



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

In the Matter of:)	PCX-2009-4
)	
FRIENDS OF HE'EIA STATE PARK,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	ORDER GRANTING RESPONDENT'S
vs.)	MOTION TO DISMISS
)	
DEPARTMENT OF LAND AND)	
NATURAL RESOURCES, STATE OF)	
HAWAII,)	
)	
Respondent,)	
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

On October 6, 2009, Friends of He'eia State Park ("Petitioner"), filed a request for administrative review to contest the Department of Land and Natural Resources, State of Hawaii's ("Respondent") September 28, 2009 denial of its protest in connection with Request for Proposals for a Lease to Manage and Operate an Interpretive/Education Center, Grounds and Facilities at He'eia State Park, on Oahu Solicitation No. RFP-001-08-DSP ("RFP"). Petitioner's 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. By the request of Petitioner, the pre-hearing conference and hearing dates were subsequently rescheduled to October 20, 2009 and November 4, 2009, respectively.

On October 14, 2009, Respondent filed the instant motion to dismiss. On October 28, 2009, Petitioner submitted a memorandum in opposition to the motion.

The motion came before the undersigned Hearings Officer on October 29, 2009. Pamela K. Matsukawa, Esq. appeared for Respondent; and Anthony P. Locricchio, Esq. appeared on behalf of Petitioner.

Having heard the argument of counsel, and having considered the motion and memoranda attached thereto, along with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. On July 9, 2009, Respondent received a protest from Petitioner in connection with the RFP.

2. On September 28, 2009, Respondent issued a denial of Petitioner's protest. The denial was mailed to Petitioner, through its attorney¹, and through its executive director, on September 28, 2009. The denial was also faxed to a member of Petitioner's board of directors on September 28, 2009.

3. Petitioner's attorney received the denial in the mail on September 29, 2009.

4. On October 5, 2009, Petitioner, through its executive director, presented a "Notice of Administrative Appeal" ("Request for Administrative Review") to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii ("OAH") in connection with the RFP. No cash or protest bond was submitted with the request.

5. Upon her presentation of the Request for Administrative Review to OAH on October 5, 2009, Petitioner's executive director was informed that a bond satisfying the criteria set forth in HRS §103D-709(e), as amended by Act 175, was required in order to file the request. No such bond, however, was submitted to OAH by Petitioner prior to the close of business on October 5, 2009.

6. On October 6, 2009, Petitioner submitted a bond in the form of a cashier's check to OAH. Upon receipt of Petitioner's check, the Request for Administrative Review was filed with OAH.

¹ On September 28, 2009, Respondent also attempted twice to fax a copy of the denial directly to Petitioner's attorney at the fax number listed on his stationary. Both attempts, however, failed.

7. Petitioner's cashier's check was in the amount of \$2,000.00. According to Petitioner, this amount:

is based on the computation of the value of the lease in question over a 20 year period of time based on Chapter 175 formula for ascertaining the amount of [sic] a required Bond under the new law Bond if that Bond had been payable upon filing. The estimated and computed amount of said value of the lease is stated to be at an amount of over \$500,000.00, but less than \$1,000,000.

* * * *

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.

Respondent's motion is based upon the timeliness requirement set forth in HRS §103D-712(a):

Time limitations on actions. (a) Requests for administrative review under section 103D-709 shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs *within seven calendar days of the issuance of a written determination* under section 103D-310, 103D-701, or 103D-702.

(Emphasis added).

The foregoing provision is mandatory in nature and specifies that requests for administrative review must be made within seven calendar days of the issuance of the written determination. *Environmental Recycling of Hawaii, Ltd. v. County of Hawaii, PCH 95-4 (March 20, 1996); Nihl Lewa Inc. v. City & County of Honolulu, PCH 99-13 (December 17, 1999).*

“Issuance” means the date of mailing, as evidenced by the postmark date, rather than receipt of the mailing. *Nihl Lewa, Inc. v. Dept. of Budget & Fiscal Services, 103 Haw. 163 (2003).*

Accordingly, under HRS §103D-712(a), requests for administrative review must be received by

OAH as evidenced by the file-stamp date, within the prescribed 7 calendar day period. *Maui Auto Wrecking v. Dept. of Finance, PCH-2004-15 (October 27, 2004)*. Moreover, in *Diversified Plumbing & Air Conditioning, PCH-2009-4*, the Hearings Officer concluded that the procuring agency may issue its decision under HRS §103D-701(c) by facsimile transmission and, in that event, the term “issuance” as used in HRS §103D-712(a) means the date of the transmission, as evidenced by the confirmation sheet.

