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

In the Matter of BIOGENESYS INTERNATIONAL, LLC, and ANTHONY PERRY, PH.D., Petitioners, vs. STATE OF HAWAII, and UNIVERSITY OF HAWAII, Respondents.	PCH 99-8 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION GRANTING THE RESPONDENT UNIVERSITY OF HAWAII'S MOTION (AND THE RESPONDENT STATE'S JOINDER) TO DISMISS THE PETITIONERS' REQUEST FOR HEARING

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION GRANTING THE RESPONDENT UNIVERSITY OF HAWAII'S MOTION (AND THE RESPONDENT STATE'S JOINDER) TO DISMISS THE PETITIONERS' REQUEST FOR HEARING

I. INTRODUCTION

On July 23, 1999 Jeffrey S. Harris, Esq., on behalf of Biogenesys International, LLC and Anthony Perry, Ph.D. ("Petitioners"), filed a petition with this office requesting an administrative hearing against the State of Hawaii ("Respondent State") and the University of Hawaii ("Respondent University"). The petition focused on, and contested the legal validity of, a certain Research and Licensing Agreement between the Respondent University and PROBIO, Inc. pursuant to the provisions of HRS Chapter 103D (the Hawaii Public Procurement Code). The petition included a copy of the agreement as Exhibit "A", and specified that the relief sought was termination of that agreement. On July 26, 1999, a Notice of Hearing and Prehearing Conference was filed, setting a prehearing conference date of August 6, 1999, and a hearing date of August 11, 1999.

On July 30, 1999 Gary Hynds , Esq., on behalf of the Respondent University, filed a motion (with a supporting memorandum and affidavit, but no notice of hearing) to dismiss the Petitioners' request for a hearing – and subsequently (on August 3, 1999) filed a notice of hearing on the motion.[1] The motion was set to be heard on August 9, 1999, and on August 5, 1999, James J. S. Chang, Esq., on behalf of the Respondent State, filed a joinder in the Respondent University's motion. On August 6, 1999 the Petitioners filed a memorandum in opposition to the Respondents' motion (and joinder) to dismiss their request for a hearing.

On August 6, 1999 a prehearing conference was held in this matter with the Petitioners represented by Mr. Harris, with the Respondent State represented by Mr. Chang, and with the Respondent University represented by Mr. Hynds. The conference was helpful in promoting an exchange of information on the status of the matter and in facilitating a discussion of procedural issues.

On August 9, 1999 the University of Hawaii's motion to dismiss came on for consideration with Mr. Hynds representing the Respondent University, with Mr. Chang representing the Respondent State, and with Mr. Harris representing the Petitioners. At that time it was agreed by the parties that proceeding on the motion would be considered – for purposes of compliance with HRS § 103D-709(b) – as the commencement of the hearing. Furthermore, after considering the benefit of obtaining a procedural ruling on the motion before examining the substantive merit of the petition, it was also agreed by the parties that – in accordance with HAR § 3-126-60 – the August 11, 1999 hearing date would be continued to August 18, 1999.

The Hearings Officer, after having reviewed the pleadings, having listened to the parties, and having considered the motion in light of the entire record in this matter, hereby renders the following Findings of Fact, Conclusions of Law, and Decision.

II. FINDINGS OF FACT

1. On December 31, 1998 the Respondent University and Probio, Inc. entered into a detailed 24 page Research and License Agreement. The general scope of this agreement was that the Respondent University would continue to receive funds from Probio, Inc. for ongoing and future research and would continue to have Probio, Inc. pursue applications for patents on technologies resulting from such research. In return, Probio, Inc. would have an exclusive license to certain

[1] On August 2, 1999, Respondent University of Hawaii had filed an additional pleading requesting a hearing on the motion, but still no notice of hearing.

technologies that had been or would be developed from such research and an option or right of first refusal on certain other technology. The agreement also included numerous other provisions, including arrangements for Probio, Inc. to issue stock and warrants to the Respondent University and for Probio, Inc. to share certain royalties on the sale or provision of licensed products or services with the Respondent University.

