

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of	)	DOCKET NO. PCH 98-6
GTE HAWAIIAN TELEPHONE	)	OFFICE OF ADMINISTRATIVE
COMPANY INCORPORATED,	)	HEARINGS, DEPARTMENT OF
Petitioner-Appellant,	)	COMMERCE AND CONSUMER
vs.	)	AFFAIRS
DEPARTMENT OF FINANCE, COUNTY	)	
OF MAUI,	)	
Respondent-Appellee.	)	

JUN 17 1 32 PM '99

SUMMARY DISPOSITION ORDER

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties,

IT IS HEREBY ORDERED that the decision and order from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, June 17, 1999.

On the briefs:

Jeffrey S. Portnoy and Catherine Carey of Cades Schutte Fleming & Wright for petitioner-appellant

Brian T. Moto, Deputy Corporation Counsel, for respondent-appellee



DEC 9 8 35 AM '98  
HEARINGS OFFICER

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

In the Matter of	)	PCH-98-6
	)	
GTE HAWAIIAN TELEPHONE	)	HEARINGS OFFICER'S
COMPANY INCORPORATED,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Petitioner,	)	AND DECISION
	)	
vs.	)	
	)	
DEPARTMENT OF FINANCE,	)	
COUNTY OF MAUI,	)	
	)	
Respondent.	)	
_____	)	

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

I. INTRODUCTION

On or about August 18, 1998, GTE Hawaiian Telephone Company Incorporated ("Petitioner"), filed a Request for Administrative Hearing with Travis O. Thompson, Chief Procurement Officer, Department of Finance, County of Maui ("Respondent"), pursuant to Hawaii Revised Statutes ("HRS") §103D-709 and Hawaii Administrative Rules ("HAR") §3-126-42. The purpose of the request was to contest Respondent's denial of Petitioner's protests in connection with the County of Maui's Invitation for Bids for a Telecommunications System, IFB No. 96-97/P77.

On August 25, 1998, Respondent transmitted Petitioner's Request for Hearing to the Office of Administrative Hearings. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

By agreement of the parties, the hearing was subsequently rescheduled to October 2, 1998. The parties also agreed that the October 2, 1998 proceeding would be limited to the issue of whether Petitioner's protests had been timely and properly filed.

On September 3, 1998, Respondent filed an Answer to Petitioner's Request for Hearing. On September 25, 1998, Petitioner filed a Brief Regarding Timeliness of Protest and Respondent filed a First Pre-Hearing Brief. On September 30, 1998, Petitioner filed a Response to Respondent's First Pre-Hearing Brief.

The matter came on for hearing before the undersigned Hearings Officer on October 2, 1998, in accordance with the provisions of HRS Chapter 103D. Petitioner was represented by Jeffrey S. Portnoy, Esq. and Catherine Carey, Esq. Respondent was represented by Peter V. Lee, Esq. and Brian T. Moto, Esq.

At the conclusion of Petitioner's case-in-chief, Respondent orally moved to dismiss Petitioner's protests. After hearing the argument of counsel and considering the evidence presented by Petitioner, the Hearings Officer denied the motion.

At the conclusion of the hearing, the Hearings Officer requested that the parties submit Proposed Findings of Fact and Conclusions of Law by October 16, 1998. The parties subsequently requested and the Hearings Officer approved a stipulation extending the deadline for the filing of the proposed findings and conclusions to October 30, 1998. Both parties filed their Proposed Findings of Fact and Conclusions of Law by the October 30, 1998 deadline.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

## II. FINDINGS OF FACT

1. On April 27, 1997, the County of Maui ("County") issued Invitation for Bids for a Telecommunications System, IFB No. 96-97/P77 ("IFB"), to implement a cohesive, county-wide telecommunications network to replace an aging system that had been installed by Petitioner. The network was aimed at eventually encompassing all of the County's facilities on the islands of Maui, Lanai, and Molokai.

2. Because Petitioner had installed the existing system, the County engaged in negotiations directly with Petitioner for the installation of a new system. However, those negotiations were unsuccessful and the County opted to send the project out to bid.

3. In preparing the bid, the County sought the assistance of an expert in the field of telecommunications. The County issued a request for proposals and eventually selected and retained Richard Ichikawa of Telecom Assurance ("Ichikawa"), as its consultant.

