



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of:)	PCX-2010-3
)	
MAUI COUNTY COMMUNITY)	HEARINGS OFFICER'S FINDINGS
TELEVISION, INC. dba AKAKU MAUI)	OF FACT, CONCLUSIONS OF LAW,
COMMUNITY TELEVISION,)	AND FINAL ORDER
)	
Petitioner,)	
vs.)	
)	
DEPARTMENT OF ACCOUNTING)	
AND GENERAL SERVICES, STATE OF)	
HAWAII,)	
)	
Respondent.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

I. INTRODUCTION

On June 4, 2010, Maui County Community Television, Inc., dba Akaku Maui Community Television ("Petitioner"), filed a Request for Administrative Hearing in connection with Respondent Department of Accounting and General Services, State of Hawaii's ("Respondent") May 28, 2010 determination that Petitioner's protest was untimely. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On June 24, 2010, Respondent filed a motion to dismiss or in the alternative for summary judgment. A memorandum in opposition to Respondent's motion, a motion for summary judgment, and a motion for leave to file an amended request for administrative hearing were faxed to OAH by Petitioner after the close of business on July 6, 2010.

On July 9, 2010, said motions came on for hearing before the undersigned Hearings Officer; Anthony L. Ranken, Esq. appeared for Petitioner and Patricia Ohara, Esq. appeared for Respondent.

The Hearings Officer, having reviewed and considered the argument of counsel, along with the memoranda, exhibits, and declarations attached thereto, together with the records and files herein, hereby renders the following findings of fact, conclusions of law and final order.

II. FINDINGS OF FACT

1. On May 20, 2010, Respondent released Request for Proposals No. RFP-10-007-SW ("RFP") to operate, maintain and manage public, educational, and governmental (PEG) access channels, funds, facilities, and equipment ("Project") on the Hawaii Procurement System and on the Procurement Notice System. The RFP was released on the Hawaii Electronic Procurement System at 4:18 p.m. and on the Procurement Notice System at 4:30 p.m. on May 20, 2010.

2. On May 20, 2010, following the release of the RFP, Respondent, as a courtesy, notified Petitioner via email that the RFP was "available for response". Respondent also faxed a letter to Jay April of Petitioner informing April that Respondent had "issued Request for Proposals, No. RFP-10-007-SW . . ."

3. Pursuant to the terms of the RFP, the date for the submission of offers in response to the RFP was set for July 28, 2010.

4. Petitioner submitted a protest in connection with the content of the RFP by faxing its protest to Respondent at 5:42 p.m. on May 27, 2010. Petitioner also mailed a copy of the protest to Respondent on the same date.

5. Respondent's normal weekday operating hours are 7:45 a.m. to 4:30 p.m.

6. By letter dated May 28, 2010, Respondent notified Petitioner that its protest was untimely:

HRS §103D-701(a), expressly requires protests to be filed within five working days after the aggrieved party knew or should have known of the facts giving rise to the protest. The solicitation was published on the Hawaii Electronic Procurement System (HePS) and the Procurement Notice System (PNS) on May 20, 2010. The facts giving rise to Petitioner's protest were known, as of May 20, 2010, and any protest was required to be submitted no later than May 27, 2010, 4:30 p.m., the close of business in the State Procurement Office (SPO). The subject protest was received via facsimile to SPO on May 27, 2010 at 5:42 p.m. Therefore, this protest is untimely.

* * * *

7. Respondent's May 28, 2010 determination was faxed to Petitioner on the same date.

8. On June 4, 2010 at 4:31 p.m., Petitioner filed a Request for Administrative Hearing with OAH in connection with Respondent's May 28, 2010 determination. A copy of Respondent's May 28, 2010 determination was attached to the request.

9. Along with its Request for Administrative Review, Petitioner also submitted to OAH a cash bond in the sum of \$2,000.00.

10. OAH's normal weekday operating hours are 7:45 a.m. to 4:30 p.m.

11. On June 14, 2010, Respondent filed its response to Petitioner's Request for Administrative Hearing.

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.

Hawaii Revised Statutes ("HRS") §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror,

contractor or governmental body aggrieved by a determination 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-702.¹ The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

In its motion, Respondent asserts that Petitioner knew or should have known of the facts giving rise to its protest beginning on May 20, 2010 when the RFP was released and made available for inspection by prospective offerors. Therefore, according to Respondent, Petitioner was required to, but did not, submit its protest by the close of the business day on May 27, 2010, and accordingly, its protest was untimely. Additionally, Respondent contends that Petitioner's Request for Administrative Hearing was also untimely filed and, as a result, the Hearings Officer lacks jurisdiction over this matter.

