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HEARINGS OFFICE

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

In the Matter of)	PCH-95-4
)	
ENVIRONMENTAL RECYCLING)	FINAL ORDER GRANTING
OF HAWAII, LTD.,)	(IN PART) AND DENYING
)	(IN PART) RESPONDENT'S
Petitioner,)	MOTION TO DISMISS
)	
vs.)	
)	
COUNTY OF HAWAII,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent.)	

FINAL ORDER GRANTING (IN PART) AND DENYING (IN PART) RESPONDENT'S MOTION TO DISMISS

This matter having come before the undersigned Hearings Officer on December 29, 1995 and January 18, 1996 for consideration of the Respondent's Motion to Dismiss; with the Petitioner represented by its president, Michael Allen, and its sales manager, Mike Dubois, at the December proceeding and thereafter represented by Mark Van Pernis, Esq. at the January proceeding, and with the Respondent represented at all times by Gerald Takase, Esq., Deputy Corporation Counsel; and, after due consideration of the pleadings filed by the parties and their subsequent arguments in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Final Order.

Findings of Fact

1. On November 28, 1994, the Respondent published/advertised a "Notice to Proposers" which solicited interested parties to submit sealed proposals not later than 4:30 p.m. on January 5, 1995 for the following:

**REQUEST FOR PROPOSAL NO. 1533:
CONTRACT SERVICES RELATED TO
RECYCLING PROGRAMS AND ACTIVITIES
FOR THE DEPARTMENT OF PUBLIC WORKS,
COUNTY OF HAWAII**

2. The "Notice to Proposers" also stated that, upon application, forms of proposal and specifications could be obtained from the Respondent, and this information was provided to a number of interested parties including the Petitioner. A total of five proposals were received by the Respondent prior to the deadline for such submissions. The Petitioner, however, was not one of the five interested parties which had actually submitted proposals.

3. At some point prior to October 24, 1995, the Respondent selected Recycling Systems Hawaii, Inc. as the proposer having submitted the successful proposal and forwarded contract documents to it for execution. On October 24, 1995 Recycling Systems Hawaii, Inc. executed the documents (Consultant Services Contract No. 96112) and subsequently returned them for execution by the Respondent.

4. On October 30, 1994, the Petitioner, during the course of an informational meeting with the Chief Engineer for the Department of Public Works, County of Hawaii, was told that Recycling Systems of Hawaii, Inc. had been awarded a contract under RFP No. 1533. The Petitioner expressed disagreement with the selection; asked for a copy of the contract; and was told that a copy of the contract would be available after it was executed by the Respondent.

5. On November 3, 1995, Consultant Services Contract No. 96112 was executed by the Respondent.

6. By letter dated November 7, 1995 from the Chief Engineer of the Department of Public Works, County of Hawaii, the Petitioner was informed that the contract between Recycling Systems Hawaii, Inc. and the Respondent had been fully executed. In addition, the letter informed the Respondent that a copy of the contract would be available from the business office of the Department of Public Works.

7. By letter dated/filed November 16, 1995 the Petitioner submitted a written protest to the Respondent with respect to Contract No. 96112 which arose out of the award made under RFP No. 1533. The written protest was based on several criteria and concluded with a request that the contract be rescinded.

8. By letter dated/issued November 21, 1995, the Respondent replied to the Petitioner's written protest of November 16, 1995. After a short historical review and a brief analysis of the protest, the Respondent's letter concluded that the selection process was not flawed and dismissed the Petitioner's protest.

9. On November 27, 1995, the Petitioner received the Respondent's November 21, 1995 letter denying the Petitioner's November 16, 1995 protest of the award and contract.

10. By letter dated December 6, 1995, the Petitioner submitted to the Respondent a written request for administrative review (a formal contested case hearing) of the Respondent's conduct with respect to RFP No. 1533 and Contract No. 96112. This letter (the content of which was identical to the content of the Petitioner's earlier written protest) was forwarded by the Respondent to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, and became the basis for initiating this matter.

Conclusions of Law

The Respondent's Motion to Dismiss was presented on the ground that the Petitioner lacked standing to pursue this matter based on the following three grounds:

1. The November 16, 1995 protest was not timely filed in accordance with the provisions of Hawaii Administrative Rules (HAR) § 3-126-3;
2. The December 6, 1995 request for a hearing was not timely filed in accordance with the provisions of Hawaii Revised Statutes (HRS) § 103D-712; and,
3. The Petitioner did not qualify as an interested party or protester as defined by HAR § 3-126-1.