4. The IFB provided for a multi-step competitive sealed bid process. Step 1 called for a Needs Assessment Submittal; Step 2 called for a Conceptual Design Submittal which resulted in the County issuing its final Conceptual Design specifications; Step 3 called for a Technical Design Submittal; and Step 4 consisted of the submission of Bid Price Proposals.

5. Step 1 submittals were due by July 10, 1997; Step 2 submittals were due by September 8, 1997; and Step 3 and 4 submittals were due by December 1, 1997.

6. Petitioner and NEC Hawaiian Communications Systems (West), Inc. ("NEC"), were the only two bidders who participated in the Step 3 submission.

7. After opening the Step 3 Technical Design Submittals, the County through Ichikawa, determined that there were problems with both Petitioner's and NEC's bids in meeting the IFB specifications. As a result, Ichikawa gave Petitioner and NEC a deadline of December 12, 1997 by which to make their bids fully compliant. The deficiencies in both bids were resolved prior to the December 12, 1997 deadline.

8. Petitioner's and NEC's Bid Price Proposals were opened and made public on December 15, 1997. Phyllis Freitas ("Freitas"), an account manager for Petitioner, was present at bid opening. Following an evaluation of the two bids, the County deemed NEC to be the lowest bidder.

9. Sometime in January 1998<sup>1</sup>, Freitas asked Greg King ("King"), the central purchasing agent for the County, for a copy of NEC's Step 3 Technical Design Submittal. In response, King sent Freitas the documents she had requested save for certain generic switch and marketing specifications which Freitas indicated she did not require.

10. King also provided Freitas with a letter from Nathan A. Sparks ("Sparks") of NEC to Ichikawa dated December 31, 1997. In his letter to Ichikawa, Sparks offered to make the CAMA trunks available to the County for no additional charge. The price for the CAMA trunks apparently had been omitted from NEC's bid price.

11. After reviewing NEC's Step 3 Technical Design Submittal, Freitas sent a letter dated January 16, 1998 to King. That letter stated in part:

GTE Hawaiian Tel (GTE) would like to have the County of Maui address the following questions and concerns regarding

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<sup>1</sup> It was unclear from the evidence why Petitioner waited until January 1998, the month following the opening of the bids, to request NEC's technical submission.

NEC's bid submission for the County of Maui  
Telecommunications System IFB No. 96-97/P77.

1. IFB Section 2.1.7

NEC states: "E911 enhanced 911 capability is included with the proposal, however the County will need to subscribe to a designated number of CAMA trunks at the County Bldg. to use in conjunction with the feature."

**GTE Inquiry: 1. Our position is that NEC is non-compliant to the IFB requirements.**

**2. This is a cost item that should be included in NEC's bid price since it is an "error in substance" versus an "error in form."**

**3. How is NEC planning to implement the CAMA trunks for E911 capability?**

2. NEC claims that they will not require more than 50 square feet of space, therefore they did not itemize the \$5,000 required by the County. We believe the minimum space requirements are between 56 square feet and up to 160 square feet.

\* \* \* \*

3. IFB Section 7.2

The bid requires the contractor to "provide a secure and redundant digital access."

**GTE Inquiry: Is NEC's network access non-redundant?**

**For example, if the T1 between 200 South High Street and the Police department is out of service, the users in the Police Department will not have access to voice mail.**

4. NEC's proposed solution totals 110 PBX trunks. NEC's drawings show (3) T1's or (72) available trunks for outside access from the PBX.

**GTE Inquiry: It appears that NEC's trunking design is deficient in providing the required services for all remote sites.**

(Emphasis in original).

12. Freitas' January 16, 1998 letter was received by King and faxed to Ichikawa for his response. Ichikawa provided King with his response on January 20, 1998. King incorporated

Ichikawa's response in a letter to Freitas dated February 27, 1998. The letter was sent to Freitas by regular mail.

13. Among other things, the February 27, 1998 letter from King indicated that the County was not treating the January 16, 1998 letter from Freitas as either a complaint or a protest, and stated, "[I]t appears at this time that unless there are additional objections from GTE, we will begin the process of issuing a contract to NEC."

14. On March 16, 1998, Leslee A. Ellenson ("Ellenson"), a senior contract administrator for Petitioner, faxed a letter to King stating that Petitioner had received King's February 27, 1998 letter on March 9, 1998.<sup>2</sup> The letter also indicated that Petitioner was filing an "official protest" to the IFB solicitation and that Petitioner would be sending a supplemental letter detailing the grounds for its protest at a later date.

