

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

In the Matter of)	PCH-2004-17
)	
ROBERT'S HAWAII SCHOOL BUS, INC.,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS
Petitioner,)	
vs.)	
)	
DEPARTMENT OF EDUCATION, STATE)	
OF HAWAII,)	
)	
Respondent,)	
_____)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. CHRONOLOGY OF CASE

On November 15, 2004, Robert's Hawaii School Bus, Inc. ("Petitioner"), by and through its attorneys David A. Nakashima and Mei-Fei Kuo, filed its request for a hearing to protest the cancellation of certain invitations for bids ("IFB") by the Department of Education, State of Hawai'i ("Respondent").

On November 26, 2004, Respondent, by and through its attorneys Aaron H. Schulaner and Holly T. Shikada, filed its Motion to Dismiss.

On December 1, 2004, Petitioner by and through its attorneys David A. Nakashima and Mei-Fei Kuo, filed its Memorandum in Opposition to Respondent's Motion to Dismiss.

On December 2, 2004, Respondent's Motion to Dismiss came on for hearing before the undersigned Hearings Officer. Respondent was represented by its attorney Aaron H. Schulaner. Petitioner was represented by its attorneys David A. Nakashima and Mei-Fei Kuo.

After reviewing and considering the pleadings and presentations of counsel, as well as the entire record of these proceedings, the Hearings Officer orally granted Respondent's Motion to Dismiss, and requested counsel for Respondent to submit a proposed order for review and adoption by the Hearings Officer.

On December 6, 2004, Respondent, by and through its attorney Aaron H. Schulaner, submitted its proposed Order Granting Respondent's Motion to Dismiss for the Hearings Officer's review.

Having reviewed and considered the pleadings and presentations of counsel, as well as the entire record of these proceedings, the Hearings Officer renders the following limited findings of fact, conclusions of law, and final order in regards to Respondent's Motion to Dismiss.

II. FINDINGS OF FACT

1. September 30, 2003, Respondent issued an Invitation for Bids for furnishing security services at Hawai'i State Airports, ("September 30, 2003 IFB"). The initial deadline for the receipt of sealed bids was December 4, 2003.

2. On or about June 1, 2004, Respondent issued the following IFBs: No. D04-107, D04-108, D04-109, D04-111, and D04-112. Subsequently, on July 22, 2004 Respondent issued an IFB for D05-004. Finally, on August 2, 2004, Respondent issued an IFB for D05-013. All of the IFBs related to the provision of school bus transportation.

3. On or about August 27, 2004, Respondent sent a letter to the various vendors, including Petitioner, informing them that the bids exceeded available funds and asking for new bids.

4. By letter dated September 8, 2004, Petitioner informed Respondent that Petitioner would not be able to reconsider its previous bids.

5. On or about September 15, 2004, Respondent canceled the IFBs pursuant to Hawai'i Administrative Rules ("HAR") §3-122-96-2-D.

6. By letter dated September 23, 2004, Petitioner, by and through its attorneys David A. Nakashima and Mei-Fei Kuo, protested the cancellation of the IFBs, pursuant to Hawai'i Revised Statutes ("HRS") §103D-701(a).

7. By letter dated October 28, 2004, (but mailed on October 27, 2004), Respondent denied Petitioner's protest. The letter was addressed to Mei-Fei Kuo, Esq. and David Nakashima, Esq.

8. On or about October 28, or 29, 2004, Respondent's letter dated October 28, 2004, denying Petitioner's protest, was received by David Nakashima, counsel for Petitioner. However, because of other pending matters and workload priorities, Mr. Nakashima was not able to review Respondent's letter dated October 28, 2004, when the letter was first received by Mr. Nakashima's office.

9. From November 1, 2004, to November 5, 2004, and part of the week of November 8, 2004, Mr. Nakashima was out of the office on sick leave due to illness. During the period that Mr. Nakashima was out on sick leave and unable to work, Mr. Nakashima's staff was not aware of the significance of Respondent's letter dated October 28, 2004, denying Petitioner's protest, specifically in regards to the necessity of filing a timely request for hearing to contest Respondent's denial. Consequently, Mr. Nakashima was unable to instruct Ms. Kuo to timely respond to the Respondent's denial by filing a request for hearing with the Office of Administrative Hearings.

10. On November 15, 2004, Petitioner filed the present request for hearing. The request for hearing was filed more than seven (7) calendar days after the issuance of the denial of the protest.

III. CONCLUSIONS OF LAW

A. Timeliness of Petitioner's Request for Administrative Review

In regards to the timeliness of the filing of Petitioner's request for administrative review, the provisions of HRS §103D-712, state in relevant part:

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.

Accordingly, the Hearings Officer finds and concludes that Petitioner was required to have filed its request for administrative review with the Office of Administrative Hearings by November 3, 2004, assuming that Respondent's letter dated October 28, 2004, was mailed on

October 27, 2004. At the very latest, Petitioner was required to have filed its request for administrative review with the Office of Administrative Hearings by November 4, 2004, assuming that Respondent's letter dated October 28, 2004, was actually mailed on October 28, 2004.

Consequently, because Petitioner's request for administrative review was filed with the Office of Administrative Hearings on November 15, 2004, the Hearings Officer must conclude that Petitioner's request was not timely filed in accordance with HRS §103D-712.

B. Applicability of HAR §3-125-50

Petitioner has asserted that HAR §3-125-50 provides the Hearings Officer with the discretion to enlarge the time period in which a request for administrative review under HRS §103D-712 must be filed. The provisions of HAR §3-125-50 state:

Extensions of time. Unless otherwise provided, the hearings officer may extend the time within which any procedural action shall be taken, at the request of any party. The hearings officer, in the sole discretion of the hearings officer, may require that the extension be stipulated to by all parties to the proceeding or that the request be by motion for good cause shown as to why the extension should be granted.

However, in order for the provisions of HAR §3-125-50 to be utilized, the Hearings Officer must first have jurisdiction over the case and the subject matter. In this case, because the Petitioner's request for administrative review was not timely filed, the Hearings Officer did not have jurisdiction over the case, and therefore HAR §3-125-50 cannot be utilized to extend the mandatory filing deadline imposed by HRS §103D-712.

C. Excusable Neglect

Petitioner has asserted that the circumstances surrounding the illness of Petitioner's lead counsel constitutes excusable neglect and therefore provides the Hearings Officer with an independent basis upon which to enlarge the time period for requesting an administrative review pursuant to HRS §103D-712.

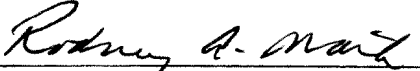
Although the severity of Mr. Nakashima's illness during the relevant time periods would clearly provide a basis for excusable neglect regarding certain kinds of professional responsibilities, the current case law regarding procurement hearings does not yet recognize excusable neglect as a basis to extend the time period for requesting an administrative review pursuant to HRS §103D-712.

IV. ORDER

Having reviewed and considered the presentations of the parties as well as the entire record of this proceeding,

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss in the above-captioned matter, be and is hereby granted.

DATED: Honolulu, Hawai'i, December 9, 2004.



RODNEY A. MAILE
Senior Hearings Officer
Department of Commerce
and Consumer Affairs