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DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE



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

In the Matter of)	PCH-2004-15
)	
MAUI AUTO WRECKING,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND FINAL ORDER
vs.)	GRANTING RESPONDENT'S
)	MOTION TO DISMISS
DEPARTMENT OF FINANCE,)	
COUNTY OF MAUI,)	
)	
Respondent.)	

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

I. INTRODUCTION

On September 29, 2004, Maui Auto Wrecking ("Petitioner"), filed a request for hearing to contest the Department of Finance, County of Maui's ("Respondent") denial of its protest in connection with its Request for Proposals for the Disposal of Derelict and Abandoned Vehicles, Job No. 03-04/P72 ("RFP"). 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 October 14, 2004, Respondent filed the instant motion to dismiss. On October 18, 2004, Petitioner submitted a memorandum in opposition to the motion.

The motion came on for hearing before the undersigned Hearings Officer on October 20, 2004. Respondent was represented by its attorney, Cheryl Tipton, Esq. Petitioner was represented by its authorized representative, Kathren A. Masten. Both parties appeared by telephone.

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 or about March 21, 2004, Respondent issued the RFP.
2. Three proposals were submitted to Respondent in response to the RFP, including one by Petitioner.
3. On September 2, 2004, Respondent informed the three offerors that Respondent had elected to cancel the solicitation.
4. By letter dated September 7, 2004 to Respondent, Petitioner protested Respondent's decision to cancel the solicitation.
5. By letter dated September 17, 2004, Respondent denied the protest and informed Petitioner of its right to appeal the denial to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH"). The September 17, 2004 denial letter was mailed by Respondent on or before September 21, 2004 and received by Petitioner on September 22, 2004.
6. On September 28, 2004, Petitioner mailed its request for administrative review to OAH.
7. On September 29, 2004, Petitioner's request for administrative review was received by and filed with OAH.
8. On October 14, 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 by September 21, 2004. *See, Nihī Lewa v. Dept. of Budget & Fiscal Services, 103 Haw. 163 (2003)*. Thus, any request for administrative review of that denial had to be filed by September 28, 2004. Nevertheless, Petitioner's request was not filed with OAH until September 29, 2004.

In response, Petitioner points out that Hawaii Administrative Rules (“HAR”) §3-126-49(a), entitled, “Time”, provides, among other things, that “[i]ntermediate Saturdays, Sundays, and holidays shall not be included in a computation when the period of time prescribed or allowed is seven days or less.” Therefore, according to Petitioner, the request for administrative review was due on or before September 30, 2004.

The applicability of HAR §3-126-49(a) to HRS §103D-712(a) has been previously considered by this Office. In *RCI Environmental, Inc. v. Johns, PCH 2000-10 (January 2, 2001)*, the Hearings Officer found that:

[w]hile 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 terms “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” (emphasis in original).

And more recently, in *Eckard Brandes, Inc. v. Department of Finance, County of Hawaii, PCH 2003-14 (July 15, 2003)*, the Hearings Officer concluded that:

[t]he provisions of HAR §3-126-49 are applicable only if there is no applicable statute or rule that provides otherwise. In this case there is a specific statute, HRS §103D-712, which provides that requests for administrative review shall be filed within seven calendar days of a written determination.

Applying these decisions to the case at hand, the Hearings Officer concludes that the requirement in HAR §3-126-49(a) that intermediate Saturdays, Sundays, and holidays shall not be included in a computation when the period of time prescribed is seven days or less, is inapplicable to the calculation of the seven-calendar-day period for the filing of requests for administrative review as provided in HRS §103D-712(a).

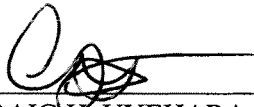
Petitioner also asserts that because the seven-calendar-day period commenced upon the *mailing* of the denial on or before September 21, 2004, it stands to reason that Petitioner’s request, having been *mailed* on September 28, 2004, was also timely. Petitioner apparently bases this argument on *Nihi Lewa, Inc., supra*, where the Hawaii Supreme Court determined that the term, “issuance” as used in HRS §103D-712(a), means the date of mailing as evidenced by the postmark. However, because the *Nihi Lewa* holding was limited to the determination of the term, “issuance”, Petitioner’s reliance on that decision is misplaced. Rather, HRS §103D-712(a) specifically provides

that “[r]equests for administrative review . . . shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs within seven calendar days . . .” That language clearly evidences an intent by the Legislature to require that such requests be *received* by OAH within the seven-calendar-day period. Accordingly, the Hearings Officer concludes that requests for administrative review made pursuant to HRS §103D-712(a), must be *received* by OAH, as evidenced by OAH’s file-stamp date, within the prescribed period. Consequently, because Petitioner’s request was not received by OAH until September 29, 2004, one day after the September 28, 2004 deadline, the request was untimely.

IV. DECISION

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

Dated at Honolulu, Hawaii: OCT 27 2004



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