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

In the Matter of:	)	PCY-2012-003
	)	
SODERHOLM SALES AND LEASING, INC.,	)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
	)	
Petitioner,	)	
vs.	)	
	)	
DEPARTMENT OF BUDGET AND FISCAL SERVICES, CITY & COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	
	)	

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

I. INTRODUCTION

On February 6, 2012, Soderholm Sales & Leasing, Inc. ("Petitioner"), filed a request for administrative review to contest the Department of Budget and Fiscal Services, City & County of Honolulu's ("Respondent") denial of its protest in connection with Respondent's solicitation for bids RFB-DTS-386814 ("RFB"). 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.

On February 21, 2012, Respondent filed the instant motion to dismiss. On March 5, 2012, Petitioner submitted a memorandum in opposition to the motion.

The motion came before the undersigned Hearings Officer on March 7, 2012. Nicole R. Chapman, Esq. and Ryan H. Ota, Esq. appeared for Respondent; and R. Erik Soderholm appeared on behalf of Petitioner as its authorized representative.

Having heard the argument of the parties, and having considered the memoranda, exhibits and affidavit 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 June 30, 2012, Petitioner filed a protest relating to the RFB (“First Protest”).
2. On September 29, 2011, Respondent denied Petitioner’s First Protest.
3. On October 5, 2011, Petitioner filed a request for administrative hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii (“OAH”) to review Respondent’s denial of the First Protest. The matter was designated as PCH-2011-10.
4. On December 28, 2011, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in PCH-2011-10. In determining an appropriate remedy in that case, the Hearings Officer concluded, in relevant part:

\* \* \* \*

The Hearings Officer concludes that in the present situation it would not be appropriate to order a “revision” of the solicitation by remanding the matter to the City for further consideration. Soderholm was the only bidder, and the City has already determined Soderholm’s bid to be deficient. Soderholm’s bid did not provide the required four-corner weight analysis. (citation omitted). There is no evidence in the record that Soderholm ever protested this determination.

\* \* \* \*

*The stated defect in Soderholm’s bid is a matter of responsiveness, not responsibility. As all parties have recognized throughout this proceeding, responsiveness is*

*determined at the time of bid opening and defects in terms of responsiveness normally cannot be remedied at a later date. It would be contrary to the purposes and objectives of the Procurement Code to order a remand here to allow consideration of a bid already determined to be deficient on its face.*

\* \* \* \*

*(Emphasis added).*

5. No appeal of the Hearings Officer's decision in PCH-2011-10 was taken.

6. On January 10, 2012, Petitioner filed another protest in connection with the RFB ("Second Protest"). Petitioner's Second Protest was emailed to Respondent on January 10, 2012 at 5:31 p.m.

7. By letter dated January 23, 2012, Respondent denied the Second Protest. Respondent's denial was emailed to Petitioner on January 24, 2012 at 11:01 a.m. by way of a reply to Petitioner's protest. Petitioner received and read the reply on January 24, 2012.

8. Respondent also mailed a copy of the denial to Petitioner by certified mail on January 26, 2012. Petitioner received the copy of the denial on January 27, 2012.

9. On January 30, 2012, Petitioner submitted a request for administrative review of Respondent's January 24, 2012 denial to the Motor Vehicle Industry Licensing Board, Professional and Vocational License Division, Department of Commerce and Consumer Affairs, State of Hawaii ("Board").

10. By letter dated February 1, 2012, the Executive Officer of the Board informed Petitioner that:

On or about January 30, 2012, the above referenced letter and materials were delivered to the Professional and Vocational Licensing Division's Licensing Branch at 335 Merchant Street, Room 301. Licensing Branch then transmitted all to me.

As you are aware, the Motor Vehicle Industry Licensing Board ("Board") has no jurisdiction over protests that are filed under the State Procurement Law. Therefore, the Board will not take any action on this matter.

Please direct all inquiries and requests regarding the protest to the OAH at 335 Merchant Street, Suite 100, Honolulu, HI 96813; phone: 586-2828

\* \* \* \*

11. By letter dated February 3, 2012, Petitioner wrote to the Board:

We are in receipt of your February 1<sup>st</sup> letter regarding the misdirected mail. Per your conversation with my office manager, Anna Price, please accept this letter as our formal request to have the information binder/appeal taken to OAH, room 100.