2. The Research and License Agreement was the result of efforts by the Respondent University and Probio, Inc. to renegotiate/replace a preexisting research contract which had initially been entered into between the Respondent University and Concord International, Inc. effective on April 1, 1998. On May 4, 1998, however, Concord International, Inc. assigned its portion of the contract to Probio, Inc. Thereafter, the Respondent University and Probio, Inc. desired to enter into a new agreement to supplant and nullify the existing contract, and subsequently entered into the December 31, 1998 agreement.

3. During the latter part of 1998, Petitioner Perry had been very much in favor of the Respondent University entering into an agreement with Probio, Inc., and urged it to do so quickly because of the time-sensitive nature of the research activities to be covered by the agreement. In January of 1999 Petitioner Perry became aware that the December 31, 1998 Research and License Agreement had been signed, and over the course of the following months he had multiple discussions about it with the Respondent University. He was also provided with a copy of the agreement on May 7, 1999.

4. In the Spring of 1999 Petitioner Biogenesys was formed as a corporation (with Petitioner Perry having about a one third interest in it).

5. By a letter dated June 16, 1999 Petitioner Perry, through his attomeys, sent a request to the Respondent University for certain information including various aspects of the Research and License Agreement, as well as the prior contract with Concord International, Inc. and its later assignment to Probio, Inc. By a reply letter dated July 8, 1999 the Respondent State, through its attorneys, declined to produce the majority of the requested information citing its purportedly confidential nature and relying upon the provisions of HRS Chapter 92F.

6. By a letter dated July 12, 1999 Petitioners Biogenesys and Perry submitted a notice of protest to the Respondent University. The letter stated, *inter alia*, that:

> The procurement covered by this protest is the Research and License Agreement ... apparently entered into on December 31, 1998, between the University of Hawaii ... and PROBIO, Inc... The Agreement provided for the sale of intellectual property rights,

allegedly owned by UH, related to inventions by Dr. Perry and others. The Agreement also provided for the purchase of goods and services from PROBIO related to commercial development of the intellectual property rights.

The reason for the protest is that the UH violated the Procurement Code, Haw. Rev. Stat. Chapter 103D, and the Procurement regulations, Haw. Admin. R. §§ 3-122-1 et. seq. and 3-130-1 et. seq., as adopted by the UH, by actions and omissions, including but not limited to, the following[.]

The letter then went on to categorize seven areas of alleged violations, asked that the Respondent University take no further action pursuant to the agreement, and requested an immediate termination of the agreement.

7. Effective as of July 1, 1998, the law regarding the scope or extent of the application of the Hawaii Public Procurement Code was changed by amendments to HRS Chapter 103D. The result was that the procurement activities of the Respondent University were statutorily removed from the code, although under the new law the Respondent University was both encouraged and allowed to – and apparently did – follow the content of the code's statutes and rules as a matter of policy guidance.

8. By a follow-up letter dated July 15, 1999 the Petitioners wrote to the Respondent University to say that they had discovered that "the parties to the Agreement may have continued to take action under the Agreement despite the protest[,]" and requested confirmation that no further action would be taken pending resolution of the protest. Neither the July 12, 1998 letter nor the July 15, 1998 letter made any mention of acts or omissions by the Respondent State, although copies of the letters were sent to the Administrator of the State Procurement Office.

9. On July 23, 1999, prior to receiving an agency level decision on their protest from the Respondent University, the Petitioners filed the present petition with the Department of Commerce and Consumer Affairs (DCCA), Office of Administrative Hearings, requesting a hearing on the December 31, 1998 Research and License Agreement between the Respondent University and Probio, Inc.

III. CONCLUSIONS OF LAW

In an administrative proceeding of this nature a motion for dismissal, or other summary adjudication, may be granted as a matter of law if 1) the non-moving party cannot establish a material and relevant factual controversy when the

evidence is viewed in the manner most favorable to that party, and 2) the legal contentions of the moving party justify such relief.

