged, Blind, or Disabled, which was issued by Respondent pursuant to Hawaii Revised Statutes (HRS), chapter 103F.

4. Pursuant to HRS §103F-501, Petitioner submitted its protest of the contract award on February 22, 2008 to the Head of the Purchasing Agency, Lillian Koller, Director of the Department of Human Services.

5. On March 12, 2008, Director Koller issued her written decision of the protest which upheld the procurement award and dismissed Petitioner's protest.

6. Pursuant to HRS §103F-502, Petitioner submitted its request for reconsideration dated March 19, 2008 to the chief procurement officer (CPO).

7. On May 19, 2008, the CPO issued his written decision which provided that there was no evidence that Respondent violated any State of Hawaii procurement statutes, rules and RFP requirements in the evaluation of Petitioner's technical proposal.

8. On May 23, 2008, Petitioner filed an Appeal and Request for Hearing with the State of Hawaii Department of Commerce and Consumer Affairs (DCCA) pursuant to HRS chapter 103D-709.

III. CONCLUSIONS OF LAW

If any of the conclusions of law are deemed to be a finding of fact, it shall be so construed.

Petitioner is a person aggrieved in connection with an award of a contract procured under HRS chapter 103F. The issue is whether the DCCA has jurisdiction to hear Petitioner's appeal from a protest of a contract award made pursuant to HRS chapter 103F. Respondent's Motion is based on the assertion that the DCCA lacks jurisdiction to hear Petitioner's appeal pursuant to HRS chapter 103F. Petitioner believes it can file its appeal pursuant to HRS §103D-709. HRS §103D-709(a) provides the following (footnotes added):

§103D-709 Administrative proceedings for review. (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f)¹ shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, person aggrieved under section 103D-106², or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310³, 103D-701⁴, or 103D-702⁵.

HRS §103D-709(c) provides in relevant part that “[o]nly parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and [103D-702(g)] may initiate a proceeding under this section.”

¹ HRS §26-9(f), **Department of commerce and consumer affairs**, addresses the appointment and authority of hearings officers.

² HRS §103D-106, **Penalties**, states what the penalties are for intentional violation of chapter 103D or its implementing rules.

³ HRS §103D-310, **Responsibility of offerors**, addresses the process where prospective offerors submit notice of intention to submit an offer, and the procurement officer's responsibility for determining whether the offeror meets certain basic qualifications.

⁴ HRS §103D-701, **Authority to resolve protested solicitations and awards**, addresses the protest process under chapter 103D.

⁵ HRS §103D-702, **Authority to debar or suspend**, addresses the process whereby a person may be debarred from consideration for public contracts.

Petitioner may request review by the DCCA if its appeal specifically falls under one of the foregoing sections set forth in HRS §103D-709. However, Petitioner is not a party to a protest made and decided under any provision of HRS chapter 103D. This appeal stems from a contract for health and human services procured pursuant to HRS chapter 103F, which is specifically exempt from the requirements under HRS chapter 103D.

HRS §103F-104 provides:

§103F-104 Exemption from chapter 103D. Contracts to purchase health and human services required to be awarded pursuant to this chapter shall be exempt from the requirements of chapter 103D, unless a provision of this chapter imposes a requirement of chapter 103D on the contract or purchase.

HRS §103F-102 provides that “[c]hief procurement officer’ means those officials designated by section 103D-203.” Petitioner argues that the reference to HRS chapter 103D found in this definition is the nexus which imposes a requirement on the contract to allow Petitioner to appeal to the DCCA pursuant to HRS §103D-709. The Hearings Officer finds that Petitioner’s analysis is insufficient and concludes that the reference in HRS §103F-102 to the definition of “chief procurement officer” in HRS §103D-203 does not entitle Petitioner to file an administrative appeal pursuant to HRS §103D-709, for the QExA RFP which was procured under HRS chapter 103F.

HRS chapter 103F is void of any language permitting any right of appeal with the DCCA. Instead, the statute provides specific remedies for an aggrieved party to employ by initially filing a protest to the head of purchasing agency and then, if still unsatisfied, by submitting a request for reconsideration to the chief procurement officer. HRS §103F-501(e) provides the following (footnotes added):

§103F-501 Protested awards. (a) A person who is aggrieved by an award of a contract may protest a purchasing agency's failure to follow procedures established by this chapter, rules adopted by the policy board, or a request for proposals in selecting a provider and awarding a purchase of health and human services contract, provided the contract was awarded under section 103F-402⁶ or 103F-403⁷. Amounts payable under a contract awarded under section 103F-402 or 103F-403, and all other awards of health and human services contracts may not be protested and shall be final and conclusive when made.

