



2004 JUL -8 P 3:07

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

In the Matter of	)	PCH-2003-29
	)	
APEX SOFTWARE, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER
vs.	)	GRANTING RESPONDENT'S
	)	MOTION TO DISMISS
STATE PROCUREMENT OFFICE,	)	
DEPARTMENT OF ACCOUNTING	)	
AND GENERAL SERVICES, STATE	)	
OF HAWAII,	)	
	)	
Respondent.	)	

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

I. INTRODUCTION

On December 11, 2003, Apex Software, Inc. ("Petitioner"), filed a request for hearing to contest the State Procurement Office, Department of Accounting and General Services, State of Hawaii's ("Respondent") denial of its protest in connection with RFP-02-036-SW. 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 March 3, 2004, Respondent filed the instant motion to dismiss. On May 24, 2004, Petitioner submitted a memorandum in opposition to the motion.

The motion came before the undersigned Hearings Officer on June 3, 2004. Respondent was represented by Patricia Ohara, Esq. Petitioner failed to appear.

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. In 2003, Respondent issued a Request for Proposals for a “Hawaii Electronic Procurement System,” RFP-02-036-SW (“RFP”).
2. Petitioner submitted a proposal in response to the RFP. Petitioner is located in Phoenix, Arizona.
3. Respondent evaluated the proposals and notified Petitioner that Respondent was awarding the contract to another offeror.
4. By letter dated October 30, 2003 to Respondent, Petitioner protested the ranking of its proposal.
5. By letter dated and mailed on November 21, 2003, Respondent denied the protest and informed Petitioner of its right to file an administrative review of the denial.<sup>1</sup> This letter was mailed by Respondent on November 21, 2003 and received by Petitioner on November 24, 2003.
6. On November 26, 2003, Respondent received an E-Mail from Petitioner. Attached to the E-Mail was a copy of a letter dated November 26, 2003 from Petitioner and addressed to the Office of Administrative Hearings, Department of Commerce & Consumer Affairs (“OAH”) requesting an administrative review of the November 21, 2003 denial.
7. On December 11, 2003, Petitioner contacted OAH by telephone and was informed that no request for administrative review had been received from Petitioner.
8. Immediately following and as a result of the telephone conversation with OAH on December 11, 2003, Petitioner faxed a letter dated December 11, 2003 to OAH

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<sup>1</sup> Respondent’s denial letter informed Petitioner that “you have the right to an administrative hearing for which you are required to submit a request directly to the Office of Administrative Hearings, Department of Commerce & Consumer Affairs, 335 Merchant Street, Ste. 100, Honolulu, Hawaii 96813 (ph. (808) 586-2828), within seven (7) calendar days after this final decision.”

requesting an administrative review of Respondent's November 21, 2003 denial of its protest. The facsimile transmission also included (1) a copy of a letter addressed to OAH dated November 26, 2003 requesting an administrative review of Respondent's November 21, 2003 denial of its protest; and (2) a copy of what appeared to be various receipts from the United States Postal Service ("USPS").

9. A copy of Petitioner's December 11, 2003 and November 26, 2003 letters along with the USPS receipts were also received by OAH by mail on December 16, 2003.

10. On March 3, 2004, Respondent 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.

Respondent's motion is based upon the timeliness requirement set forth in HRS §103D-712(a):

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, 103D-701, or 103D-702.

(Emphasis added).

Here, the uncontroverted evidence established that Respondent's denial of Petitioner's protest was issued on November 21, 2003. Thus, any request for administrative review of that denial was required to be filed with OAH by November 28, 2003. Petitioner's request for administrative review, however, was not filed until December 11, 2003.

Notwithstanding that, Petitioner claims that on November 26, 2003, it mailed its written request for administrative review to OAH at the address provided by Respondent in its November 21, 2003 denial letter: 335 Merchant Street, Suite 100, Honolulu, Hawaii 96813. Petitioner asserts that had it sent its request to OAH's former address at 250 South King Street, it would have been received by the November 28, 2003 deadline.

At the outset, the Hearings Officer notes that the 335 Merchant Street address was the proper mailing address for OAH on November 26, 2003.<sup>2</sup> Moreover, and in any event, there is very little evidence to support Petitioner's argument that its request, which was apparently sent from Arizona on November 26, 2003, would have been delivered to OAH by the November 28, 2003 deadline, regardless of which address it was sent to.<sup>3</sup> According to Petitioner, this conclusion is based on the fact that the return receipt that was attached to Respondent's November 21, 2003 denial letter was returned on November 26, 2003, two days after the letter was delivered to Petitioner on November 24, 2003. While Petitioner's theory suggests that delivery of the letter in two days was possible, it by no means establishes that the letter *was* delivered within the prescribed period of time or would have been delivered in a timely fashion if it had been sent to OAH's former address. It is also worth noting that Petitioner apparently did not mail its request for administrative review until November 26, 2003 even though it had received the denial on November 24, 2003, and did not make any attempt to confirm<sup>4</sup> the receipt of Petitioner's November 26, 2003 letter by OAH until December 11, 2003.<sup>5</sup> It was Petitioner's responsibility to ensure that its request for review was filed with OAH in a timely manner. For these reasons, the Hearings Officer concludes that Petitioner did not file its request for administrative review within the time prescribed by HRS §103D-712(a).<sup>6</sup>

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<sup>2</sup> OAH had relocated to the 335 Merchant Street address prior to November 26, 2003.

<sup>3</sup> Under these circumstances, there is no basis to estop Respondent from arguing that Petitioner's request for review is untimely.

<sup>4</sup> According to the exhibits attached to Petitioner's memorandum, it appears that Petitioner could have tracked the status of the letter at any given time after November 26, 2003 based upon the item number assigned to it by the USPS.


<sup>5</sup> According to the undisputed evidence, the November 26, 2003 letter was not e-mailed to OAH on that date or at anytime prior to December 11, 2003.

<sup>6</sup> It is also apparent from the record that even if this matter proceeded to hearing, there would be no competent evidence to support or otherwise warrant a different outcome.

IV. DECISION

Based on the foregoing considerations, Respondent's motion to dismiss is granted and this matter is hereby dismissed.

Dated at Honolulu, Hawaii: JUL - 8 2004



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