15. Because Ellenson believed that March 16, 1998 was the last day for the filing of a protest, she proceeded to fax the March 16, 1998 letter to King. The letter was faxed to King's office at 4:37 p.m.

16. On April 6, 1998, Ellenson faxed another letter to King. A copy of that letter was faxed to Travis O. Thompson, the County's chief procurement officer. The letter stated in pertinent part:

This letter is our detailed follow-up to our memo dated March 16, 1998, wherein we advised you GTE Hawaiian Tel was officially filing a protest to the above captioned solicitation pursuant to Hawaii Administrative Rule (HAR) 3-126-3. This letter meets the requirements for the content of a Protest letter as stated in HAR 3-126-3 Filing of Protest.

**I. Non-Compliant Technical Design – E911 System**

The subject Invitation for Bid (IFB) specifically states the requirements and capabilities of the E911 System for the County of Maui. IFB Section 2.1.7 states:

"System shall provide accurate caller location information for all E911 calls originating within the system. The System shall recognize and treat both "9+911" and "911" calls dialed within the System as bona-fide E911 calls to the community's Emergency 911 System. All "911" calls originated from within the system shall be "station identifiable" by the E911 system Call Taker with designations, as a minimum, of the calling station telephone number and correct physical location."

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<sup>2</sup> There was no evidence to establish when King's February 27, 1998 letter was mailed.

NEC's bid submission, dated December 8, 1997, stated:

"E911 Enhanced 911 capability is included with the proposal, however, the County will need to subscribe to a designated number of CAMA trunks at the County Building to use in conjunction with the feature."

In response to our technical questions on how the CAMA trunks will provide calling telephone number and correct physical location and whether NEC's final bid price includes the CAMA trunks, Maui County responded with a memo dated February 27, 1998 signed by Greg King – Central Purchasing Agent. The memo states:

"My understanding of the situation is that NEC did not interpret our specifications correctly regarding the E911 trunks when they put their technical proposal together. Their interpretation of the specification was that the provided system would be E-911 ready, and that they were not responsible for providing the CAMA trunks. I have reviewed this situation with our Corporation Counsel and a determination has been made that as long as NEC is willing to comply with our interpretation of the specifications and not adjust their price, the County of Maui will not reject their bid. They have agreed to do so."

As such, NEC stated they are not responsible for providing the CAMA trunks and did not include this in their technical design. This non-compliance resulted in a lower bid price.

NEC's bid submission excluded the CAMA trunk network design, and was therefore technically non-compliant at the time of bid submittal. A general tariff offering for CAMA trunks was not and is still not available.

\* \* \* \*

## II. Non-Compliant Network Design – E911 Location Identification

IFB Section 2.1.7 requires, in part:

"All '911' calls originated from within the system shall be 'station identifiable' by the E911 system Call Taker with designations, as a minimum, of the calling station telephone number and correct physical location."

NEC's bid submission does not include the capability of providing the E911 Call Taker with the physical location of the calling telephone using their solution of CAMA trunking.

\* \* \* \*

### III. Non-Compliant Network Design – Redundancy

IFB Section 1.2.11 states:

“The County government’s use of PBX’s are normally limited to large concentration of telephones outside the Wailuku CTX service area. An exception, however, is the Wailuku Police Station at 55 Mahalani Street, Wailuku, which is currently served by an 8 year old NEAX 2400 procured by competitive bidding. The system as configured, however, does not provide the convenient 4 digit intra-system access to other County telephone stations as enjoyed by the CTX users. As an appreciable community of interest does exist between the Police and County CTX users, both systems should be included in a cohesive operational network, however, with special emphasis in the assurance of secure and redundant services for the Police Department.”

IFB Section 2.3.5 states:

“The proposed telecommunications network of systems shall maintain a trunking scheme providing for redundancy by economical trunking to and from the PSTN. The network shall provide centralization of trunking from at least two systems – one system servicing the Maui County Defense Agency. All other entities may be connected to the PSTN via intra-networking trunking.

NEC’s bid submission does not include redundancy for the following locations: the War Memorial, Kaohu Highway Division, 614 Palapala, and the Police Department’s access to the voice system at 200 S. High Street.

\* \* \* \*

The fact that NEC’s bid submission does not provide network redundancy for the voice mail system is a serious non-compliance point. Although Richard Ichikawa’s letter implies that the voice mail system is a feature enhancement for the Police Department, GTE Hawaiian Tel views the voice mail capability as a major component of their telecommunications network.