\* \* \* \*

12. Petitioner's request for administrative review was filed with OAH on February 6, 2012.

### 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, in part, 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).

Contrary to Petitioner's assertion that the foregoing is merely directory, this Office has repeatedly and consistently held that the requirement in HRS §103D-712(a) is *mandatory* in nature and dictates 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); Nehi Lewa Inc. v. City & County of Honolulu, PCH 99-13 (December 17, 1999)*<sup>1</sup>. HRS §103D-712(a) also expressly requires that 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, the provisions of HRS §103D-712 relating to the timeliness of a request for an administrative hearing cannot be waived by a party. *Environmental Recycling of Hawaii, Ltd. v. County of Hawaii, PCH 95-4 (March 20, 1996)*. This Office has also consistently found that the failure to comply with HRS §103D-712(a) precludes the pursuit of an administrative hearing. *Soderholm Sales and Leasing, Inc. v. County of Kauai, PCH-99-4 (March 9, 1999); 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)*.

Here, Petitioner acknowledges that Respondent's denial of its Second Protest was issued on January 24, 2012. Petitioner was therefore required to file its request for administrative review with OAH on or before January 31, 2012. Notwithstanding that requirement, OAH did not receive Petitioner's request until February 6, 2012. Petitioner nevertheless contends that it satisfied the timeliness requirement when it submitted its request to the Board/Department of Commerce and Consumer Affairs on January 30, 2012<sup>2</sup>. Petitioner's argument, however, flies in the face of the express requirements of HRS §103D-712(a) and the Procurement Code's underlying objective of creating an expeditious process for the resolution of disputes over the awarding of contracts. Petitioner was responsible to ensure that its request for review was filed

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<sup>1</sup> In *Nehi Lewa*, the Hearings Officer said:

This mandatory language in [HRS §103D-712(a)] is clear as to the time, place, and manner of filing requests for administrative review – such as that attempted by the Petitioner. The record, however, is equally clear that the Petitioner has not complied with the requirement that such requests “shall be made directly to the office of administrative hearings” (emphasis in original). The fact that the Petitioner filed its request with the Respondent does not meet the threshold requirements of HRS §103D-712(a) and does not confer jurisdiction on the office of administrative hearings. The authority of this office is set by statute and can neither be enlarged nor diminished by the independent receipt, and transmittal, of such a request by another office or a county of state government.

<sup>2</sup> It is worth noting that in 1999, the Legislature passed Act 162 which, among other things, specifically required that requests for administrative review be “made directly to the office of administrative hearings of the department of commerce and consumer affairs”. In passing Act 162, the committee on government operations and housing reported that the Act made amendments “to improve the efficiency of the procurement process.” Permitting a protestor to file its appeal with any office of the department of

with OAH in a timely manner. *Apex Software, Inc. v. State Procurement Office*; PCH-2003-29 (July 8, 2004). See also, *Superior Protection, Inc. v. Department of Transportation*; PCH-2004-12 (August 18, 2004) (request for hearing sent to the respondent who then transmitted request to DCCA did not meet the requirements of HRS §103D-712 and did not confer jurisdiction on DCCA). Having failed to do so, Petitioner is now precluded from pursuing the instant action.

Additionally, Petitioner argues that this appeal is not a relitigation of the same issues involved in the First Protest. According to Petitioner, it is contesting the apparent rejection of its bid by Respondent and seeking an order requiring Respondent to evaluate its bid. In his December 28, 2011 decision, the Hearings Officer concluded, in relevant part, that “[i]t would be contrary to the purposes and objectives of the Procurement Code to order a remand here to allow consideration of a bid already determined to be deficient on its face.” Clearly, the Hearings Officer had determined that an order remanding the matter to Respondent for consideration of Petitioner’s “deficient” bid was inappropriate and “contrary to the purposes and objectives of the Procurement Code”. If Petitioner disagreed with that conclusion, its recourse was to pursue an appeal of the decision to the circuit court as required by HRS §103D-710. It chose not to do so. The Hearings Officer concludes that this proceeding is barred by the doctrine of res judicata.

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.

Dated at Honolulu, Hawaii: MAR 16 2012



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

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commerce and consumer affairs in the hope that it will eventually find its way to OAH is obviously contrary to an efficient procurement process.