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

In the Matter of)	PCH-2003-20
)	
ECKARD BRANDES, INC.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND FINAL ORDER
vs.)	GRANTING RESPONDENTS'
)	MOTION TO DISMISS
DEPARTMENT OF FINANCE,)	
COUNTY OF HAWAI'I; WILLIAM)	
TAKABA, in his capacity as Director)	
of Finance, County of Hawai'I, Chief)	
Procurement Officer,)	
)	
Respondents.)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

On July 15, 2003, Eckard Brandes, Inc. ("Petitioner"), filed a request for hearing to contest the July 9, 2003 decision of William Takaba and the Department of Finance, County of Hawaii's ("Respondents") to reject Petitioner's protest concerning a project known as Bid No. 2054, Drywell and Culvert Cleaning and Maintenance for the County of Hawaii. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 23, 2003, Respondents filed the instant motion to dismiss. On August 18, 2003, Petitioner submitted a memorandum in opposition to the motion.

The motion came before the undersigned Hearings Officer on August 18, 2003. Petitioner was represented by Ernest H. Nomura, Esq.; Respondents were represented by Craig T. Masuda, Esq.

Having reviewed and considered the motion, memoranda and exhibits attached thereto and the argument of counsel, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order.

II. FINDINGS OF FACT

1. On February 18, 2003, Respondents issued an invitation for bids (“IFB”) to perform work on a project known as Bid No. 2054, Drywell and Culvert Cleaning and Maintenance for the County of Hawaii (“Project”).
2. Only two bidders submitted bids in response to the IFB, Kamaaina Pumping, Inc. (“Kamaaina Pumping”) and Petitioner.
3. The bids were opened on or about March 12, 2003.
4. Petitioner filed a protest on March 31, 2003. In its protest, Petitioner contended that Kamaaina Pumping should be disqualified because of a conflict of interest involving an employee of the Department of Public Works, County of Hawaii.
5. On May 6, 2003, Respondents issued its denial of Petitioner’s protest.
6. On May 14, 2003, Petitioner filed a request for administrative hearing to contest Respondents’ May 6, 2003 denial. This matter was designated as PCH-2003-14.
7. On May 27, 2003, Respondents filed a motion to dismiss Petitioner’s request for administrative hearing in PCH-2003-14.
8. Respondents posted the notice of award of the contract to Kamaaina Pumping for the Project on July 1, 2003.
9. By letter dated July 3, 2003, Petitioner protested the award of the contract for the Project to Kamaaina Pumping.
10. By letter dated July 9, 2003, Respondents denied Petitioner’s protest.
11. On July 15, 2003, the Hearings Officer in PCH-2003-14 issued her Final Order Granting Respondent’s Motion to Dismiss Petition.
12. On July 15, 2003, Petitioner filed a request for hearing to contest the July 9, 2003 denial of Petitioner’s protest concerning the Project.
13. On July 23, 2003, Respondents filed the instant motion to dismiss.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

In seeking the dismissal of this action, Respondents assert that this proceeding involves the same parties and addresses an issue that was decided in PCH-2003-14. Respondents

also cite this Office's decision in *GTE Hawaiian Telephone Company, Incorporated v. Department of Finance, County of Maui, PCH-98-6 (December 9, 1998)* for the proposition that Petitioner is not entitled to a second hearing on similar issues where the initial petition was untimely.

The salient facts are not in dispute. In PCH-2003-14, Respondent moved to dismiss Petitioner's request for hearing arguing, among other things, that Petitioner's protest was untimely. According to Respondents, the protest should have been filed on March 5, 2003 - 5 working days after February 26, 2003, the date Petitioner apparently confirmed that Randell A. Riley ("Riley") was an employee of the County of Hawaii.¹ HRS §103D-701(a) provides:

§103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. *A protest shall be submitted in writing within five working days after the aggrieved person knows, or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of the award of the contract either under section 103D-302 or 103D-303, as applicable; provided further that no protest based on the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.*

(Emphasis added).

Although the Hearings Officer in PCH-2003-14 found that Petitioner's protest would have been premature had it been filed prior to a determination that Kamaaina Pumping was the low bidder and would be awarded the contract,² the Hearings Officer nevertheless concluded that the protest was untimely:

Petitioner should have filed its protest within five working days of bid opening, or March 19, 2003, as that is when it knew or should have known that Kamaaina Pumping was the low bidder and Respondent would be awarding the contract to Kamaaina Pumping. As Petitioner filed its protest on March 31, 2003, the Hearings Officer concludes that Petitioner's protest was untimely.

