



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2007 DEC 12 A 9:30

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

In the Matter of	)	PCH-2007-7
	)	
CR DISPATCH SERVICE, INC., dba	)	HEARINGS OFFICER'S
SECURITY ARMORED CAR &	)	FINDINGS OF FACT,
COURIER SERVICE,	)	CONCLUSIONS OF LAW,
	)	AND ORDER GRANTING
Petitioner,	)	RESPONDENT DEPARTMENT
	)	OF EDUCATION'S MOTION
vs.	)	TO DISMISS OR IN THE
	)	ALTERNATIVE FOR
DEPARTMENT OF EDUCATION,	)	SUMMARY JUDGMENT
STATE OF HAWAII,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED COURIER SERVICES, INC.,	)	
	)	
Intervenor.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER GRANTING RESPONDENT DEPARTMENT OF EDUCATION'S  
MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. INTRODUCTION

On November 6, 2007, CR Dispatch Service, Inc., dba Security Armored Car & Courier Service ("Petitioner"), filed a request for hearing to contest the October 31, 2007 decision of the Department of Education ("Respondent") to deny Petitioner's protest

concerning Invitation for Bid Nos. D08-065/066/067 (“IFBs”) to provide courier services to Respondent. 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 November 14, 2007, United Courier Services, Inc. (“Intervenor”) filed a motion to intervene in this proceeding. On November 16, 2007, an order was issued granting Intervenor’s motion to intervene.

On November 19, 2007, Respondent filed a motion to dismiss or in the alternative for summary judgment and on November 20, 2007, Intervenor filed a Joinder in Respondent’s motion. On November 23, 2007, Petitioner submitted a memorandum in opposition to the motion.

On November 23, 2007, Respondent also filed a motion to quash subpoenas served upon Respondent, along with a motion to strike Petitioner’s memorandum in opposition to Respondent’s motion to dismiss or in the alternative for summary judgment.

The motions came before the undersigned Hearings Officer on November 26, 2007. Petitioner was represented by Joel D. Kam, Esq.; Respondent was represented by Aaron H. Schulaner, Esq. and Intervenor was represented by Thomas J. Wong, Esq. Following oral arguments, the Hearings Officer denied Respondent’s motion to strike Petitioner’s memorandum in opposition to Respondent’s motion to dismiss or in the alternative for summary judgment. The remaining two motions were taken under advisement.

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

## II. FINDINGS OF FACT

1. On October 5, 2007, Respondent posted and made available to the public the IFBs to solicit courier services on Oahu and the neighbor islands.

2. The IFBs sought bids for contracts to commence on January 1, 2008 to December 31, 2008. The IFBs also provided that the contracts could be extended for two

additional twelve-month periods under the same terms and conditions of the original contract upon the mutual agreement of the parties.

3. Paragraph 6 of the Special Conditions of the IFBs, entitled, “Bidder Qualification”, states in relevant part:

PUC Certificate or Permit. At the time of bidding and during the contract period, Bidder must be registered with and authorized by the State of Hawaii, Public Utilities Commission (PUC) as a “common carrier” capable of rendering services similar to that specified herein. In the absence of PUC-authorized common carriers on the island, the DOE reserves the right to contract with a company authorized as a “contract carrier”. This PUC-issued certificate or permit authorizes the bidder’s business of transporting property using motor vehicle(s).

\* \* \* \*

4. On October 17, 2007, Respondent issued Addendum A<sup>1</sup> to IFBs D08-065 and D08-066. On October 19, 2007, Respondent issued Addendum B to IFBs D08-065 and D08-066 and Addendum A to IFB D08-067, indefinitely suspending the solicitation of bids. On November 1, 2007, Respondent issued Addendum C to IFBs D08-065 and D08-066 and Addendum B to IFB D08-067, rescheduling the bid opening for November 7, 2007.

5. On October 24, 2007, Petitioner filed a protest concerning the “Bidder Qualification” under Paragraph 6 of the Special Conditions of the IFB. More specifically, Petitioner protested the requirement in Paragraph 6 that bidders “must be registered with and authorized by the State of Hawaii, Public Utilities Commission (PUC) as a *common carrier* . . .” (emphasis added).