NEC’s bid submission omitted system redundancy for the systems identified above and was therefore, technically non-



compliant at the time of bid submittal. This non-compliance resulted in a lower bid price.

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17. By letter dated May 10, 1998 to Petitioner, Respondent denied the protest. The stated reasons for the denial included the following: the letter had been faxed rather than mailed or hand-delivered; the letter had been addressed to the central purchasing agent rather than to the chief procurement officer or head of the purchasing agency; the letter did not expressly set forth the reasons for the protest; and the letter was not accompanied by supporting documentation.

18. On May 14, 1998, Respondent allowed Petitioner to view a contract in conjunction with the IFB. The contract had been signed by NEC on March 26, 1998 and by the County effective May 8, 1998.<sup>3</sup>

19. By letter dated May 15, 1998, Petitioner sought reconsideration of Respondent's May 10, 1998 denial of Petitioner's "first" protest. In the letter, Petitioner also asserted a "second" protest based on the County's alleged awarding of the contract to NEC.

20. By letter dated May 26, 1998, Respondent denied Petitioner's May 15, 1998 request for reconsideration as well as Petitioner's "second" protest.

21. On June 8, 1998, Petitioner sought reconsideration of Respondent's denial of its May 15, 1998 protest. By letter dated August 6, 1998, Respondent denied Petitioner's request for reconsideration.

### III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

#### A. Jurisdiction.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. **Carl Corp. v. State Dept. of Educ., 85 Hawaii 431 (1997)**. And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those

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<sup>3</sup> Respondent disputes that the contract was awarded to NEC and contends that as a matter of policy, contracts are awarded by the Director of Finance following the successful execution of a contract by all of the parties.

determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

B. Timeliness of the Protest.

1. Commencement of Filing Period.

At issue in this proceeding is the timeliness of Petitioner's protest. HAR §3-126-3(a) provides:

**Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of the purchasing agency, and shall be filed in duplicate **within five working days after the protestor 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 the purchasing agency. Protests filed after the five-day period shall not be considered.****

(Emphasis added).

Respondent asserts that Petitioner knew or should have known of the facts leading to the filing of its protest by January 16, 1998, as evidenced by Petitioner's letter of that date to King, the County's central purchasing agent. According to Respondent, because Petitioner did not file its protest until March 16, 1998, the protest is untimely.

Petitioner contends that it could not have known of the facts leading to the filing of its protest until it received King's February 27, 1998 letter responding to Freitas' letter of January 16, 1998. According to Petitioner, it did not receive King's letter until March 9, 1998. Petitioner therefore argues that the protest letter it faxed to King on March 16, 1998<sup>4</sup> was filed within the five working days prescribed by HAR §3-126-3(a).

These circumstances require the Hearings Officer to determine when Petitioner first knew or should have known of the grounds for its protest. Petitioner articulated those grounds in its April 6, 1998 letter to King.

The first ground for the protest alleged that "NEC's bid submission excluded the CAMA trunk design, and was therefore technically non-compliant at the time of bid submittal." Petitioner also claimed that "NEC's bid submission does not include the capability of providing the E911 Call Taker with the physical location of the calling telephone using their solution of CAMA trunking". An allegation that "NEC's bid submission does not include redundancy for the following

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<sup>4</sup> March 15, 1998 was a Sunday.

locations: the War Memorial, Kaohu Highway, 614 Palapala, and The Police Department's access to the voice mail system at 200 S. High Street" constituted the third and final ground for the protest.

All of these grounds alleged that NEC's bid omitted certain features that were required by the IFB. Consequently, Petitioner's protest was essentially that NEC's bid was unresponsive to the IFB – a conclusion it could have reached following a review of the IFB and NEC's Step 3 Technical Design Submittal.

This, however, does not end the inquiry because the basis for a protest grounded upon the non-responsiveness of another bid, in addition to the alleged non-responsiveness itself, is the protestor's knowledge that the government has awarded, or intends to award the contract to the non-responsive bidder. *Artais, Inc., 88-3 BCA, No. 21025 (1988) (emphasis added)*. Prior to that time, a protest would be premature since the government could well reject the offending bid. In other words, the adverse action being protested is the government's acceptance of an alleged non-responsive bid, not merely the offeror's submission of such a bid.