A. TIMELINESS OF PROTEST.

HRS §103D-701(a) provides:

§103D-701. Authority to resolve protested solicitations and awards. (a) 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 a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, *a 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*; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; *provided further that no protest based on the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.*

(Emphasis added).

¹ Accordingly, the Hearings Officer's jurisdiction in this case is limited to a review of Respondent's May 28, 2010 determination regarding the timeliness of the protest and the Hearings Officer's jurisdiction over this matter, and does not extend to the substantive issues raised in Petitioner's protest.

This Office has previously held that HRS §103D-701(a), expressly requires protests to be filed within 5 working days after the aggrieved party knew or should have known of the facts giving rise to the protest *and*, in any event, prior to the date set for the receipt of offers where the protest is based on the content of the solicitation. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009)*. The requirement was designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services; PCH 2000-8*. Moreover, in construing HRS §103D-701(a), this Office has consistently held that the accomplishment of the underlying objectives of HRS Chapter 103D requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc., v. County of Maui, PCH 98-6 (December 9, 1998)*. See also, *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget and Fiscal Services, PCH-2000-8 (October 17, 2000)(strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute’s underlying purpose); CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007)*. This Office has also established that the filing of a protest must take place by the close of business on the last day permitted for such filings. In *GTE Hawaiian Telephone Co., Inc., vs. County of Maui, PCH 98-6 (December 9, 1998)*, the Hearings Officer explained that:

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. (footnote omitted).

(Emphasis added).

There is no dispute here that Petitioner's protest is one based entirely on the content of the RFP. Therefore, at the very least, Petitioner should have known of the facts giving rise to its protest upon the release of the RFP on May 20, 2010. Consequently, Petitioner had until the close of business on May 27, 2010 to submit its protest. Nevertheless, Petitioner waited until *after* Respondent's normal weekday operating hours on the last day permitted by HRS §103D-701 to submit its protest. Under these circumstances, the Hearings Officer concludes that the protest was untimely.

Notwithstanding the clear language of HRS §103D-701(a) and its underlying policy of expediting the resolution of protests, Petitioner nevertheless argues that a protest based on the content of the solicitation need only be submitted prior to the date set for the receipt of offers, and that the 5-day limitation period is inapplicable to such protests. In support of that conclusion, Petitioner argues that Hawaii Administrative Rule ("HAR") §3-126-3 makes no mention of the 5-day period for the submission of protests but rather, allows an aggrieved party to file a protest any time prior to the receipt of offers. Petitioner, however,

ignores the clear language in HAR §3-126-3(b) that permits the filing of protests “pursuant to section 103D-701, HRS . . .” As discussed previously, HRS §103D-701 expressly requires protests based on the content of the solicitation to be filed within 5 working days after the aggrieved party knew or should have known of the facts giving rise to the protest and, in any event, prior to the date set for the receipt of offers.

Moreover, Petitioner’s suggestion that the 5-day limitation period is contrary to HAR §3-126-3(a) which provides that a protestor “initially should seek an informal resolution of [its] complaint . . .”, is also unpersuasive. While HAR §3-126-3(a) uses the term, “should” to express a *preference* that the parties attempt to resolve a complaint informally, both HRS §103D-701 and HAR §3-126-4, by use of the term, “shall”, clearly *require* the filing of protests within 5 days. *See, Tenant v. Roys, Jr., 722 P.2d 848 (1986)* (“*should*” is directional and not mandatory as is the term, “*shall*”). Thus, although HAR §3-126-3(a) encourages the parties to resolve their differences prior to the filing of a protest, that section does not toll or otherwise affect the timeliness requirements set forth in HRS §103D-701².

Alternatively, Petitioner complains that notwithstanding the release of the RFP on May 20, 2010, Petitioner’s CEO “did not have an opportunity to begin reading the RFP until the weekend.” According to Petitioner, “[w]ith something as long and as dense as this RFP, one can’t expect that a potentially aggrieved party would digest it immediately and become aware of the problems giving rise to a protest . . .” The commencement of the 5-day period within which to submit a protest, however, does *not* depend on a party’s ability to “digest” the RFP or to “become aware of the problems giving rise to the protest.” Rather, the period commences once the aggrieved party knows or *should have known of the facts giving rise to its protest*. Thus, once provided with access to the information upon which its protest is eventually based, it is the bidder’s responsibility to *diligently* access the solicitation and to “digest”, prepare and submit its protest within the requisite 5 working days. This conclusion is in keeping with the underlying intent of the 5-day filing period to expedite the resolution of

