



ADMINISTRATIVE AFFAIRS
MAR 5 3 07 AM '99
HEARINGS OFFICE

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

In the Matter of)	PCH-99-4
)	
SODERHOLM SALES AND)	FINAL ORDER GRANTING
LEASING, INC.,)	RESPONDENT'S MOTION TO
)	DISMISS APPEAL
Petitioner,)	
)	
vs.)	
)	
COUNTY OF KAUAI,)	
)	
Respondent.)	
_____)	

FINAL ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS APPEAL

I. INTRODUCTION

This matter having come before the undersigned Hearings Officer on March 4, 1999, for consideration of the County of Kauai's ("Respondent") Motion to Dismiss Appeal; with Soderholm Leasing and Sales, Inc. ("Petitioner") represented by R. Erik Soderholm, Vice President of Respondent, and Respondent represented by Galen T. Nakamura, Esq.; and after due consideration of the pleadings filed by the parties and their 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.

II. FINDINGS OF FACT

1. By a letter dated November 2, 1998, Petitioner submitted a protest regarding Solicitation Document No. 2265, Two Wheelchair Accessible

Passenger Buses ("Solicitation"). Respondent argued that the "lowest nominal bidder" was not responsive, and as such, the contract should be awarded to Petitioner as the "lowest responsive bidder". Additionally, Petitioner stated that it hoped that Respondent would not cancel the bid and rebid because Petitioner submitted a responsive bid.

2. By a letter dated January 11, 1999, Respondent notified Petitioner that, after consideration of its November 2, 1998 letter, Respondent decided to cancel the Solicitation. This letter also notified Petitioner that it could request reconsideration of this decision within ten working days after receipt of this letter.

3. Petitioner received this letter on January 14, 1999.

4. On January 20, 1999, Respondent received Petitioner's letter dated January 19, 1999, requesting that ~~Petitioner~~ *Respondent* reconsider its decision to cancel the Solicitation.

5. By a letter dated February 12, 1999, Respondent issued its decision to deny Petitioner's request for reconsideration. Petitioner determined that the Solicitation was ambiguous and inadequate, and as such, cancellation of the Solicitation was warranted under Hawaii Administrative Rules § 3-122-96. This letter also informs Petitioner that:

[Y]ou have the right to an administrative proceeding under HAR §§ 3-126-42 through 3-126-74. You must inform the State within five working days after the date of this decision as to whether an administrative appeal will be filed, and must file your appeal within seven calendar days of this decision.

6. Petitioner received Respondent's decision on February 16, 1999.

7. On February 22, 1999, Respondent received Petitioner's letter dated January 19, 1999 (sic) which requested an administrative proceeding.

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, Inc. v. County of Kauai, PCH-96-9 (Hearings Officer's Final Order November 20, 1996).

Respondent's motion was based on the theory that the Office of Administrative Hearings lacked jurisdiction to hear this matter because Petitioner had not complied with the provisions of Hawaii Administrative Rules ("HAR") § 3-126-8(e) which provides:

§ 3-126-8 Request for reconsideration.

...

- (e) The protesting bidder or offeror shall inform the State within five working days after the final decision if an administrative appeal will be filed. An appeal shall be filed within seven calendar days of the determinations under section 3-122-110, this section, or sections 3-126-12 or 3-126-16.

Respondent argued that because Petitioner had not informed the Office of Administrative Hearings ("OAH") of its intention to file an administrative appeal, Petitioner had not complied with the requirement that it notify "the State" that an administrative appeal will be filed. However, § 3-120-2 defines "State" to mean:

the judiciary, the legislature, office of Hawaiian affairs, department of education, University of Hawaii, division of community hospitals within the department of health, remaining departments of the executive branch and all governmental bodies administratively attached to them, **and the counties.** (Emphasis added.)

As such, a reasonable reading of HAR § 3-126-8(e) would require that the protesting bidder or offeror inform the chief procurement officer or head of the purchasing agency that issued the final decision if an administrative appeal will be filed. In this case, Petitioner notified Respondent that it was filing an

administrative appeal on February 22, 1999, within the five working days required by HAR § 3-126-8(e).

Secondly, Respondent argued that Petitioner failed to comply with HAR § 3-126-8(e) by failing to file its request for administrative appeal within seven calendar days of the final decision. In addition, Hawaii Revised Statutes ("HRS") § 103D-712 provides:

§ 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[.]

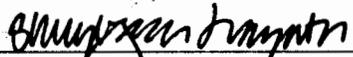
Both HRS § 103D-712 and HAR § 3-126-8(e) require that a request for administrative review be made within seven calendar days of the issuance of a written determination. In this case, Respondent issued its written determination on February 12, 1999, and seven calendar days from February 12, 1999 is February 19, 1999. Petitioner's request for hearing was made on February 22, 1999. Accordingly, the Hearings Officer concludes that Petitioner's request for hearing was not timely made, precluding Petitioner from pursuing an administrative appeal.

IV. FINAL ORDER

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

IT IS HEREBY ORDERED that the above-entitled matter is dismissed.

DATED: Honolulu, Hawaii, MAR -9 1999



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