¹ The Hearings Officer in PCH-2003-14 found that Riley "is the president, secretary, director and majority shareholder of Kamaaina Plumbing, Inc." and that "[o]n February 26, 2003, Petitioner was informed that Mr. Riley was a County of Hawaii employee." In both PCH-2003-14 and PCH-2003-20, Riley is the subject of Petitioner's protest that Kamaaina Plumbing should be disqualified because of Riley's alleged conflict of interest.

² The bids were not opened until March 12, 2003.

Petitioner, on the other hand, relied upon Hawaii Administrative Rules (“HAR”) §3-126-4(a) in support of its argument that it was entitled to file its protest anytime prior to the expiration of the five-day period immediately following the posting of the award. HAR §3-126-4(a) states:

§3-126-4 Protest of an award. (a) A protest of a (sic) award shall be submitted in writing to the chief procurement officer or as otherwise specified in the solicitation within five working days after the posting of the notice of award for solicitations pursuant to section 103D-302 or 103D-303, HRS.

And since the notice of award had not been posted, Petitioner reasoned that its protest was not untimely.

In rejecting that argument, the Hearings Officer noted that HAR §3-126-4(a) was promulgated to implement HRS §103D-701(a) and concluded that:

As rules and regulations may not enlarge, alter, or restrict the provisions of the act being administered, the conflict between HRS §103D-701(a) and HAR §3-126-4(a) must be resolved in favor of HRS §103D-701(a)(citation omitted). Accordingly, the Hearings Officer concludes that Petitioner’s protest was untimely as it should have been filed by March 19, 2003, five working days after bid opening.

In the present case, Petitioner apparently takes the position that HRS §103D-701(a) requires protests to be filed *within* the five-day period immediately following the posting of the notice of award. Thus, according to Petitioner, while its March 31, 2003 protest in PCH-2003-14 may have been “premature”, its July 3, 2003 protest is timely, having been filed two days after the notice of award had been posted.³

Petitioner’s argument, however, completely ignores the requirement in HRS §103D-701(a) that expressly provides that protests “shall be submitted in writing within five working days after the aggrieved person knows, or should have known of the facts giving rise thereto”, and is simply a red herring. This Office has previously held that HRS §103D-701(a) requires that protests be filed within five working days after the bidder knew or should have known of the facts giving rise to the protest but no later than five working days after the posting of the award. *Frank Coluccio*

³ On July 1, 2003, while the Hearings Officer’s decision regarding Respondent’s motion to dismiss petition in PCH-2003-14 was pending, Respondents posted the notice of award of the contract for the Project to Kamaaina Pumping. Thereafter, on July 3, 2003, Petitioner submitted “this award protest in connection with the County of Hawaii’s recent posting of the award of Invitation for Bid No. 2054, Proposal and Specification for Price Agreement for Furnishing Drywell and Culvert Cleaning and Maintenance for the Department of Public Works, County of Hawaii (“Bid No. 2054) to Kamaaina Pumping, Inc.” The basis for this second protest is virtually identical to the protest filed in PCH-2003-14.

Construction Co., v. City & County of Honolulu, et al., PCH-2002-18 (February 13, 2003). Indeed, the posting of the notice of award does not resurrect an untimely protest. As the Hearings Officer noted in *GTE Hawaiian Telephone Company, Incorporated v. Department of Finance, County of Maui, PCH-98-6 (December 9, 1998)*, “[a]ny other conclusion would undermine the underlying purpose of the Procurement Code.”

Accordingly, the dispositive question raised by this motion is the same question that was addressed in PCH-2003-14: whether Petitioner filed its protest within five working days after it knew or should have known of the facts giving rise to its protest? And because that question has already been adjudicated and determined in the prior litigation between the parties, Petitioner is now collaterally estopped from relitigating the timeliness of its protest.⁴

IV. DECISION

Based on the foregoing considerations, Respondents’ Motion to Dismiss is granted and this matter is hereby dismissed.

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Dated at Honolulu, Hawaii: _____.



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

⁴ Issue preclusion is a doctrine that limits a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy. Issue preclusion applies to a subsequent suit on a different cause of action and prevents the parties or their privies who lost in the earlier suit from relitigating any issue that was actually litigated and finally decided in the earlier action. The party asserting issue preclusion must establish that (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom issue preclusion is being asserted was a party or in privity with a party to the prior adjudication. See generally, *Steve M. Rogers, et al., v. Maneck B. Minoo, et al., 101 Hawaii 420 (2003)*. In this case, the Hearings Officer finds all four of these elements to be present.