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

In the Matter of RCI ENVIRONMENTAL, INC., Petitioner, vs. TIMOTHY E. JOHNS, IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, and AMERICAN MARINE CORPORATION, Respondents.	PCH 2000-10 FINAL ORDER GRANTING RESPONDENT TIMOTHY E. JOHNS' MOTION TO DISMISS ADMINISTRATIVE APPEAL

FINAL ORDER GRANTING RESPONDENT TIMOTHY E. JOHNS' MOTION TO DISMISS ADMINISTRATIVE APPEAL

This matter came before the undersigned Hearings Officer on December 27, 2000, for consideration of Respondent Timothy E. Johns' Motion To Dismiss Administrative Appeal with the Movant/Respondent represented by Lynn M. Otaguro, Esq., with the Petitioner (opposing the motion) represented by Robert G. Klein, Esq., and with Respondent American Marine Corporation (orally joining in the motion) represented by Margery S. Bronster, Esq. Thereafter, on December 28, 2000, the Petitioner filed a Supplemental Declaration which established the (previously uncontested but unverified) chronology surrounding a letter from Respondent Johns to the Petitioner.

The Hearings Officer, having considered the motion, the supporting and opposing memoranda filed by the parties, the supplemental declaration, and the arguments of record, has prepared the following findings of fact, conclusions of law, and final order.

Findings of Fact

1. By a letter dated June 30, 2000 to Respondent Johns, the Petitioner protested his award of Job No. 9-OF-W (Ala Wai Canal Dredging) to Respondent American Marine Corporation based on the Petitioner's assertion that the bid submitted by Respondent American Marine Corporation had been nonresponsive.

2. By a reply letter dated August 4, 2000, Respondent Johns informed the Petitioner that he considered the bid proposal submitted by Respondent American Marine Corporation to be responsive and that he was denying the Petitioner's protest. The letter informed the Petitioner that it could request an agency reconsideration of this denial by filing such a request within ten working days of receipt of Respondent Johns' letter.

3. By a letter dated August 11, 2000, the Petitioner requested that Respondent Johns reconsider his August 4, 2000 decision denying the Petitioner's protest. The basis for requesting reconsideration was substantially similar to the basis for submitting the initial protest.

4. By a letter dated November 15, 2000 – some three months after the Petitioner had requested reconsideration – Respondent Johns reiterated that he had found Respondent American Marine Corporation's bid to be responsive, and denied the Petitioner's August 11, 2000 request for reconsideration. The Petitioner received Respondent Johns' November 15, 2000 letter (postmarked November 16, 2000) on November 17, 2000.

5. Respondent Johns' November 15, 2000 letter informed the Petitioner that it could request an administrative hearing by filing such a request pursuant to Hawaii Revised Statutes ("HRS") §103D-709 and Hawaii Administrative Rules ("HAR") § 3-126-42. It also stated that the Petitioner would have to comply with HAR § 3-126-8 – which Respondent Johns incorrectly stated as requiring such a request to be filed "within seven (7) calendar days after your receipt of this decision."

6. By a letter dated November 22, 2000 the Petitioner informed Respondent Johns that it had received his letter of November 15, 2000 denying its request for reconsideration, and that pursuant to HRS § 103D-701 and HAR § 3-126-8 it intended to request an administrative hearing regarding the matter.

7. On November 29, 2000 the Petitioner filed its request for an administrative hearing in this matter, pursuant to HRS § 103D-709, with the Department of Commerce and Consumer Affairs.

Conclusions of Law

In an administrative proceeding of this nature a motion for dismissal, or other summary disposition, may be granted as a matter of law when the legal contentions of the moving party justify such relief, and when the non-moving party cannot establish a material factual controversy even though the motion is viewed in the light most reasonably favorable to the non-moving party. *Biogenesis International, LLC, et. al. vs. State of Hawaii, et. al.*, PCH 99-8 (August 13, 1999).

The determinative issue in this proceeding was whether the Petitioner's request for an administrative hearing pursuant to HRS § 103D-709 was filed in a timely manner, and the applicable provisions of HRS § 103D-712(a) read as follows:

> **HRS § 103D-712 Time limitations on actions.**
> (a) Requests for administrative review under section 103D-709 shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs within seven calendar days of the issuance of a written determination under section 103D-310 [Responsibility of offerors], 103D-701 [Authority to resolve protested solicitations and awards], or 103D-702 [Authority to debar or suspend].

In light of the inapplicability of either HRS §§ 103D-310 or 103D-702 to the facts in the present case, as well as the implicit reliance of all parties on HRS §103D-701 as the procedural basis underlying the applicability of HRS §103D-712, that section is taken to be the relevant one cited within HRS § 103D-712. As noted for the first time during the course of the parties' oral arguments, however, neither HRS §§ 103D-701, nor HRS § 103D-712 (nor the other sections cited therein), nor any other sections of Chapter 103D make mention of a procedure for an agency's reconsideration of its initial denial of a protest. This procedure is contained solely within HAR § 3-126-8 which reads as follows:

> HAR § 3-126-8 [Request for reconsideration]
> (a) Reconsideration of a decision of the chief procurement officer or the head of a purchasing agency may be requested by the protestor, appellant, any interested party who submitted comments during consideration of the protest, or any agency involved in the protest. The request for consideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.
> (b) Requests for reconsideration of a decision of

the chief procurement officer or the head of a purchasing agency shall be filed not later that ten working days after receipt of such decision.