The record in this case established that Petitioner learned for the first time that Respondent intended to award the contract to NEC from King's February 27, 1998 letter. In that letter, King informed Freitas, among other things, that, "unless there are additional objections from GTE Hawaiian Tel, we will begin the process of issuing a contract to NEC." The Hearings Officer therefore finds that Petitioner knew or should have known of the facts leading to the filing of its protest upon its receipt of King's February 27, 1998 letter. Petitioner's protest was therefore due within 5 working days of the receipt of that letter.

## 2. Filing of Protest.

In determining whether Petitioner filed its protest within the required period, the Hearings Officer is mindful of the purpose of the HRS Chapter 103D and its implementing rules "to promote economy, efficiency, and effectiveness in the procurement of goods and services." See **HAR §3-120-1**.<sup>5</sup> See also, **Standing Committee Report No.S8-93, 1993 Senate Journal, at 39.**

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<sup>5</sup> HAR §3-120-1 states:

Purpose. The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods and services, and the construction of public works for the State and counties, by:

- (1) Simplifying, clarifying, and modernizing the law governing procurement;
- (2) Requiring the continued development of procurement policies and practices;
- (3) Making the procurement laws of the State and counties as consistent as possible;

Moreover, it is significant to note that R9-101.03.1 of the Recommended Regulations for the American Bar Association's Model Procurement Code for State and Local Governments<sup>6</sup> suggests a 14-day period within which to file protests rather than the shorter 5-day period provided in HAR §3-126-3(a). It is also noteworthy that although the Recommended Regulations in an Editorial Note suggest that "[j]urisdictions may wish to allow consideration of protests filed after [14 days] for good cause shown", no such exception was included in HAR §3-126-3. These considerations underscore the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. Those considerations also support the notion that government is entitled to know, with some degree of certainty, when cases may be brought and when they may not. The accomplishment of these objectives requires strict adherence to time constraints for the initiation and prosecution of protests.<sup>7</sup>

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- (4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and counties;
  - (5) Providing increased economy in procurement activities and maximizing to the fullest extent practicable the purchasing value of public funds;
  - (6) Fostering effective broad-based competition within the free enterprise system;
  - (7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and
  - (8) Increasing public confidence in the procedures followed in public procurement.

<sup>6</sup> In 1992, the Legislature requested that the State Auditor conduct a study to provide information and recommendations for the enactment of a comprehensive procurement code. *Act 274, Session Laws of Hawaii, 1992*. In Act 274, the Legislature specifically asked that the study review among other things, the American Bar Association's *Model Procurement Code for State and Local Governments* ("model code") and the procurement codes from the federal government and other states. And, in enacting Chapter 103D, the Legislature noted that "[a]fter careful review of various procurement models and thoughtful discussion and debate, your Committees agreed to use the American Bar Association's (ABA) Model Procurement Code for State and Local Governments as their guide in establishing a comprehensive procurement system for Hawaii. *Standing Committee Report No. S8-93, 1993 Senate Journal, at 39*.

<sup>7</sup> Public bidding statutes must be construed with sole reference to the public good and must be rigidly adhered to in order to guard against favoritism, improvidence, extravagance and corruption. See *N.E.R.I. Corp. v. New Jersey Highway Authority*, 686 A.2d 328 (N.J. 1996); *TEC Electric, Inc. v. Franklin Lakes Board of Education*, 665 A.2d 803 (N.J. Super. 1995). Consequently, strict compliance with public bidding guidelines is generally required. *TEC Electric, Inc., supra*. In *Superior Oil Company v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969), cited with approval in *State v. Weisz & Sons, Inc.*, 713 P.2d 176 (Wyo. 1986), the court emphasized the importance of strict compliance with bidding requirements and quoted with approval from an opinion of the comptroller general:

The strict maintenance of the competitive bidding procedures required by law is infinitely more in the public interest *than obtaining a pecuniary advantage in individual cases by permitting practices which do violence to the spirit and purpose of the law . . .* (emphasis in original). 409 F.2d at 1119-1120.

In the instant case, Petitioner asserts that it did not receive King's February 27, 1998 letter until March 9, 1998.<sup>8</sup> Therefore, according to Petitioner, it had up to and including March 16, 1998 to file its protest. Indeed, on March 16, 1998, Petitioner faxed a letter to King that stated that Petitioner was filing "its official protest."