² Of course, if, as a matter of policy, the Legislature prefers a rule that provides an aggrieved party with additional time to file a protest in order to allow the parties to pursue an informal resolution of a dispute, they can so provide. They have not done so and the Hearings Officer has no inclination to establish a policy contrary to that previously established by the Legislature.

protests and provides agencies with some degree of certainty as to when protests may be filed:

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. (footnote omitted) See also, Standing Committee Report No.S8-93, 1993 Senate Journal, at 39.* 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 (footnote omitted) 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 (footnote omitted).*

GTE Hawaiian Telephone Co., Inc.; supra (emphasis added).

Petitioner also apparently argues that even if the 5-day “clock” started ticking “the very moment the RFP was published”, its protest was still timely as Respondent “sent out the RFP by email” after-hours on May 20, 2010. Therefore, according to Petitioner, it did not receive the RFP until the next day, May 21 and, as such, had until May 28, 2010 to submit its protest. Petitioner’s argument misses the mark. According to the undisputed facts, the RFP was “published” on or before 4:30 p.m. on May 20, 2010, after which courtesy

letters and emails were sent to Petitioner and others regarding the release of the RFP. Thus, according to Petitioner's own theory, its protest was due by 4:30 p.m. on May 27, 2010.

Based on these considerations, the Hearings Officer rejects Petitioner's arguments and concludes that Petitioner should have known of the facts giving rise to its protest upon the release of the RFP on May 20, 2010.

Petitioner also asserts that HAR §3-126-3(c) allows an aggrieved party to mail its protest to Respondent and, therefore, its protest is deemed to have been "submitted" for the purpose of meeting the 5-day filing period upon the mailing of its protest on May 27, 2010. Nothing in HRS §103D-701, however, supports this conclusion. On the other hand, the Hearings Officer notes that the plain meaning of "submit" includes the following definitions: "to present or propose to another for review, consideration, or decision", and "to deliver formally". *Webster's Ninth New Collegiate Dictionary*. Furthermore, HAR §§3-126-3 and 4 both use the term, "filing" interchangeably with the term, "submit." These considerations lead the Hearings Officer to conclude that a protest, whether by personal service, or by other permissible means, *must be received by the agency within the requisite 5-day period*. For this very reason, HAR §3-126-3(c) suggests³ that where the protestor elects to mail its protest, it do so via certified mail, return receipt requested, so as to have proof of the date the protest was received by the agency.

B. TIMELINESS OF APPEAL.

For the following reasons, the Hearings Officer concludes that Petitioner's Request for Administrative Hearing was also untimely. HRS §103D-712(a) provides:

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).

³ HAR §3-126-3(c) is merely directional in nature and, as such, does not preclude an aggrieved party from "submitting" its protest by facsimile transmission. Nevertheless, as stated above, the protest must be received by the agency within the requisite 5-day period.

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); *Nihi Lewa Inc. v. City & County of Honolulu*, PCH 99-13 (December 17, 1999). Moreover, 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, 2005); *Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii*, PCX-2009-4 (November 19, 2009). Furthermore, the rationale for requiring protests to be submitted to the procuring agency on or before the close of business on the last day on which such filings could be made applies equally to the filing of requests for administrative review under HRS §103D-709.

The Hearings Officer disagrees with Petitioner's contention that the "important thing is not the time stamp but when the document was brought to DCCA's office, which was by 4:30 p.m." On the contrary, the Hearings Officer concludes that under HRS §103D-712(a), a request for administrative review is "made" upon being file-stamped by OAH. Such a conclusion provides a protestor with a clear understanding and confirmation of when its appeal has been perfected, avoids factual disputes over when a protestor entered the confines of OAH to file its appeal⁴, and, above all, discourages last minute filings⁵.

Respondent's denial of Petitioner's protest was issued on May 28, 2010. Thus, Petitioner's appeal to OAH was due on or before the close of business on June 4, 2010. Petitioner's request for administrative review, having been filed-stamped at 4:31 p.m. on June 4, 2010, was therefore late and, accordingly, the Hearings Officer lacks jurisdiction over this matter. *See, Robert's Hawaii School Bus, Inc. v. DOE*; PCH-2004-17 (December 9, 2004)(because Petitioner's request for administrative review was untimely, the Hearings Officer lacked jurisdiction over the case).

⁴ Petitioner even suggested that the locking of the office door should be the deciding factor in determining whether an appeal was timely filed.