The merit of these arguments will be considered in seriatim.

First, with respect to the timeliness of the protest, it is worth noting that HAR § 3-126-3 provides, in relevant part, that:

§ 3-126-3 Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate within five working days after the protester knows or should have known of the facts leading to the

filing of a protest. A protest is considered filed when received by the chief procurement officer or the head of a purchasing agency. Protests filed after the five-day period shall not be considered.

(b) Protesters may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

The language of this rule does not require that the time within which a protest must be filed is necessarily calculated from the date of an award or the signing of a contract. In fact, subsection (b) makes it clear that timely protests may be filed well in advance of - or well subsequent to - either date, depending upon when the protester knew or should have known about facts that provided him or her a reasonable basis for filing a protest.

In the present matter, the evidence has not established that the oral communications exchanged between the Petitioner and the Chief Engineer for the Department of Public Works in their meeting of October 30, 1995 were sufficient to have put the Petitioner in such a knowledgeable position as to start the "five working days" clock running. Similarly, the evidence has not established that the Petitioner's receipt of the November 7, 1995 notification letter from the Chief Engineer of the Department of Public Works provided additional factual information that would have put the Petitioner in a more knowledgeable position than it was on October 30, 1995. In short, it does not appear that the Petitioner was in a knowledgeable position to file a protest until obtaining and reviewing a copy of the actual contract within a reasonable period of time after it was made available by the Respondent. Accordingly, the Respondent has not shown that the Petitioner's initial protest was untimely in failing to meet the requirements of HAR § 3-126-3, and thus has not prevailed with its first argument in support of its motion to dismiss.

Second, with respect to the timeliness of the request for an administrative hearing, it is worth noting that the statutory language of HRS § 103D-712(a) differs in significant respects from the regulatory language in HAR § 3-126-3. The provisions of HAR § 103D-712(a) state that:

[§ 103D-712] Time limitations on actions. (a) Requests for administrative review under section 103D-709 shall be made within seven calendar days of the issuance of a written determination under sections 103D-310, 103D-701, or 103D-702.

This statute does establish a particular date (the issuance of a written determination) from which to calculate the "seven calendar days" within which a request for administrative review must be made. Furthermore, the mandatory language of this provision is jurisdictional in nature and, unlike a failure to comply with HAR § 3-126-3, precludes an untimely protester from pursuing an administrative hearing.

In the present matter, the evidence established that the Respondent had issued a written determination (denial) of the Petitioner's protest by letter dated November 21, 1995 - over two weeks before the Petitioner made its December 6, 1995 request for a hearing. Accordingly, the request did not meet the seven calendar day requirement. Furthermore, even if one were to calculate this period from the receipt rather than from the issuance of a written determination, the face of the Petitioner's December 6, 1995 request for administrative review makes it clear that the Respondent's written determination (denial of protest letter) was received on November 27, 1995. Therefore, the Petitioner would have had to make its request not later than December 4, 1995, and its December 6, 1995 letter still exceeded the seven calendar day limitation set out in the statute.¹ Accordingly, the Respondent has established that the Petitioner failed to comply with HRS § 103D-712(a) and thus has prevailed with its second argument in support of its motion to dismiss.

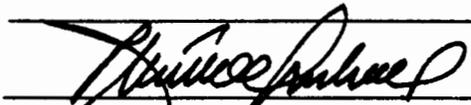
Third, with respect to the Petitioner's status, or lack thereof, as a protester and its impact on the Petitioner's standing to pursue an administrative hearing, it is worth noting that by prevailing in its second argument the Respondent has rendered this third argument moot and it need not be further addressed at this time.

Final Order

Therefore, based upon the above Findings of Fact and Conclusions of Law, the above-entitled matter is hereby dismissed.

MAR 20 1996

DATED: Honolulu, Hawaii, _____



RICHARD A. MARSHALL
Hearings Officer
Department of Commerce
and Consumer Affairs

¹ The Petitioner's vacuous argument that the provisions of HRS § 103D-712 somehow had been, or even could be, waived by an employee of the Respondent was not supported by either the facts or the law.