(c) A request for reconsideration shall be acted upon as expeditiously as possible. The chief procurement officer or the head of a purchasing agency may uphold the previous decision or reopen the case as such officer deems appropriate.

(d) The decision under subsection (c) shall be final and the protesting bidder or offeror shall be informed:

(1) Whether the protest is denied or sustained; and

(2) If the protest is denied, the protestor's right to an administrative proceeding pursuant to subchapter 5.

(e) The protesting bidder or offeror shall inform the State within five working days after the final decision if an administrative appeal will be filed. An appeal shall be filed within seven calendar days of the determinations under section 3-122-110, this section, or sections 3-126-12 and 3-126-16.

The HAR § 3-126-8 reconsideration procedure, appears to be solely a regulatory creation of the state procurement policy board under the limited authority granted to it by HRS § 103D-202 which reads, in relevant part, as follows:

HRS § 103D-202 Authority and duties of the policy board. Except as otherwise provided in this chapter, the policy board shall have the authority and responsibility to adopt rules, *consistent with this chapter*, governing the procurement, management, control, and disposal of any and all goods, services, and construction.

Emphasis added. Accordingly, HAR § 3-126-8 may be either an appropriate rule for clarifying and enhancing the implementation of HRS Chapter 103D, or an invalid rule which "violates constitutional or statutory provisions, or exceeds the statutory authority of the agency" (HRS § 91-7) as expressed by the legislature in enacting that chapter.

After considering the legislative intent behind the 1993 adoption of the Hawaii Public Procurement Code (HRS Chapter 103D)[1] and the legislature's subsequent amendment of the code in 1995[2], as well as the effect of the reconsideration process in this case (a three month hiatus followed by essentially the

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[1] Senate Standing Committee Report No. S8-93, 1993 Senate Journal, at page 39.

[2] Standing Committee Report No. 811, 1995 House Journal, at page 1333.

same denial of essentially the same protest) and the similar effects in other cases[3], it would seem that there is little cause to believe that the reconsideration process contained in HAR § 3-126-8 is consistent with the purpose of the code – or even the purpose of the rules themselves which is set forth in HAR § 3-120-1 as follows:

> HAR § 3-120-1 Purpose. The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods and services, and the construction of public works for the State and counties, ...

To the contrary, it would seem that the reconsideration process may actually be counterproductive to the expressed purpose(s) of the Hawaii Public Procurement Code. Although other cases which have included an agency reconsideration prior to a request for an administrative hearing have been considered both administratively and judicially, the validity of HAR § 3-126-8 itself has not previously been raised as an issue. Thus its consideration in this matter would appear to be one of first impression.

The promulgation of such a rule *might* have been appropriate if the ten working days allowed for requesting a reconsideration under subsection (b) had been less, instead of more, than the seven calendar days allowed for requesting an administrative hearing under subsection (e). Nevertheless, such is not the situation here, where the effect of the rule is to extend – more or less indefinitely – the statutory time limitations on actions prescribed in HRS § 103D-712. Thus, it appears that HAR § 3-126-8 is invalid because it exceeds the statutory authority of the procurement policy board[4], and the Petitioner's request for an administrative hearing should actually have been made in accordance with the requirements of HRS § 103D-712 (i.e. within seven calendar days of Respondent Johns' August 4, 2000 decision denying the Petitioner's protest).

In recognition that this interpretation of the law may be the subject of appellate review, however, and that it may not be fully embraced after judicial evaluation, it becomes important to consider an alternative evaluation of the timeliness issue under the filing requirements that are set out for requesting an administrative hearing under the provisions of HAR § 3-126-8(e). Under this analysis the Petitioner would have had seven calendar days from the November 15, 2000 denial of its request for reconsideration within which to request an administrative hearing. This means that its request for an administrative hearing would have to have been filed not later than November 22, 2000.The argument that the provisions of HAR § 3-126-49 [Time] should apply in calculating time limitations on actions under HAR § 3-126-8(e) is not

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[3] *E.g. Arakaki v. State*, 87 Haw. 147 (1998), at page 148; and, *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1977), at page 437.

[4] A recent case which examined this rule-statute conflict was *Richard v. Metcalf*, 82 Haw. 249 (1996), at page 257. *See also, Puana v. Sunn*, 69 Haw. 187 (1987), at page 189 (citing *In re Carlson*, 38 Haw. 9 (1948) and *Jacober v. Sunn*, 6 Haw. App. __, 715 Pac.2d 813, 819 (1986)).

convincing, as an examination of its contents reflects that it reads, in relevant part, as follows:

> HAR § 3-126-49 Time. (a) Unless otherwise provided by statute or rule, in computing any period of time prescribed or allowed by this chapter, the day of the act, event, or default after which the designated period of time is to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday in the State, in which event the period runs until the next day which is neither a Saturday, Sunday, nor a holiday. Intermediate Saturdays, Sundays, and holidays shall not be included in a computation when the period of time prescribed or allowed is seven days or less.