⁵ Particularly where a protestor waits until shortly before the applicable deadline to submit a protest or file an appeal, it bears the risk that the protest or the appeal may be received after the deadline for any number of reasons including but not limited to machine malfunctions or long lines at the window.

C. BONDING REQUIREMENT.

In addition to the foregoing arguments, Respondent argues that in amending HRS §103D-709, the Legislature intended to divest OAH of jurisdiction to review protests based on the content of the solicitation, such as the present one. HRS §103D-709, as amended in 2009 by Act 175, provides, in pertinent part:

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract . . . 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.

And HRS §103D-709(j) defines “estimated value of the contract” or “estimated value” to mean, “the lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable.”

Based on these provisions, the determination as to whether a protest satisfies the jurisdictional amount required by subsection (d), or the bond amount required by subsection (e), necessarily depends on a consideration of the lowest responsible, responsive bid or the bid amount from the responsible offeror whose proposal has been deemed to be the most advantageous. This, of course, presumes that all bids or offers have been submitted and are available for inspection. Where, however, a protest is filed prior to the date set for the submission of bids, as in the case of a protest over the contents of a solicitation, it would be impossible to determine the estimated value of the contract.

Based on the foregoing, Respondent argues that “[b]y defining “estimated value” as it did, the Legislature deliberately excluded circumstances when there were no bid or proposal amounts, such as in this case where the protest is of the solicitation and proposals haven’t been received, much less opened”, and reasons that the Legislature must have intended to divest OAH of jurisdiction to review such protests. The Hearings Officer disagrees. Any preclusion of a protestor’s right to a review of an agency’s determination made under HRS §103D-701 with respect to a protest that is based on the content of a solicitation would represent a dramatic change in the protestor’s due process rights and, among other things, would effectively allow an agency to draft a solicitation that favors one bidder or discourages competition. The Legislature could not have intended such an absurd result. Moreover, even if the Legislature intended such a change, it is reasonable to assume that it would have clearly spelled out that change in HRS §103D-709 rather than to effectuate such a law by inference.

On the contrary, the more reasonable and obvious interpretation of the applicable sections of HRS §103D-709 is that because the estimated value of the contract cannot be determined for protests over the content of the solicitation, the requirements set forth in HRS §103D-709(d) and (e) are inapplicable to such protests. For these reasons, the Hearings Officer concludes that under HRS §103D-709, as presently written, protests over

the contents of a solicitation need not meet the requirements in subsections (d) and (e) as prerequisites to the protestor's ability to pursue a request for an administrative review.

D. SUFFICIENCY OF REQUEST FOR HEARING.

Finally, Respondent asserts that Petitioner's request for administrative hearing does not satisfy the requirements of HAR §3-126-59 because it does not "state plainly and precisely" any of the facts, circumstances, laws, rules, or the relief sought", and therefore should be dismissed. In *Kauai Builders, Ltd. v. County of Kauai, et al., PCH-2009-8 (May 6, 2009)*, the Hearings Officer determined that while the petitioner's request for hearing was technically defective because it did not state the laws and rules involved, the attachment of the protest letter and response from Respondent gave sufficient notice of the issues raised.

Kauai Builders, Ltd. v. County of Kauai, et al., PCH-2009-8 (May 6, 2009).

Likewise, in this case, the fact that Petitioner attached a copy of Respondent's May 28, 2010 determination to its request for a hearing to review that very determination, leads the Hearings Officer to conclude that Respondent had sufficient notice of the issues involved here. Respondent's argument is therefore rejected.

IV. DECISION

Based on the foregoing findings of fact and conclusions of law, the Hearings Officer concludes that there exist no genuine issues of material fact left for determination at hearing and that Respondent is entitled to a decision that Petitioner's protest and request for administrative hearing were untimely, as a matter of law, and that therefore, the Hearings Officer lacks jurisdiction over this case. As such, the Hearings Officer grants Respondent's motion for summary judgment and orders as follows:

1. Respondent's May 28, 2010 determination and rejection of Petitioner's protest is affirmed;
2. Petitioner's motion for summary judgment is denied;
3. Petitioner's motion for leave to file an amended request for administrative hearing is denied; and

4. Each party shall bear its own attorney's fees, costs, and expenses.

Additionally, having determined that the bonding requirement set forth in HRS §103D-709(e) is inapplicable to the protest involved here, the Hearings Officer concludes that Petitioner is entitled to the return of its bond upon the filing of an appropriate motion.

Dated at Honolulu, Hawaii: JUL - 9 2019



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