



its attorney, Cheryl Tipton, Esq. Petitioner was represented by its authorized representative, Larry A. Poffenroth. Both parties appeared by telephone.

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

## II. FINDINGS OF FACT

1. On or about October 17, 2004, Respondent issued the IFB.
2. Two bids were submitted to Respondent in response to the IFB, including one by Petitioner.
3. By letter dated January 19, 2005, Respondent informed Petitioner that its bid had been rejected as nonresponsive to the IFB.
4. By letter dated January 25, 2005 to Respondent, Petitioner protested Respondent's decision to reject Petitioner's bid.
5. By letter dated March 8, 2005, Respondent denied the protest and informed Petitioner of its right to appeal the denial to the Department of Commerce and Consumer Affairs. The March 8, 2005 denial letter was mailed by Respondent on March 10, 2005 and received by Petitioner's attorney on March 14, 2005.
6. On March 18, 2005, Petitioner filed its request for administrative review with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.
7. A pre-hearing conference in this matter was held on March 28, 2005. During the conference, Respondent's attorney contended that Petitioner's request for administrative review was untimely and indicated an intention to file a motion to dismiss this case on that basis. Consequently, the Hearings Officer directed Respondent's attorney to file the motion by April 1, 2005 and Petitioner to file its response by April 6, 2005. Oral argument was scheduled for April 7, 2005.
8. On March 31, 2005, Respondent filed the instant motion to dismiss and on April 4, 2005, Petitioner filed its memorandum in opposition to the motion. The motion was heard on April 7, 2005.

## 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 March 10, 2005. See, *Nihi 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 March 17, 2005. Nevertheless, Petitioner's request was not filed until March 18, 2005. See generally, *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH 98-6 (December 9, 1998) (the accomplishment of the underlying objectives of the Code requires strict adherence to the time constraints for the initiation and prosecution of protests).

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 March 21, 2005.

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.

*See also, Maui Auto Wrecking v. Dept. of Finance, PCH-2004-15 (October 27, 2004).*

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).<sup>2</sup>

IV. DECISION

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

Dated at Honolulu, Hawaii: APR 11 2005.



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

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<sup>2</sup> Petitioner also urges the Hearings Officer to strike the motion as untimely. According to Petitioner, the motion should have been filed prior to the March 28, 2005 pre-hearing conference and Respondent's failure to do so prevents Petitioner from "having his day in Court". The issue, however, was raised by Respondent at the pre-hearing conference and Petitioner had ample time and opportunity to respond to and otherwise address the motion. Moreover, the timeliness of Petitioner's request for administrative review is jurisdictional in nature and, as such, may be raised at anytime during this proceeding.