Even assuming that Petitioner did not receive King's February 27, 1998 letter until March 9, 1998, the evidence established that Petitioner's March 16, 1998 letter was faxed to King at 4:37 p.m. HAR §3-126-49(b) states that the "hours of the day during which documents will be accepted for filing by the panel or hearings officer shall be those specified in section 80-1, HRS."<sup>9</sup> HRS §80-1 specifies that the "Offices of the . . . counties, shall be open for the transaction of public business between the hours of 7:45 a.m. and 4:30 p.m., Monday to Friday, inclusive." Thus, the only way in which Petitioner's protest may be deemed timely filed is through a determination that the period of time between the end of one business day and the beginning of the next one is a part of the business day just ended.

Petitioner did not attempt to file the protest until after 4:30 p.m. on the last day on which the filing could be made. The fact that the County's facsimile machine was still functioning when Petitioner sent its filing is irrelevant. Petitioner would not have been able to personally serve its protest upon Respondent after 4:30 p.m. It would therefore make little sense if Petitioner could file its protest by faxing it to Respondent's office after normal business hours. These considerations lead the Hearings Officer to find that such filings can only take place during the working hours of the County, not the hours that machinery which assists the County in the performance of its duties is operational.

This finding establishes a readily discernible rule for timeliness and encourages protestors not to wait until the last minute before filing a protest. Generally, the earlier the protest is filed, the sooner it may be resolved. The purpose of the Procurement Code's timeliness rules is to discourage precisely the practice that occurred in this case. Accordingly, the Hearings Officer finds and concludes that Petitioner's letter of protest dated March 16, 1998 was filed after the time permitted by the applicable rules and was therefore untimely.<sup>10</sup>

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<sup>8</sup> Freitas testified that she received the letter in her in-tray on Monday, March 9, 1998 and informed senior contract administrator, Leslee A. Ellenson, of the letter on Monday, March 16, 1998. Freitas also testified that it is not her department's practice to time-stamp incoming correspondence. Ellenson testified that while envelopes are occasionally retained, she did not know whether the envelope containing King's February 27, 1998 was retained.

<sup>9</sup> Although HAR §3-126-49(b) refers to filings before the Hearings Officer or panel, the Hearings Officer can discern no reason why the rule should not apply to the filing of protests pursuant to HAR §3-126-3 as well.

### 3. Waiver of Timeliness Requirement.

Petitioner also contends that Respondent waived its right to assert that Petitioner's protest was untimely when it failed to include that as a basis for its denial of the protest in its May 10, 1998 letter.<sup>11</sup> The language of HAR §3-126-3(a), however, is plain and unambiguous. It clearly requires that a specific time provision be met in the filing of a protest in order to have the protest considered, and expressly prohibits consideration of untimely protests. This language read in light of the underlying purpose of the Procurement Code, as discussed earlier, leads the Hearings Officer to conclude that the time requirement set forth in HAR §3-126-3(a) is mandatory and therefore not subject to waiver by Respondent. **The Hawaii Corporation, dba Pacific Construction Company v. Kim and Dillingham Corporation, 53 Haw. 659 (1972). See generally, Appeal of Kennedy Temporaries, No. 1061 (MSBCA July 20, 1982) (timeliness requirement is substantive in nature and could not be waived).**

### 4. Sufficiency of Protest.

Moreover, even if the March 16, 1998 letter had been timely filed, it was nevertheless incomplete. Petitioner's letter stated in part:

Thank you for your letter dated February 27, 1998, which GTE Hawaiian Tel subsequently received on March 9, 1998.

Upon receiving and reviewing the letter, GTE Hawaiian Tel hereby files its official protest to the solicitation (IFB 96-97/P77). We are in the process of developing a letter detailing the grounds of our protest. It will be forwarded to Mr. Travis Thompson, Mr. Wayne Fujita and yourself.

In order to expedite the resolution of protests, HAR §3-126-3(c) requires, among other things, that protests include "[a] statement of reasons for the protest;" and "supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which

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<sup>10</sup> Respondent also argued that under HAR §3-126-3, service of the protest was limited to personal service or service by mail, and that service of the protest upon the chief procurement officer or head of the purchasing agency was required. On the other hand, Petitioner contended that the rule does not expressly prohibit protestors from faxing protests. Petitioner also claimed that it was instructed by the County to send its protest to Greg King, rather than its chief procurement officer, Travis O. Thompson. Nevertheless, because Respondent has established that the protest was untimely, the resolution of these alternative theories is unnecessary.