In this matter the Respondent University advanced four separate bases for its contentions (with respect to both Respondents) in favor of dismissal, and the Respondent State advanced two additional contentions (with respect only to itself) which may be summarized essentially as follows:

> 1. Lack of jurisdiction by the (DCCA) to hear the matter under the provisions of HRS Chapter 103D,
> 2. Untimely filing of a "Petition" [protest][2] by the Petitioners under the provisions of HRS §103D-701,
> 3. Lack of standing by the Petitioners to pursue relief under the provisions of HRS § 103D-701,
> 4. Inapplicability of HRS §§ 103D-102(b) & 103D-104 to the subject matter/event being contested;
> 5. Lack of any independently alleged violation of law by the Respondent State, and
> 6. Improper naming of the Respondent State as a party considering the limitations on actions in HRS § 304-6.

First, in examining the issue of whether the DCCA has jurisdiction to conduct an administrative hearing in this matter under HRS Chapter 103D, it should initially be noted that HRS § 103D-102(c) [**Application of this chapter.**] states, in relevant part, that:

> *Unless other laws expressly exempt a governmental body from the requirements of this chapter or any of its provisions*, this chapter and all rules adopted by the policy office pursuant to section 103D-211 shall apply to all governmental bodies of this State...

Emphasis added. It must also be noted, however, that HRS § 304(d) [**Powers of regents; official name.**] (effective July 1, 1998 as part of Act 115 SLH) states that:

> The Board [of Regents for the University of Hawaii] shall develop internal policies and procedures for the procurement of goods, services, and construction, consistent with the goals of public accountability and public procurement

[2] The Respondent University titled this topic as the untimely filing of a petition (the administrative hearing level), but its actual argument, as well as its cited authority, was to the untimely filing of a protest (the agency review level). The question of any untimely filing of the petition (*as premature*) was touched upon but not actually pursued as an issue.

> practices, *but not subject to chapter 103D*. However, where possible, the board is encouraged to use the provisions of chapter 103D; provided that the use of one or more provisions of chapter 103D shall not constitute a waiver of the exemption of chapter 103D and shall not subject the board to any other provision of chapter 103D.

Emphasis added. The subject matter/event of the Petitioners' request for this administrative hearing was clearly articulated in its petition as being the December 31, 1998 Research and License Agreement between the Respondent University and Probio, Inc. This event occurred several months *after* the effective date of the amendment to HRS § 304(d) which removed the Respondent University from the (previously applicable) provisions of the Hawaii Public Procurement Code. Although the Petitioners correctly pointed out that other substantially similar contractual agreements had preceded this one, they were historically independent events which contributed background information but did not themselves constitute the subject matter/event contested in the petition. Accordingly, Chapter 103D is inapplicable to this proceeding and the Respondent University's motion (and the Respondent State's joinder) should be granted on this basis.

Second, in examining the issue of whether there was an untimely filing of a "Petition" [protest] by the Petitioners under HRS §103D-701(a) **[Authority to resolve protested solicitations and awards.]**, a good beginning is a review of the language in that statute, which reads as follows:

> Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or the head of a purchasing agency. The protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.

This provision of law is frequently asserted (but difficult to use successfully) as a basis for obtaining a dismissal, since it refers to "knew or should have known" as the standard for determining when a protester has sufficient factual information to constitute an adequate basis for a protest. Although Petitioner Perry certainly had considerable knowledge about certain events leading up to the execution of the contested agreement, and (at least indirectly) may have actually participated in and/or contributed to its genesis, it was not conclusively shown that he possessed the particular facts necessary to constitute an adequate basis for filing a protest more than five working days before doing so. Similarly, any information known by Petitioner Biogenesys, appears to have been obtained solely through Petitioner Perry. Accordingly, the Respondent University's motion should not be granted on

this alternate basis. On the other hand, however, there was no showing that the Petitioners had *ever* filed a protest with the Respondent State. Since they did not comply with this mandatory prerequisite for agency level review (and would now be unable to do so in a timely manner) the Respondent State's joinder in the motion should be granted on this alternate basis.