While HAR § 3-126-49 has general applicability to time sensitive requirements within the Hawaii Public Procurement Code, its purpose is to further define the generic use of the term "days" where that term is not further defined within the statute or rule where it appears. Significantly, HAR § 3-126-49 begins with the limiting language that it applies "*Unless otherwise provided by statute or rule...*" Emphasis added. And HAR § 3-126-8(e) does provide otherwise – by specifically stating that requests for administrative review *shall* be made "within seven calendar days."

Thus, since the Petitioner's November 29, 2000 filing of its request for an administrative hearing was done two weeks after the November 15, 2000 date of Respondent Johns' denial of its request for reconsideration it was not done in compliance with the time limitation in HAR § 3-126-8. The filing of such a request fourteen calendar days after the operative event does not comply with the requirement that such a pleading be filed within seven calendar days of that event. Furthermore, the argument that the Petitioner relied on a portion of Respondent Johns' November 15, 2000 letter (incorrectly stating that the time for filing such a request was within seven calendar days after receipt of the decision) does not remedy the filing. While that letter might or might not constitute a basis for some other action, its content is not cognizable as a basis for this forum to do otherwise than correctly apply the correct law.

Finally, the argument has been made that the operative event for beginning to measure the seven calendar days allowed for filing requests for an administrative hearing under HRS § 103D-712 or HAR § 3-126-8 should not be the date of issuance of the agency's denial, but rather the date of receipt of the agency's denial. This issue has been raised and rejected in other cases, where it has been uniformly recognized that (despite whatever value such a change – or some other amendment[5] –

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[5] Previous cases do reflect that calculations of time for filing requests have been a recurring source of disputes; that a potential for confusion or abuse exists when either petitioners or respondents make assertions about their delivery or their receipt of documents in the absence of independent verification;

might actually bring) the statute identifies the operative event as "the issuance of a written determination" and the rule is in accord by also focusing on the "determination" as the operative event. In addition, it has been consistently held that the term "date of issuance" is distinguishable from the term "date of receipt" (although it is possible that under a given set of circumstances both could refer to the same calendar date), and that compliance with the provisions of the statute and/or rule is mandatory – with the result that a failure to make a timely filing deprives this forum of jurisdiction to conduct further proceedings. *Nehi Lewa, Inc. vs. Dept. of Budget & Fiscal Services, City & County of Honolulu*, PCH 99-13 (December 17, 1999); *Soderholm Sales and Leasing, Inc. vs. County of Kauai*, PCH 99-4 (March 9, 1999); and, *Brewer Environmental Industries, Inc. vs. County of Kauai*, PCH 96-9 (November 20, 1996). [6]

The argument that *Brewer, supra*, (which addressed at least two separately determinative issues) holds otherwise is misplaced. While *Brewer* acknowledged that HAR § 3-126-8(b) – as distinguished from HAR § 3-126-8(e) – would allow for the filing of a request for agency reconsideration "not later than ten working days after receipt" of an agency's denial of a protest (which is not the issue here), it also stressed that HRS § 103D-712 requires that requests for administrative hearings must be made "within seven calendar days of a written determination."

Likewise, the argument that *Big Island Recycle & Rubbish vs. County of Hawaii*, PCH 96-6 (March 14, 1997) holds otherwise is misplaced. *Big Island* addressed a different issue which had arisen under subsection (c) of HAR § 3-126-67 [Dismissal of requests for hearings] wherein a notice of proposed dismissal had allowed the petitioner fifteen days after receipt of the notice to request a hearing to contest it – in accordance with the discretionary language of that rule requiring the allowance of "at least fifteen calendar days" to make the request.

Final Order

Accordingly, it having been determined that the Petitioner's request for an administrative hearing was not timely filed pursuant to the mandatory requirements of HRS § 103D-712 and HAR § 3-126-8(e) and that this forum is without jurisdiction to conduct further proceedings in the matter,

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and, that changing the code's language to require the use of certified mail or other proof of issuance would be helpful in minimizing future occurrences of such disputes.

[6] Although such cases did discuss arguments raised therein by respondents favoring the use of a receipt date for calculating time limitations, the cases did not accept that argument, nor was their outcome predicated upon a failure to show compliance with the statute as calculated under a date of receipt. The same is true for the holding in *Environmental Recycling of Hawaii, Ltd. vs. County of Hawaii, Dept. of Finance*, PCH 95-4 (March 20, 1996).

It is hereby ORDERED that, for good cause shown, Respondent Johns' Motion is granted, and the Petitioner's request for an administrative hearing is hereby dismissed.

DATED, Honolulu, Hawaii JAN - 2 2001

RICHARD A. MARSHALL
Administrative Hearings Officer