



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of)	PCH-2003-14
)	PCH-2003-20
ECKARD BRANDES, INC.,)	[Consolidated]
)	
Petitioner,)	HEARINGS OFFICER'S
)	RESPONSE TO ORDER
vs.)	REMANDING CASE
)	
DEPARTMENT OF FINANCE,)	
COUNTY OF HAWAI'I; WILLIAM)	
TAKABA, in his capacity as Director)	
of Finance, County of Hawai'i, Chief)	
Procurement Officer,)	
)	
Respondents.)	
)	

HEARINGS OFFICER'S
RESPONSE TO ORDER REMANDING CASE

I. INTRODUCTION

On December 12, 2003, the Circuit Court issued an Order Remanding Case To Department of Commerce and Consumer Affairs. The Order remanded PCH-2003-14 and PCH-2003-20 to this office for "hearing on the issue of when Petitioner-Appellant EBD was an aggrieved party consistent with the Hawaii Procurement Code, Haw. Rev. Stat. ch. 103D." Pursuant to the Court's order, a Status Conference was held on February 9, 2004 wherein the parties agreed to the consolidation and hearing of both matters by the undersigned Hearings Officer. On February 10, 2004, a notice of oral argument was issued.

On April 28, 2004, these matters came before the undersigned Hearings Officer. Petitioner was represented by Ernest H. Nomura, Esq.; Respondents were represented by Craig T. Masuda, Esq.

Having reviewed and considered the memoranda and the argument of counsel, the Hearings Officer hereby renders the following supplemental conclusions of law.

II. CONCLUSIONS OF LAW

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. *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 the award of the contract either under section 103D-302 or 103D-303, 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).

The foregoing section dictates that only “aggrieved” persons have standing to protest. In order to have standing, an actual or prospective bidder, offeror or contractor must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. *B&B Security Consultants, Inc.; DCCAB No. P-630; District of Columbia v. Group Insurance Administration, 633 A.2d 2 (D.C. 1993)*. Consequently, a party is not aggrieved until official action, adverse to it, has been taken.

In PCH-2003-14, the Hearings Officer found, among other things, as follows:

* * * *

2. Randell A. Riley is the president, secretary, director and majority shareholder of Kamaaina Pumping, Inc. (“Kamaaina Pumping”). He is one of two employees of Kamaaina Pumping.

* * * *

4. On February 26, 2003, Petitioner was informed that Mr. Riley was a County of Hawaii employee.

5. Bid opening for IFB No. 2054 was March 12, 2003. Kamaaina Pumping was determined to be the low bidder.

6. By a letter dated March 28, 2003, Petitioner filed a protest, which Respondent received on March 31, 2003. Petitioner contended that Kamaaina Pumping should be disqualified because of a conflict of interest, as Mr. Riley is an employee of the Department of Public Works, County of Hawaii.

7. On May 6, 2003, Respondent issued a denial of Petitioner's protest. One of the bases for the denial was that the protest was untimely. Petitioner received Respondent's denial on May 7, 2003.

* * * *

Respondent's May 6, 2003 denial of Petitioner's "protest" also stated that:

[r]egarding the issue you raise alleging a conflict of interest, please be advised that, although Mr. Riley had discussed the potential with both the Public Works Department and our Corporation Counsel prior to accepting a position, the Finance Department requested that he apply to the County Board of Ethics for a formal ruling as soon as we learned of a potential conflict.

At their meeting of April 9, 2003, the County Board of Ethics heard the matter and found that there was no conflict of interest.

* * * *

Based upon the above, your protest is denied.

* * * *

Clearly, Respondent's determination that there was no conflict of interest constituted an "official" action that adversely affected Petitioner and, according to the record, was the first time Petitioner had been so affected by any action or decision of Respondent.

