



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-2009-4
)	
DIVERSIFIED PLUMBING & AIR)	
CONDITIONING,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
HAWAII PUBLIC HOUSING)	
AUTHORITY, STATE OF HAWAII,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On February 17, 2009, Diversified Plumbing & Air Conditioning ("Petitioner"), filed a request for administrative review of the Hawaii Public Housing Authority, State of Hawaii's ("Respondent") denial of Petitioner's protest in connection with Respondent's Invitation for Bids for the project designated as, "Repair of Dry Standpipes (DSP) and Testing at La'iola Elderly, HPHA Job No. 08-044-115-S ("Job"). The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On March 4, 2009, the matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes ("HRS")

Chapter 103D. Petitioner was represented by its owner, Douglas E. Luiz, II, and Respondent was represented by its attorney, Nalani P. Wilson-Ku, Esq.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On November 14, 2008, Respondent issued a Request for Quotations in connection with the Job on the State of Hawaii's electronic procurement system.

2. Respondent's Request for Quotations was made pursuant to HRS §103D-305 and Hawaii Administrative Rule ("HAR") §3-122-74.

3. Quotes for the Job were due on or before December 18, 2008.

4. Five quotes were submitted and opened on December 18, 2008. KD Construction, Inc. ("KD Construction") was determined to be the apparent low offeror, having submitted a quote in the sum of \$25,800.00. Doonwood Engineering, Inc. submitted the second lowest quote of \$29,267.00. The other quotes were submitted by Site Engineering, Inc. in the amount of \$33,400.00, Petitioner in the amount of \$46,888.00, and RRL, Inc. in the sum of \$48,888.88.

5. On or about January 15, 2009, Respondent awarded the contract for the Job to KD Construction and notified the other offerors.

6. By letter dated January 21, 2009, Petitioner protested the awarding of the contract to KD Construction. Petitioner's protest letter was transmitted to Respondent by facsimile transmission and received by Respondent on January 21, 2009. The protest stated in part:

We are writing in protest of award of the above project for the following. The awarded contractor does not possess the appropriate contractor's license for fire protection systems – which is a contractor license classification **C-20 fire protection license**.

* * * *

7. By letter dated February 5, 2009, Respondent denied Petitioner's protest. The denial was based, in part, on Respondent's determination that KD Construction's subcontractor, Alii Fire Protection Company, Ltd., has a "current and valid C-20 fire protection License No. 19841, and it will coordinate and conduct the fire testing of the DSP lines for compliance with the Honolulu Fire Department as required under Amendment No. 1."

8. Respondent's denial letter was furnished to Petitioner by facsimile transmission on February 6, 2009 and received by Petitioner on the same date. The letter was also mailed to Petitioner on February 9, 2009.

9. Respondent's facsimile machine produced a confirmation sheet which indicated that the entire letter denying the protest had been transmitted to Petitioner on February 6, 2009.

10. On February 17, 2009, Petitioner filed the instant request for administrative review. Petitioner's request stated in part:

We respectfully request an administrative hearing for the above subject project the repair and testing of fire system for the following reasons:

1) The awarded contractor does not possess the appropriate contractor's license for fire protection systems – which is a contractor classification **C-20 fire protection license**.

* * * *

2) Also we would like to point out that bidder #2 and #3 also do not possess the appropriate license classification for the work being done.

* * * *

3) In addition the first, second, and third bidders did not list any subcontractors at bid time as required by subcontractor listing law.

* * * *

III. CONCLUSIONS OF LAW

At the outset, Respondent contends that Petitioner's request for administrative hearing is untimely as it was filed more than 7 days after Respondent faxed its denial letter to Petitioner on February 6, 2009. Under HRS §103D-712(a), Petitioner was required to file its request for administrative review with the Office of Administrative Hearings within 7 calendar days of the *issuance* of Respondent's letter denying the protest. Respondent maintains that its denial of the protest was issued on February 6, 2009 when it was faxed to Petitioner. Therefore, Respondent contends that Petitioner was required to file its request for administrative review no later than February 13, 2009. Petitioner's request, however, was not filed until February 17, 2009.

In *Nihi Lewa, Inc. v. Dept. of Budget and Fiscal Services*, 80 P.3d 984 (2003), the Hawaii Supreme Court held that the term, "issuance" as used in HRS §103D-712(a), means the date of mailing, as evidenced by the postmark, rather than the protestor's receipt of the agency's decision. Although *Nihi Lewa* did not involve the question whether the procuring agency may issue its decision on a protest by facsimile transmission to the protestor, the court's reasoning is applicable here:

It was within the prerogative of the Legislature to decide that the time for filing a request for administrative review should begin running sooner rather than later. The overall framework of the Hawai'i Public Procurement Code indicates that the Legislature intended to create an expeditious process for resolving disputes over the awarding of contracts. (citation omitted). Under most circumstances, public projects cannot proceed while a protest is pending. (citation omitted). Given that disputes over the award of contracts will necessarily result in delays that will affect public works and, given that the Legislature expressed a clear intent to expedite the process by which such disputes are resolved, "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it," HRS §1-15 (1993), support the purchasing agency's construction of the term "issuance" to mean the date on which a written determination is mailed, as evidenced by the postmark. *Using the date of mailing as the triggering*

mechanism (1) creates an easily verifiable way of establishing the filing deadline (i.e., counting from the date of postmark), (2) reduces the potential for delay that might arise if the party authorized to receive the written determination is unavailable when actual delivery is made, and (3) is in harmony with other provisions of the legislative scheme. See, e.g. Hawaii Administrative Rules §3-126-74 (providing that service of a hearings officer's decision "shall be deemed complete upon its mailing to the party's last known address").

Id. at 988-89 (emphasis added).

The facsimile transmission to the protestor of the procuring agency's decision regarding a protest is likewise consistent with the Legislature's intent to create an expeditious process for resolving disputes over the awarding of government contracts. It also creates an easily verifiable way to establish the filing deadline by counting from the date of the confirmation sheet and reduces the potential for delay that might arise if the party authorized to receive the determination is unavailable when delivery is made. The facsimile transmission of the decision is also authorized by HRS §103D-701(d) which provides that "[a] copy of the decision . . . shall be mailed or *otherwise furnished immediately* to the protestor and any other party intervening." (emphasis added).¹ Based on these considerations, the Hearings Officer concludes that the procuring agency may issue its decision under HRS §103D-701(c) by facsimile transmission and, in that event, the term "issuance" as used in HRS §103D-712(a) means the date of the transmission, as evidenced by the confirmation sheet.

Petitioner does not dispute that Respondent's denial of its protest was faxed to Petitioner on February 6, 2009. Indeed, Petitioner acknowledged that it received the denial on that date. Consequently, Petitioner's request for administrative review was due by February 13, 2009. Petitioner's request for administrative review, however, was not filed at the Office of Administrative Hearings until February 17, 2009. Petitioner's request is therefore untimely and, as a result, the Hearings Officer lacks jurisdiction over

¹ In contrast, nothing in HRS Chapter 103D or its implementing rules permits the filing of a request for administrative review by facsimile transmission. See, *Superior Protection, Inc. v. Department of Transportation*; PCH-2004-12 (August 18, 2004)(*there is no authority to support the contention that the filing of a request for administrative review by facsimile transmission to the DCCA is acceptable*).

this matter. Having arrived at this conclusion, the Hearings Officer will not address the remaining issues in this case.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that Petitioner's request for administrative review be and is hereby dismissed and that Respondent shall bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: MAR 9 2009

/s/ CRAIG H. UYEHARA

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