In addition, HRS Chapter 103D contemplates and requires the timely filing of a *complete* request for administrative review. Like protests, requests for administrative review must be complete when filed. In *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998)*, for instance, this Office held that the time limitation for filing a valid protest is not tolled by an initial incomplete filing. There, the Hearings Officer noted 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, and concluded that the time limitation for the filing of a protest was not tolled by the filing of an incomplete protest letter. This conclusion applies equally to the filing of a request for administrative review.

The undisputed evidence in this case established that Respondent’s denial of Petitioner’s protest was issued on September 28, 2009 by mail and by fax. Thus, Petitioner had until October 5, 2009 to file a *complete* request for administrative review with OAH.

On July 1, 2009, Act 175 went into effect. Under Act 175, HRS §103D-709 was amended to, among other things, require the Hearings Officer to “issue a written decision not later than forty-five days from the receipt of the request . . .” and the circuit court to resolve any application for judicial review “by the thirtieth day from the filing of the application . . .” The Act also amended HRS §103D-709 as follows:

* * * *

(d) *Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided*

pursuant to section 103D-701 *may initiate a proceeding under this section; provided that:*

- (1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or
- (2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

(e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

- (1) \$1,000 for a contract with an estimated value of less than \$500,000;
- (2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

* * * *

(Emphasis added).

In addition to expediting the overall appeals process, the amendments to HRS §103D-709, as provided by Act 175, were obviously designed to limit the filing of appeals. In order to file an appeal with OAH, the protest must meet the jurisdictional amounts set forth in subsection (d), and the protestor must submit a bond meeting the criteria set forth in subsection (e). Until such a bond is posted, the request for administrative review is incomplete and the time limitation for filing a valid request for administrative review continues to run.²

Here, the uncontroverted evidence established that Petitioner submitted a cashier's check in response to the bonding requirement of HRS §103D-709(e) on October 6, 2009, eight

² Any other conclusion would nullify the underlying intent of the bonding requirement.

days after the issuance of the denial. As such, the Hearings Officer concludes that Petitioner's Request for Administrative Review was untimely filed and the Hearings Officer therefore lacks jurisdiction over this matter.

In response, Petitioner apparently contends that Act 175 is inapplicable here because it was approved by the Governor on July 13, 2009 following the filing of Petitioner's July 9, 2009 *protest*. Petitioner, however, ignores the fact that the Act expressly provides that it shall take effect July 1, 2009. In addition, Respondent correctly points out that when Petitioner filed its protest, it had, at most, a "mere expectancy of a future benefit" or a "contingent interest in property founded upon the anticipated continuance of existing laws", with regard to a *possible* appeal to OAH. According to the legal authorities cited by Respondent, such an expectancy "may be enlarged or abridged or entirely taken away by legislative enactment", while a vested right may not.² Respondent argues that Petitioner did not have a vested right to appeal to OAH until the protest denial was issued on September 28, 2009, well after the effective date of Act 175.

To be sure, a protestor has the right to file a request for administrative review with OAH once the denial of its protest has been issued. However, in order to perfect that right, the protestor is still required to file a request for administrative review that meets the timeliness and other requirements imposed by the laws in effect at the time the request is filed. Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. *Damon, supra*. These considerations lead the Hearings Officer to conclude that a protestor's right to maintain an appeal vests only upon its filing of a request for administrative review that meets the requirements imposed by the *laws in effect at the time the request is filed*. In this case, because Petitioner initiated the instant appeal in October 2009, well after the Act took effect in July, the Act is clearly applicable, and as such, Petitioner was obligated to comply with the bonding requirement imposed by the Act.

Petitioner also complains that the issuance of the protest denial on September 28, 2009 was invalid because there was apparently \$2.30 "postage due" on the mailing to Petitioner's attorney. The undisputed evidence, however, established, and Petitioner does not dispute, that it

² In *Damon v. Tsutsui*, 31 Haw. 678 (1930), the court explained that rights "are vested, in contradistinction to being expectant or contingent . . . They are expectant, when they depend upon the continued existence of the present condition of things until the

received the denial the next day, September 29, 2009. The “postage due” obviously did not prevent or otherwise affect the timely delivery of the denial. Under these circumstances, the Hearings Officer concludes that Petitioner’s complaint is without merit.

IV. DECISION

Based on the foregoing considerations, Respondent’s motion to dismiss is granted and this matter is hereby dismissed. Each party shall bear its own attorney’s fees and costs incurred in this matter.

Furthermore, because the Hearings Officer lacks jurisdiction to hear this matter, Petitioner’s bond amount shall be returned to Petitioner upon the filing of an affidavit by Petitioner attesting that the time to appeal has lapsed and that no appeal has been timely filed. In the event a timely application for judicial review of this decision is filed, the disposition of the bond shall be subject to determination by the court.

Dated at Honolulu, Hawaii: November 19, 2009.

/s/ CRAIG H. UYEHARA

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

happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting (citations omitted).”