(b) The protest shall be submitted to the head of the purchasing agency, in writing, within five working days after the postmark date on the notice of award.

(c) The head of the purchasing agency, or a designee, may settle and resolve a protest by one or more of the following means:

- (1) Amending or canceling a request for proposal;
- (2) Terminating the contract which was awarded;
- (3) Initiating a new process to award a contract;
- (4) Declaring the contract null and void from the time of its award; or
- (5) Affirming the purchasing agency's contract award decision.

This authority shall be exercised in accordance with rules adopted by the policy board.

(d) If the protest is not resolved by mutual agreement, the head of the purchasing agency, or a designee, shall promptly issue a decision in writing. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the protesting person of the protester's right to reconsideration as provided in this part.

A copy of the written decision shall be mailed or otherwise furnished to the person who initiated the protest.

(e) A decision under subsection (d) shall be final and conclusive unless a request for reconsideration is submitted to the chief procurement officer under section 103F-502.

HRS §103F-502 provides (emphasis added):

§103F-502 Right to request reconsideration. (a) A request for reconsideration of a decision of the head of the purchasing agency under section 103F-501 shall be submitted to the chief procurement officer not later than five working days after the receipt of the written decision, and shall contain a specific

⁶ HRS §103F-402, **Competitive purchase of services**, addresses the requirements for the competitive purchase of health and human services.

⁷ HRS §103F-403, **Restrictive purchase of services**, addresses the requirements for the non-competitive purchase of health and human services.

statement of the factual and legal grounds upon which reversal or modification is sought.

- (b) A request for reconsideration may be made only to correct a purchasing agency's failure to comply with section 103F-402 or 103F-403, rules adopted to implement the sections, or a request for proposal, if applicable.
- (c) The chief procurement officer may uphold the previous decision of the head of purchasing agency or reopen the protest as deemed appropriate.
- (d) A decision under subsection (c) shall be final and conclusive.

Additionally, HRS §103F-504 provides (emphasis added):

§103F-504 Exclusivity of remedies. The procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for persons aggrieved in connection with the award of a contract to resolve their concerns.

The statute is very clear that these specific remedies are the only remedies available for persons aggrieved in connection with contracts issued pursuant to HRS chapter 103F. Here, Petitioner exercised and exhausted both remedies available to it. Further, the language of HRS chapter 103F is unambiguous, stating that the decision of the chief procurement office is final and conclusive.

It is also clear that the legislature intended protests under HRS chapter 103F to be more streamlined than those provided for under HRS chapter 103D.⁸ To apply the

⁸ The legislative intent in enacting chapter 103F, Hawaii Revised Statutes, is set forth in section 1 of Act 190, SLH 1997, which provides (emphasis added):

SECTION 1. The legislature finds there is a need to improve the process used to expend state funds for grants, subsidies, and purchases of services, particularly the process used to purchase health and human services from organizations and individuals in the community available and qualified to act on behalf of the State in responding to the health and human service needs of its citizens.

It is the legislature's intent that separate processes be used by state agencies to expend appropriations of state funds for grants and subsidies for public purposes, and to pay for and provide health and human services to the State's citizens on the agencies' behalf. It is also the legislature's intent that all state agencies use the same single process to obtain and pay for these health and human services.

The objective of this single process to purchase and provide health and human services is to ensure the fair and equitable treatment of all persons who apply to, and are paid to provide those services on the agencies' behalf. It is the intent of this legislature that this improved process result in a simpler, standardized process

remedies of HRS chapter 103D in this matter would be ignoring the intent of the legislature to improve and simplify the process for the purchase of health and human services. “It is well-settled that, [w]hen construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.” *Office of Hawaiian Affairs v. Housing and Community Development Corp of Hawaii (HCDCH)*, 117 Haw. 174, 191, 177 P.3d 884, 901 (Haw. 2008) (citations omitted).

Moreover, “[w]hile HRS chapter 103D provides for a hearing to review any request from a party aggrieved by a determination of the chief procurement officer or head of a purchasing agency, a similar provision is conspicuously absent from HRS chapter 103F[.]” *Alaka’i Na Keiki, Inc. v. Hamamoto*, 113 Hawai’i 210, 150 P.3d 1281, 2007 WL 158980 (Hawai’i) (citations omitted). And “[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intention existed.” *Id.* (Citations omitted.)

Accordingly, the Hearings Officer concludes that the DCCA lacks jurisdiction to hear Petitioner’s appeal.

IV. DECISION

Based on the foregoing Findings of Facts and Conclusions of Law, Respondent's Motion to Dismiss is granted and the Petitioner's Appeal and Request for Hearing filed on May 23, 2008 is dismissed with prejudice.

DATED: Honolulu, Hawaii, _____.

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