



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 FEB 13 A 9:52

HEARINGS OFFICE

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

In the Matter of)	PCH-2008-23
)	
DIVERSIFIED PLUMBING & AIR)	HEARINGS OFFICER'S FINAL ORDER
CONDITIONING,)	GRANTING RESPONDENT'S MOTION
)	TO DISMISS PETITIONER'S REQUEST
Petitioner,)	FOR AN ADMINISTRATIVE HEARING
)	
vs.)	
)	
DEPARTMENT OF EDUCATION, STATE))	
OF HAWAII,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINAL ORDER GRANTING RESPONDENT'S MOTION
TO DISMISS PETITIONER'S REQUEST FOR AN ADMINISTRATIVE HEARING

I. INTRODUCTION

On December 19, 2008, Diversified Plumbing & Air Conditioning ("Petitioner") filed a request for hearing to contest the Department of Education, State of Hawaii's ("Respondent") decision to terminate their contract. The matter was set for a pre-hearing conference on December 29, 2008 and a hearing on January 5, 2009. The Notice of Hearing and Pre-Hearing Conference ("Notice") was transmitted to the parties.

On December 26, 2008, Respondent filed a Motion to Dismiss Petitioner's Request for An Administrative Hearing ("Motion").

At the pre-hearing conference held on December 29, 2008, Petitioner was represented by its owner Douglas Luiz II and Respondent was represented by Jerrold G.H. Yashiro, Esq. The parties agreed that Respondent's Motion would be heard on January 5, 2009 and that the hearing would be taken off the calendar and rescheduled at a second pre-hearing

conference if Respondent's Motion was denied. A Pre-Hearing order was issued on December 29, 2008.

On December 31, 2008, Petitioner requested that the hearing on the Motion be postponed. Respondent had no objection so the parties agreed to reschedule the hearing on the Motion to January 16, 2009. On January 16, 2009, most State offices, including the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("DCCA") were closed due to bad weather. Accordingly, on January 22, 2009, a Notice of Rescheduled Hearing was issued, rescheduling the hearing on the Motion to February 3, 2009. On January 23, 2009, the Hearings Officer received a request from Petitioner, asking that the hearing on the Motion be rescheduled to sometime after they receive documents they requested through the Office of Information Practices. By a letter dated January 23, 2009, the Hearings Officer advised Petitioner that the hearing on the Motion had already been rescheduled so if Respondent does not agree to a new date, a motion may be filed to continue the hearing.

The hearing on the Motion was held on February 3, 2009. Petitioner was represented by Mr. Luiz and Respondent was represented by Mr. Yashiro. The matter was taken under advisement.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order.

II. FINDINGS OF FACT

1. By a letter dated November 17, 2008 Respondent informed Petitioner that it:

...deducted the cost of the remittance of the As-Built drawings and submission of the final closing documents.

Therefore, we are withholding the remaining retention on the project in the sum of \$5,143, for failure to comply with the contract requirements. You are hereby notified that the contract is closed and no further payment will be made.

2. By a letter dated December 8, 2008, Petitioner requested that Respondent rescind or reverse its decision to close the contract on DOE Job No. 57-16-6144.

3. By a letter dated December 19, 2008, Respondent affirmed that the project was closed.

4. On December 19, 2008, Petitioner filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs (“OAH”), requesting that the “termination of the contract be rescinded, payment made on the balance due the approval and payment of the change order in question.”

III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH 96-9 (November 20, 1996).

Respondent’s Motion to Dismiss is based on the assertion that DCCA does not have jurisdiction to hear this matter because DCCA does not have jurisdiction to hear and determine contract issues. While Petitioner argued that DCCA “should” have jurisdiction, it failed to cite any legal authority in support of its contention.

Hawai’i Revised Statutes (“HRS”) § 103D-709(c) provides:

103D-709 Administrative proceedings for review.

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b) and [103D-702(g)] may initiate a proceeding under this section.

After a review of the sections cited in HRS § 103D-709(c), the Hearings Officer finds that those sections are not applicable here. Accordingly, the Hearings Officer concludes that DCCA does not have jurisdiction to hear this matter.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent’s Motion is granted and,

IT IS HEREBY ORDERED that the above-entitled matter is dismissed.

DATED: Honolulu, Hawaii, FEB 13 2009.

/s/ SHERYL LEE A. NAGATA

SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce and Consumer Affairs