



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

In the Matter of)	PCH-2009-11
)	
DIVERSIFIED PLUMBING & AIR)	HEARINGS OFFICER'S FINDINGS OF
CONDITIONING,)	FACT, CONCLUSIONS OF LAW AND
)	DECISION GRANTING RESPONDENT'S
Petitioner,)	MOTION TO DISMISS; APPENDIX "A"
)	
vs.)	
)	
HAWAII HOUSING FINANCE AND)	
DEVELOPMENT CORPORATION,)	
DEPARTMENT OF BUSINESS,)	
ECONOMIC DEVELOPMENT AND)	
TOURISM, STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

On May 15, 2009, Diversified Plumbing & Air Conditioning ("Petitioner") filed its request for administrative hearing to contest the Hawai'i Housing Finance and Development Corporation, Department of Business, Economic Development and Tourism, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On June 9, 2009, Respondent filed a Motion to Dismiss Request for Hearing ("Motion") and Petitioner filed a Pre-Hearing Memorandum. On June 15, 2009, Petitioner

filed a memorandum in opposition to Respondent's Motion and Respondent filed a Pre-Hearing Brief.

A hearing on the Motion was held on June 16, 2009. Petitioner was represented by Robert K. Matsumoto, Esq. and Respondent was represented by Craig Y. Iha, Esq. After hearing arguments from the parties and reviewing the pleadings filed by the parties, the Hearings Officer informed the parties that she had decided to grant the Motion and directed Respondent to prepare proposed findings of fact, conclusions of law and decision for her review. On June 22, 2009, Respondent filed the requested proposed findings of fact, conclusions of law and decision and it is attached hereto and incorporated herein by reference as Appendix "A".

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

The Hearings Officer adopts Findings of Fact numbers 1-5 as provided in Appendix "A".

III. CONCLUSIONS OF LAW

The Hearings Officer adopts the Conclusions of Law as provided in Appendix "A".

IV. DECISION

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.

DATED: Honolulu, Hawaii, _____ .

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

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

HEARINGS OFFICE

In the Matter of

DIVERSIFIED PLUMBING & AIR
CONDITIONING,

Petitioner,

vs.

HAWAII HOUSING FINANCE AND
DEVELOPMENT CORPORATION, STATE
OF HAWAII,

Respondent.

PCH-2009-11

PROPOSED HEARINGS OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER GRANTING
RESPONDENT HAWAII HOUSING
FINANCE AND DEVELOPMENT
CORPORATION'S MOTION TO DISMISS

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
GRANTING RESPONDENT HAWAII HOUSING FINANCE AND DEVELOPMENT
CORPORATION'S MOTION TO DISMISS

I. INTRODUCTION

On April 6, 2009, Petitioner Douglas Luiz II dba Diversified Plumbing & Air Conditioning filed a request for hearing to contest the May 11, 2009 decision of the Respondent Hawaii Housing Finance and Development Corporation to deny in part Petitioner's protest concerning Invitation for Bid ("IFB") No. PPMS 2009-01 to replace the booster and hot water circulating pumps at the Pohulani Elderly Housing project. The 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 June 9, 2009, Respondent filed a motion to dismiss the request for hearing on the grounds that Petitioner's protest was untimely. Petitioner filed a memorandum in opposition to the motion to dismiss on June 15, 2009.

The motion came before the undersigned Hearings Officer on June 16, 2009. Petitioner was represented by Robert K. Matsumoto, Esq. Respondent was represented by Craig Y. Iha, Esq.

Having reviewed and considered the motion, memoranda, declarations, and exhibits attached thereto, along with the records and files herein and the argument of counsel, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and order. If it should later be determined that any of these findings of fact should be properly deemed conclusions of law or vice versa, they shall be deemed as such.

II. FINDINGS OF FACT

1. On March 2, 2009, Respondent issued its IFB for the subject procurement. Bids were opened on March 27, 2009 at Respondent's offices. Doonwood Engineering, Inc. ("Doonwood"), Redesign Builders, Inc. ("Redesign"), and Alakai Mechanical Corporation ("Alakai") were the three low bidders.

2. Petitioner was present during the bid opening on March 27, 2009 and had the opportunity to review pertinent bid documents, including the bidders' subcontractor lists and bid amounts. Respondent's staff did not place any time constraints or other restrictions on Petitioner while he reviewed the bid documents.

3. On April 6, 2009, Petitioner filed his protest with Respondent, alleging that Doonwood, Redesign, and Alakai did not list required subcontractors in their bid documents.

4. On May 11, 2009, Respondent sustained Petitioner's protest with respect to Doonwood, but denied the protest as to Redesign and Alakai.

5. Petitioner filed his request for hearing on May 15, 2009.

III. CONCLUSIONS OF LAW

In bringing this motion, Respondent argues that Petitioner's protest was untimely under HRS 103D-701(a), which states that protests must be filed "within five working days after the aggrieved person knows or should have known of the facts giving rise thereto." When Petitioner should have known of the facts giving rise to his protest depends on when he was given the opportunity to review the bid documents containing the relevant information. *See Thyssenkrupp Airport Systems, Inc. v. State of Hawaii, Dept. of Transportation*, PCH 2008-13 (October 7, 2008) at p. 5 (facts giving rise to a protest based on specifications "were known or should have been known by Petitioner when it received and had an opportunity to review the Specifications").

Petitioner argued in his protest that the three low bidders failed to list required subcontractors in their bid documents, and that the low bids were therefore nonresponsive. The protest further presumed that Respondent intended to award the contract to one of the low bidders. Petitioner was present during the March 27, 2009 bid opening and was given the opportunity by Respondent to examine the bid documents. As such, Petitioner had the opportunity to review the documents containing all factual information giving rise to his protest, namely: (1) the identities of the low bidders; (2) the bid amounts; and (3) the names and license numbers of the bidders' listed subcontractors. Petitioner should therefore have known of the facts giving rise to his protest on March 27, 2009, and was required to submit his protest no later

than April 3, 2009. Because Petitioner did not submit his protest until April 6, 2009, the protest was untimely.

Petitioner argues that this matter should not be dismissed because: (1) Petitioner did not “verify and confirm” the license status of the low bidders’ subcontractors until the week following the bid opening; and (2) Respondent waived any failure of Petitioner to comply with the timeliness requirement of HRS § 103D-701(a). Neither argument is persuasive.

First, the steps Petitioner took to process the information contained in the bid documents are not relevant in determining when he should have known of the facts giving rise to his protest. The Hawaii Procurement Code is designed to minimize the disruption to government procurement and contract performance, and requires “strict adherence” to the time limits for filing protests. *See GTE Hawaiian Telephone Co. Inc. v. Dept. of Finance, County of Maui*, PCH-98-6 (December 9, 1998) (protest faxed at 4:37 p.m. was seven minutes late and untimely); *CR Dispatch Service, Inc. v. Dept. of Education, State of Hawaii*, PCH-2007-7 (December 12, 2007). The Procurement Code does not allow tolling of any deadlines to give Petitioner more time to build the theory of his case. The deadline for Petitioner to file his protest therefore started running on March 27, 2009, when Petitioner was given the opportunity to review the bid documents.

Second, the deadline at issue is a mandatory requirement established by HRS § 103D-701(a). It is not an affirmative defense or requirement subject to waiver by Respondent. *See GTE Hawaiian Telephone Co. Inc.* at p. 13.

IV. ORDER

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

1. Respondent's motion to dismiss is granted and this matter is hereby dismissed;
- and
2. Each party shall bear its own attorneys' fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: _____.

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