



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 APR 21 A 11: 18

HEARINGS OFFICE

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

In the Matter of)	PCH 2009-5
)	
AKAMAI ROOFING, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	FINAL ORDER GRANTING
)	RESPONDENT'S MOTION TO DISMISS
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
CERTIFIED CONSTRUCTION, INC.,)	
)	
Intervenor.)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On February 19, 2009, Akamai Roofing, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Transportation, State of Hawai'i's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On February 26, 2009, a stipulation was filed to allow Certified Construction, Inc. ("Intervenor") to intervene in this proceeding.

On February 26, 2009, Respondent filed a Motion to Dismiss ("Motion"). On March 4, 2009, Intervenor filed a joinder to Respondent's Motion.

On March 5, 2009, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Scott E. Kubota, Esq., Respondent was represented by Laura Y. Kim, Esq. and Intervenor was represented by Jeffrey W. Juliano, Esq. and Kristi L. Arakaki, Esq. At the pre-hearing conference the parties agreed that the hearing on the Motion would take place on March 12, 2009 and that the parties would reschedule the hearing on the merits if the Motion was denied.

On March 10, 2009, Petitioner filed its memorandum in opposition to the Motion. On March 11, 2009, Respondent and Intervenor filed their reply memoranda.

On March 12, 2009, oral arguments were heard by the undersigned Hearings Officer. Petitioner was represented by Mr. Kubota, Respondent was represented by Ms. Kim and Intervenor was represented by Mr. Juliano and Ms. Arakaki. 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 decision.

II. FINDINGS OF FACT

1. On October 10, 2008, Respondent posted an Invitation for Bids ("IFB") for a Harbors Division project entitled "Roof Repairs at Pier Shed, Port Allen, Kauai, Hawai'i, Job H.C. 70044 (the "Project"). The IFB stated that sealed bids would be publicly read and opened on October 30, 2008.

2. Petitioner was the apparent low bidder with a bid of \$169,750.00. The second low bidder was Intervenor with a bid of \$189,529.00.

3. By a letter dated November 19, 2008, Intervenor filed a protest on the basis that Petitioner did not list an asbestos subcontractor.

4. By a letter dated December 12, 2008, Respondent rejected Intervenor's protest.

5. Intervenor filed a request for hearing with the Department of Commerce and Consumer Affairs, State of Hawai'i ("DCCA"), on December 23, 2008 (PCH 2008-24).

6. After discussions between Respondent and Petitioner on January 7, 2009, and upon further review of the IFB specifications and Intervenor's request for hearing,

Respondent determined that a C-19 license (asbestos contractor) was necessary to complete the Project.

7. On January 8, 2009, Respondent orally informed Petitioner that it would be rejecting Petitioner's bid as nonresponsive for failing to list a C-19 asbestos subcontractor.

8. By a letter dated January 9, 2009, faxed to Petitioner on January 12, 2009, and postmarked on January 15, 2009, Respondent informed Petitioner that it was rejecting Petitioner's bid because it did not possess a C-19 asbestos contractor license.

9. By a letter dated January 23, 2009, and received by Respondent on the same date, Petitioner protested Respondent's rejection of Petitioner's bid.

10. By a letter dated February 9, 2009 and sent by facsimile and certified mail on February 10, 2009, Respondent informed Petitioner that it was rejecting Petitioner's bid protest.

11. By a letter dated February 13, 2009, Petitioner informed Respondent that it would file for an administrative appeal.

12. On February 19, 2009, Petitioner filed a request for hearing with the DCCA.

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 Petitioner did not file its request for administrative hearing with DCCA within seven calendar days of the issuance of the denial of the protest. Respondent also asserts that its denial of Petitioner's protest should be upheld because Petitioner's protest was untimely. Petitioner contends that the Hearings Officer does not have jurisdiction to rule on the Motion because Intervenor's protest, which Petitioner asserts, initiated these proceedings, was not timely filed, tainting all subsequent rulings and determinations.

Hawaii Revised Statutes ("HRS") § 103D-712 provides in relevant part:

103D-712 Time limitation 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.

In *Nehi Lewa, Inc. v. Department of Budget and Fiscal Services*, 103 Haw. 163, 80 P3d. 984 (2003) the Hawaii Supreme Court determined that the term "issuance" as used in HRS § 103D-712(a) means the date of mailing as evidenced by the postmark. In this case, Respondent issued its written determination on February 10, 2009. Thus, Petitioner's request for hearing was due no later than February 17, 2009. Petitioner filed its request for hearing on February 19, 2009. Accordingly, the Hearings Officer concludes that Petitioner's request for hearing was untimely.

In light of the findings and conclusions above, a determination as to whether Petitioner's protest was timely or whether Intervenor filed a timely protest in PCH 2008-24 is unnecessary.

IV. FINAL ORDER

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

IT IS HEREBY ORDERED that the above-entitled matter is dismissed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, APR 27 2009.

/s/ SHERYL LEE A. NAGATA

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