6. On October 31, 2007, Respondent denied the protest.

7. On November 6, 2007, Petitioner filed a request for administrative hearing to contest Respondent’s denial.

---

<sup>1</sup> The changes made by Addendum A consisted of having the bidders replace the original offer page with a revised page and increasing the coverage for crime insurance. Nothing in Addendum A affected Paragraph 6.

### III. CONCLUSIONS OF LAW

In bringing this motion, Respondent argues that Petitioner's protest was untimely and the Hearings Officer therefore lacks jurisdiction to hear this matter, the protest fails to state a claim upon which relief may be granted, and Petitioner is unable to show that the specifications are not "reasonably related to the minimum needs of the agency".

The salient facts are not in dispute. The IFBs were posted and made available on October 5, 2007. Hawaii Revised Statutes §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).

In construing the foregoing provision, this Office has previously held that the accomplishment of the underlying objectives of HRS Chapter 103D requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc., v. County of Maui, PCH 98-6 (December 9, 1998)*. See also, *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget and Fiscal Services, PCH-2000-8 (October 17, 2000)*(strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute's underlying purpose. Because the IFBs had been posted on October 5, 2007, Petitioner knew or should have known of Paragraph 6 and the requirement that bidders had to be registered

with and authorized by the Public Utilities Commission as a common carrier, at the time of bidding and during the contract period. Thus, any protest based upon the requirement in Paragraph 6 should have been filed by October 12, 2007.<sup>2</sup> The protest, however, was not filed until October 24, 2007 and is therefore untimely.

Petitioner contends that because Respondent did not raise the timeliness issue in its October 31, 2007 denial, it has effectively waived that objection. In *GTE Hawaii Telephone Co., Inc.*, the Hearings Officer concluded:

Petitioner also contends that Respondent waived its right to assert that Petitioner's protest was untimely when it failed to include that as a basis for its denial of the protest in its May 10, 1998 letter (footnote omitted). The language of HAR §3-126-3(a), however, is plain and unambiguous. It clearly requires that a specific time provision be met in the filing of a protest in order to have the protest considered, and expressly prohibits consideration of untimely protests. This language read in light of the underlying purpose of the Procurement Code, as discussed earlier, leads the Hearings Officer to conclude that the time requirement set forth in HAR §3-126-3(a) is mandatory and therefore not subject to waiver by Respondent. *The Hawaii Corporation, dba Pacific Construction Company v. Kim and Dillingham Corporation*, 53 Haw. 659 (1972). See generally, *Appeal of Kennedy Temporaries, No. 1061 (MSBCA July 20, 1982)* (timeliness requirement is substantive in nature and could not be waived).

Applying the holding in *GTE Hawaii Telephone Co., Inc.* in this case, the Hearings Officer concludes that the timeliness requirement of HRS §103D-701(a) is not subject to waiver by Respondent.

Petitioner also asserts that the October 17, 2007 addendum to the IFBs effectively tolled the timeliness requirement. There is no dispute, however, that none of the addenda issued in connection with the IFBs affected the provision (Paragraph 6) upon which the protest was based and therefore cannot serve as a basis to toll the limitation period.

---

<sup>2</sup> October 6, 2007 was a Saturday.

Having determined that Petitioner's protest was untimely, the Hearings Officer need not address the alternative arguments upon which Respondent's motion is based.

IV. DECISION

Based on the foregoing considerations, the Hearings Officer orders as follows:

1. Respondent's motion to dismiss or in the alternative for summary judgment is granted and this matter is hereby dismissed;
2. Respondent's motion to quash subpoenas served upon Respondent is hereby rendered moot; and
3. Each party shall bear its own attorney's fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: DEC 12 2007

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

---

*Hearings Officer Findings of Fact, Conclusions of Law, and Order Granting Respondent Department of Education's Motion to Dismiss or in the Alternative for Summary Judgment; CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. Dept. of Educ., et al., PCH-2007-7.*