<sup>11</sup> Respondent objected to the timeliness of the protest for the first time in its May 26, 1998 letter to Petitioner. In that letter, Respondent stated:

You were notified by letter on May 10, 1998 that your protest dated March 16, 1998 was deficient for a number of reasons. Further, your March 16, 1998 protest was not filed in a timely manner. . . .

case the expected availability date shall be indicated.” Petitioner’s March 16, 1998 letter does not contain any of this information. Rather, the letter states, “[w]e are in the process of developing a letter detailing the grounds of our protest. It will be forwarded to Mr. Travis Thompson, Mr. Wayne Fujita and yourself.” On April 6, 1998, Petitioner provided Respondent with a letter detailing its protest.

Petitioner argues that the March 16, 1998 letter fulfilled the “technical requirements” for filing a protest, because among other things, the letter “expressly referenced the County’s February 27, 1998 letter, and, thus, indirectly referenced GTE’s January Inquiry Letter, putting the County on notice of the general grounds of GTE’s protest”; and that these “grounds were fully explained in Petitioner’s April 6, 1998 letter”. The government, however, is not required to assume or speculate as to the basis for a protest. Rather, HAR §3-126-3(c) mandates that protests shall include that information. Such a requirement is not unreasonable particularly in light of the Procurement Code’s objective of expediting the resolution of protests for the benefit of all concerned.<sup>12</sup> And while Petitioner’s April 6, 1998 follow-up letter detailed the basis for its protest, it was filed well beyond the 5-day period of HAR §3-126-3(a). To be considered, the supplemental letter must independently meet the timeliness requirement for the filing of protests. The time limitation for filing a valid protest is not tolled by an initial incomplete filing. Any other result would render the timeliness requirement virtually meaningless by allowing a protestor to disclose the basis for his protest weeks or months after the filing of an incomplete “protest” letter. Indeed, in this case, Petitioner did not provide the required information until some 3 weeks after announcing its “official protest.” Simply put, HAR §3-126-3 contemplates and requires the timely filing of a complete protest. Accordingly, Petitioner’s protest was untimely for the additional reason that no such protest was filed by the March 16, 1998 deadline.

C. Second Protest.

Alternatively, Petitioner argues that it was entitled to and did file a second, separate protest to challenge the **awarding** of the contract to NEC. That protest, according to Petitioner, was filed on May 15, 1998, a day after it learned that the contract had allegedly been awarded to NEC. In making this argument, Petitioner relies in part on HAR §3-126-3(b) which states:

(b) Protestors 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.

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<sup>12</sup> Moreover, unlike civil cases, there is no formal discovery under HRS Chapter 103D. Thus, the timely submission of a complete protest is imperative.

A plain reading of HAR §3-126-3(b), however, leads the Hearings Officer to conclude that the foregoing section neither authorizes nor requires a protestor to delay the filing of a protest concerning the award of a contract until **after the award has been made**. Rather, the requirement that protests must be filed within 5 working days after the protestor knows or should have known of the facts leading to the filing of the protest is still controlling. Here, the facts that formed the basis for Petitioner's "second" protest are virtually the same as those upon which the first protest was based.<sup>13</sup> As previously discussed, those facts should have been known earlier on. Thus, the subsequent awarding of the contract, in and of itself, does not provide an independent basis for the filing of a second protest and cannot resurrect an untimely protest. Any other conclusion would undermine the underlying purpose of the Procurement Code.

IV. DECISION

For the reasons set forth herein, it is hereby ordered that:

1. Petitioner's Protests are dismissed; and
2. Each party shall bear its own attorney's fees, costs, and expenses.

Dated at Honolulu, Hawaii: DEC -9 1998



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

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<sup>13</sup> Petitioner also asserts that its "second" protest raised two issues that were not raised previously: whether the contract was awarded to NEC during the pendency of its "first" protest in violation of the stay imposed by the Procurement Code; and whether NEC had the capability of providing caller location identification for the E911 system as required by the IFB. The first issue raised by Petitioner is, however, rendered moot by the findings herein and HAR §3-126-5 which provides for a stay of procurements upon the filing of a **timely** protest. The second issue adds nothing new as the initial protest already included a claim that NEC's bid, for whatever reason, did not include full caller location identification for the E911 system and was therefore unresponsive to the IFB.