Third, in examining the issue of whether the Petitioners lacked standing to pursue relief under HRS § 103D-701, it is worth revisiting the first sentence of HRS § 103D-701(a) which states that: "*Any actual or prospective bidder, offeror, or contractor* who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or the head of a purchasing agency." Emphasis added. *Neither of the Petitioners* demonstrated that they met such criteria at or before the time of the December 31, 1998 Research and Licensing Agreement.[3] (This would, of course, be especially difficult for Petitioner Biogenesys to demonstrate since it did not even begin its corporate existence until early in the following year.) The purposes of Chapter 103D would not be well served, nor would it be consistent with the apparent intent of the Legislature, to construe this statute as extending standing to entities which failed to meet the necessary criteria for protesting until well after the time of the subject matter/event at issue. The most reasonable interpretation of the statute must be that "*Any actual or prospective bidder, offeror, or contractor*, must meet that criteria at or before the time of the subject matter/event being protested.[4] Accordingly, the Respondent University's motion (and the Respondent State's joinder) should be granted on this alternate basis.

Fourth, in examining the issue of whether HRS §§ 103D-102(b) & 103D-104 are applicable to the particular subject matter being contested, it should initially be noted that HRS § 103D-102(b) **[Application of this chapter.]** states, in relevant part, that:

> This chapter shall apply to every expenditure of public funds irrespective of their source by a governmental body as defined herein, under any contract[,]

HRS § 103D-104 **[Definitions]** states, in relevant part, that:

> "Contract" means all types of agreements, regardless of

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[3] Actually, the petition did not allege that either of the Petitioners met such criteria *at any time*, or that either of the Petitioners qualified as a "responsible bidder or offeror" under HAR § 3-120-2.

[4] HAR § 3-120-2 defines a "Responsible bidder or offeror" as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance."

what they might be called, for the procurement or disposal of goods or services, or for construction[,]

and the definitions of "Goods" and "Services" in this statute are equally broad in scope. Furthermore, a reasonable reading of the phrase "expenditure of public funds" would reflect its consistency with the HRS § 103D-104 definition of procurement.

> "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

Although persuasive theoretical arguments may be made as to the general legal applicability, or inapplicability, of Chapter 103D, the question of whether or not it applied to the particular agreement at issue in this matter appears to involve contested facts which preclude a definitive ruling at this stage of the proceedings. Accordingly, the Respondent University's motion (and the Respondent State's joinder) should not be granted on this alternate basis.

Fifth, in examining the issue of whether there was a lack of any independently alleged violation of law by the Respondent State, the focus is on what, if any, factual allegations were presented against it. An overall analysis of the petition's content simply does not reflect the existence of any such factual allegations, and each of the eight specified acts and/or omissions of purported wrongdoing that are set out in the petition are directed exclusively toward conduct by the Respondent University. Accordingly, the Respondent State's motion should be granted on this basis.

Sixth, in examining the closely related issue of whether the Respondent State was improperly named as a party considering the limitations on actions set out in HRS § 304-6, a good starting point is the language of that statute **[Suits.]** (also effective July 1, 1998 as part of Act 115 SLH) which states, in relevant part, that:

> The university may sue and be sued in its corporate name. Notwithstanding any other law to the contrary, all claims arising out of the acts or omissions of the university or the members of its board of regents, its officers, or its employees, including claims permitted against the State under chapter 661, and claims for torts permitted against the State under chapter 662, may be brought only pursuant to this section, *and only against the university*. However, the university

> shall be subject to suit only in the manner provided for suits against the State, including section 661-11, and any liability incurred by the university in such a suit shall be solely the liability of the university, and shall not constitute a general obligation of the State or the general credit of the State, or by any revenue or taxes of the State....

Emphasis added. In the absence of any independently alleged wrongdoing by the Respondent State (as noted above), and given the express statutory language of HRS § 304-6(a) which shields the Respondent State from vicarious liability for the acts and/or omissions of the Respondent University, the petition does not state a valid cause of action against the Respondent State. Accordingly, the Respondent State's motion should also be granted on this alternate basis.

IV. DECISION

It is hereby ORDERED that, based upon the above findings of fact and conclusions of law that: the Respondent University's motion to dismiss is granted; the Respondent State's joinder in that motion is granted; the hearing on the merits (now scheduled for August 18, 1999) is taken off the calendar; and, the matter is hereby dismissed.

DATED: Honolulu, Hawaii, AUG 13 1999

Richard A. Marshall
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs