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HEARINGS OFFICE

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

In the Matter of)	
)	
GMP ASSOCIATES, INC.,)	PCH-2001-5
)	
Petitioner,)	
)	FINAL ORDER GRANTING
vs.)	INTERVENOR'S MOTION
)	TO DISMISS, OR IN THE
BOARD OF WATER SUPPLY, CITY)	ALTERNATIVE, FOR SUMMARY
AND COUNTY OF HONOLULU,)	JUDGMENT
)	
Respondent,)	
)	
and)	
)	
OCEANIT LABORATORIES, INC.,)	
)	
Intervenor.)	
_____)	

FINAL ORDER GRANTING INTERVENOR'S MOTION TO DISMISS,
OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter having come before the undersigned Hearings Officer on June 13, 2001, for consideration of a motion by the Intervenor to dismiss the Petitioner's request for an administrative hearing, or in the alternative for summary judgment; with the Intervenor represented by Robert G. Klein, Esq., with the Petitioner (opposing the motion) represented by Richard C. Sutton, Jr., Esq., and with the Respondent (joining in the motion) represented by Reid M. Yamashiro, Esq.; and,

The Hearings Officer, having considered the motion, the supporting and opposing memoranda filed by the parties, and the arguments of record, hereby renders the following findings of fact, conclusions of law, and final order.

II. FINDINGS OF FACT

1. On March 22, 24, and 29, 1999, the Respondent caused to be published a Notice To Providers Of Preferred Services in the Honolulu Advertiser. The notice stated, *inter alia*, that the respondent anticipated a need for professional services for a number of project categories including:

Project Category 2000-22; Desalination Plant Development and Design – Prepare feasibility studies, an environmental impact statement, and/or the plans, specifications, and cost estimates for a desalination plant to include, but not be limited to, design of the plant, piping, drainage and disposal systems, landscaping, irrigation system, related transmission mains, electrical equipment, and appurtenances.

The notice also provided general information for persons interested in being considered for providing such services, and enumerated the materials required to be included in “letter of interest” submissions which would be due not later than April 22, 1999.

2. On April 22, 1999 both the Petitioner and the Intervenor submitted letters of interest (by way of Standard form (FM) 255) to the Respondent.

3. By way of an internal memorandum from Herbert H. Minakami to Clifford S. Jamile, dated February 16, 2000, the Respondent identified a listing of “consultants determined to be equally qualified to perform professional consulting services” within Project Category 2000-22; Desalination Plant Development and Design, and requested that a consultant be selected for “Item #091 – Barbers Point Pilot Desalination Plant Project.” The memorandum stated, *inter alia*, that:

The selected consultant shall assist the BWS [Respondent] in developing the final scope of work for the design of the pilot plant. A preliminary scope of work for this project is attached for your information. Work will be separated into several phases and payment is to be made on a time and materials basis. Total expenditures for this contract are not to exceed \$50,000. The SF 255 forms submitted by the consultants are attached as summaries of their qualifications. Letters of interest and complete statements of qualifications are in our files and available for your examination.

4. On February 22, 2000 Mr. Jamile approved the selection of the Intervenor as the consultant in developing the final scope of work for the design of the pilot plant (i.e. the Barbers Point Pilot Desalination Plant Project).

5. Subsequent to February 22, 2000 the Intervenor and the Respondent interacted in meetings and/or on other occasions which were related to developing the final scope of work for the design phase of the pilot plant.

6. By way of an internal memorandum from Herbert H. Minakami to Clifford S. Jamile, dated May 19, 2000, the Respondent again identified a listing of "consultants determined to be equally qualified to perform professional consulting services" within Project Category 2000-22; Desalination Plant Development and Design, and requested that a consultant be selected for "Item #091 – Barbers Point Desalination Plant – Phases II & III." The memorandum stated, *inter alia*, that:

The selected consultant shall prepare an environmental impact statement and the permit applications, plans, specifications, and cost estimates for a 3 to 5 MGD desalination plant. The budgeted amount remaining under the FY00 Capital Improvement Program Budget (Item #091) is \$1,150,000.

The SF 255 forms submitted by the consultants are attached as summaries of their qualifications. Letters of interest and complete statements of qualifications are in our files and available for your examination.

7. On May 22, 2000 Mr. Jamile approved the selection of the Intervenor as the consultant to prepare an environmental impact statement and the permit applications, plans, specifications, and cost estimates for a 3 to 5 MGD desalination plant (i.e. the Barbers Point Pilot Desalination Plant Project).

8. On May 30, 2000 the Governor approved Act 141 of the Twentieth Legislature (A Bill for an Act relating to Professional Service Contracts) which amended Hawaii Revised Statutes § 103D-304 (Procurement of Professional Services) – effective as of that date.

9. By a July 28, 2000 letter to the Respondent, the Petitioner stated that it understood someone other than the Petitioner had been selected for the "Desalination Facility – Design Project". The letter went on to state that "We understand that this selection process may be contrary to Act 141 of the 20th Legislature effective May 30, 2000." The letter also requested certain information relative to the selection process, and concluded by again stressing the Petitioner's "concern that the criteria and procedure outlined in Act 141 has not been followed..."

10. By a November 27, 2000 letter to the Respondent, the Petitioner protested the awarding of a contract to the Intervenor for the "Desalination Facility – Design Project." The letter went on to state that:

This protest is based on the amended [Emphasis added] Section 103D-304, *Hawaii Revised Statutes*, which was not followed in the solicitations, evaluation, and the award of the contract in this matter. The failure to follow these legal requirements has prejudiced GMP Associates and makes any such solicitation or award invalid.

11. By a December 29, 2000 letter to the Petitioner, the Respondent provided a reply to the Petitioner's request for information, including a statement that: "The design contract for Barbers Point Desalination Plant – Phases II and III has not yet been awarded. We are still negotiating with the selected consultant."

12. By a March 7, 2001 letter to the Respondent, the Petitioner asserted a "continuing protest" – essentially restating the content of its November 27, 2000 letter, and restating that the basis of the protest was its allegation that the Petitioner had not followed the provisions of "the amended Section 103D-304 of *Hawaii Revised Statutes*".

13. By an April 17, 2001 letter the Respondent stated that it was looking into the allegation raised in the Petitioner's March 7, 2001 letter – and, by a subsequent letter dated April 19, 2001, the Petitioner specifically stated that its concerns were:

- A. The Law Has Changed.
- B. The Board's Selection Policy Has Not Changed.
- C. The Consultant Selection Does Not Evaluate According to the Current Criteria.

14. By a certified letter from the Respondent to the Petitioner that was dated May 2, 2001, postmarked May 7, 2001, and received May 8, 2001, the Respondent informed the Petitioner, *inter alia*, that:

The protest of the awarding of a contract to Oceanit Laboratories, Inc. [Intervenor] for the design of the Kalaelo [fka Barbers Point] Desalination plant is denied. All legal requirements of the amended section 103D-304, *Hawaii Revised Statutes*, have been met.

The subject contract was awarded on December 28, [sic] 2000 and electronically posted the same day to the State Procurement Office website at http://hahalua.icsd.hawaii.gov/professional_services/.

Should you wish to appeal this decision, you may request an administrative review, pursuant to Section 103D-712, *Hawaii Revised Statutes*, within seven days of receipt

of this determination.

15. By a hand delivered letter from the Petitioner dated May 14, 2001, and filed with the Office of Administrative Hearings on the same date, the Petitioner requested an administrative review of the Respondent's "Determination of Procurement for Desalination Facility – Design Project" pursuant to Section 103D-712, *Hawaii Revised Statutes*. In stating the basis of this request, the Petitioner's letter referred to prior exchanges of correspondence with the Respondent, and concluded by summarizing the basis as follows:

This request for administrative review is made pursuant to the items raised in the enclosed letters and for failure to comply with the requirements of the Hawaii Public Procurement Code, as amended. [Emphasis added.]

III. CONCLUSIONS OF LAW

In presenting its motion to dismiss the Petitioner's request for an administrative hearing, or in the alternative for summary judgment, the Intervenor asserted that: 1) the request was procedurally defective because it was not filed in a timely manner, and 2) the request was substantively unfounded because it relied upon an amendment to the Procurement Code which was not in effect at the time of the event at issue. In an administrative proceeding of this nature a motion for dismissal, or other summary disposition, may be granted as a matter of law when the legal contentions of the moving party justify such relief, and when the non-moving party cannot establish a material factual controversy even though the motion is viewed in the light most reasonably favorable to the non-moving party. *RCI Environmental, Inc. vs. Timothy E. Johns, et. al.*, PCH 2000-10 (January 2, 2001); and, *Biogenesis International, LLC, et. al. vs. State of Hawaii, et. al.*, PCH 99-8 (August 13, 1999).

The topic of filing requests for administrative hearings – especially the need for compliance with statutory requirements and the consequences of failing to do so – has been addressed in a number of prior decisions, and each has stressed that the language of Hawaii Revised Statute (HRS) § 103D-712 is mandatory and affects the jurisdiction of this forum. *Nehi Lewa, Inc. vs. Dept. of Budget & Fiscal Services, City & County of Honolulu*, PCH 99-13 (December 17, 1999); *Soderholm Sales and Leasing, Inc. vs. County of Kauai*, PCH 99-4 (March 9, 1999); and, *Brewer Environmental Industries, Inc. vs. County of Kauai*, PCH 96-9 (November 20, 1996). The applicable provisions of HRS § 103D-712(a) read as follows:

HRS § 103D-712 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 [Responsibility of offerors], 103D-701 [Authority to resolve protested solicitations and awards], or 103D-702 [Authority to debar or suspend].

This language clearly requires that such requests be made within seven calendar days of the issuance of a written determination (i.e. the agency level denial of a protest). In most instances, the date of the agency denial letter constitutes the starting date for calculating this time. In many instances, the letter date may be the same as the mailing date, and in some instances may even be the same as the receipt date, but in other instances the letter date may not be the same as all or any of the other dates – and may not actually be the date of issuance. Under certain circumstances the date of an agency's letter may not coincide with the date of the agency's *issuance* of a written determination (i.e. denial) and thus not be the starting date for calculating the seven day timeframe for filing a request for administrative review. In short, additional evidence may need to be considered in order to make a factual decision as to when the agency determination/denial was actually issued.

The facts shown in the present matter reflect that the Respondent's May 2, 2001 denial letter was not even postmarked until May 7, 2001, and there was no evidence that any other written determination was *issued* by the Respondent prior to that time. Accordingly, the evidence weighs heavily in favor of May 7, 2001 being the date that the Respondent actually *issued* its earlier dated written determination/denial. Since the Petitioner filed its request for an administrative hearing on May 14, 2001, it appears that the Petitioner met the seven day requirement of HRS § 103D-712, and thus the Intervenor's first basis for its motion has not been substantiated. A letter may be given a certain date¹, but if – for whatever reason – that date does not correctly reflect the date of the letter's *issuance* it cannot be deemed conclusive for calculating time under the statute.

In pursuing its motion, however, the Intervenor also asserted that the Petitioner's request was substantively unfounded because the alleged wrongdoing related to an amended law which was not in effect at the time of the event at issue. This additional basis deserves separate attention as it appears to have considerable merit. From the time of the initial agency level protest through the filling of the request for an administrative hearing, the basis of the Petitioner's contention has specifically, consistently, and repeatedly been that in selecting the Intervenor for "Item #091 – Barbers Point Pilot Desalination Plant Project" the Respondent failed to follow the selection criteria set out in the amended version of HRS § 103D-304 (Procurement of professional services) which became effective on May 30, 2000. Nevertheless, the selection processes for both the initial selection of the Intervenor on February 22, 2000

¹ Since postal meters are commonplace in business and government offices, the same observation could be made regarding a date of mailing as not necessarily being the same as a date of issuance. Accordingly, persons may find it helpful to employ certified mail or other means of delivery that can be more easily used to establish a date of *issuance*.

(as the consultant for developing the final scope of work for the design of the pilot plant), and the subsequent selection of the Intervenor on May 22, 2000 (as the consultant to prepare an environmental impact statement, permit applications, plans, specifications, and cost estimates for the plant) occurred prior to the May 30, 2000 amendment of HRS § 103D-304 and thus would have to have been conducted in accordance with the prior law.²

The Petitioner's argument that because the amendment to HRS § 103D-304 dealt with a selection criteria process it was somehow procedural in nature, and thus entitled to retroactive application, was not well founded. The amendment is actually quite substantive in nature, setting out new obligations and duties – not simply proscribing methods of enforcing existing rights. The cases cited by the Petitioner rely on factual particulars which are distinguishable from those in the present matter. Furthermore, the Petitioner's implied assertion that there were any pending claims as of the effective date of the amendment is not supported by the evidence. Similarly, the Petitioner's arguments seeking an expansion of the parameters of the claim set out in its petition (or alternatively for additional time to explore new avenues of approach) was not supported by the record. The focus of the Petitioner's allegation has invariably been on the Respondent's application of the *selection criteria process* under the inapplicable version of HRS § 103D-304 as amended on May 30, 2000.

IV. FINAL ORDER

It is hereby ORDERED that, for good cause shown, the motion by the Intervenor, Oceanit Laboratories, Inc., to dismiss, or in the alternative for summary judgment, is granted. The basis of the Petitioner's request for administrative review rested upon an amended provision of the Procurement Code (HRS § 103D-304) which was not in effect at the time of the events being contested and therefore the request failed to state a claim upon which relief could be granted.

DATED, Honolulu, Hawaii JUN 18 2001



RICHARD A. MARSHALL
Administrative Hearings Officer

² A factual determination of whether, as asserted by the Respondent, its selection criteria process also met the more detailed and expansive requirements of the amended law is not relevant to the present issue.