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

In the Matter of)	PCH-2008-13
)	
THYSSENKRUPP AIRPORT)	HEARINGS OFFICER'S
SYSTEMS, INC.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER GRANTING
Petitioner,)	RESPONDENT'S MOTION
)	TO DISMISS
vs.)	
)	
STATE OF HAWAII, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent,)	
)	

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

I. INTRODUCTION

On September 11, 2008, ThyssenKrupp Airport Systems, Inc. ("Petitioner"), filed a request for hearing to contest the September 4, 2008 decision of the Department of Transportation, State of Hawaii ("Respondent") to deny Petitioner's protest concerning the invitation for bids for State Project No. AH1041-25, AIP Project No. 3-15-0004-22 ("Project"). 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 September 19, 2008, Respondent filed a motion to dismiss in this matter. On September 26, 2008, Petitioner submitted a memorandum in opposition to Respondent's motion.

The motion came before the undersigned Hearings Officer on October 2, 2008. Petitioner was represented by Karin L. Holma, Esq. and Craig Y. Iha, Esq. Respondent was represented by Laura Y. Kim, Esq.

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

II. FINDINGS OF FACT

1. On July 2, 2008, Respondent posted a Notice to Bidders for the Project ("IFB"). Pursuant to the IFB, bids were due by and would be opened on July 24, 2008.

2. The posted IFB did not include the specifications for the Project ("Specifications"). Instead, the IFB informed prospective bidders that:

* * * *

A compact disc containing the plans, specifications, proposal and contract forms may be obtained from the above offices. Bids (hard copies) shall be submitted in a sealed envelope, and shall be on the Proposal Form provided on the compact disc furnished by said Department. The "General Provisions" applicable to this project are also available for purchase from the above offices for One Dollar (\$1.00) per copy. Bids received after the established due date and time will not be considered.

* * * *

3. Compact discs containing the Specifications were made available to the public beginning on July 2, 2008 upon request.

4. On July 3, 2008, Petitioner became aware of the posted IFB and requested that a copy of the Specifications be mailed to its principal place of business in Fort Worth, Texas.

5. On July 7, 2008, Petitioner received the compact disc containing the Specifications.

6. By letter dated July 14, 2008, Petitioner submitted a request to Respondent for, among other things, a number of substitutions to the Specifications.

7. By letter dated July 17, 2008, Respondent informed Petitioner that it would not allow the substitutions Petitioner had requested in its July 14, 2008 letter.

8. On July 23, 2008, Petitioner submitted a protest to Respondent alleging that the Specifications were unduly restrictive and improperly favored the products of another manufacturer.

9. By letter dated September 4, 2008, Respondent denied the protest on the grounds that the Specifications promoted maximum competition among bidders and that Petitioner's July 23, 2008 protest was untimely.

III. CONCLUSIONS OF LAW

In bringing this motion, Respondent contends that Petitioner's protest was untimely and, therefore, the Hearings Officer lacks jurisdiction to hear this matter.

There is no dispute that the IFB was posted on July 2, 2008 but did not include the Specifications. Instead, the IFB informed potential bidders that compact discs containing the Specifications were available and "may be obtained" from Respondent. Accordingly, on July 3, 2008, after learning of the IFB, Petitioner requested that a copy of the Specifications be mailed to its Fort Worth, Texas headquarters as Petitioner did not maintain any office or have any representative in Hawaii¹. Petitioner received the compact disc containing the Specifications on July 7, 2008. However, Petitioner did not file its protest until July 23, 2008.

Hawaii Revised Statutes §103D-701(a) provides:

§103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror or

¹ Although Respondent alleges that "Petitioner has a local office on the island of Oahu and has on previous occasions sent a local representative to pick up bid documents", the Hearings Officer views the evidence in light most favorable to the non-moving party for purposes of this motion.

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).

In construing HRS §103D-701(a), this Office has consistently held that the accomplishment of the underlying objectives of HRS Chapter 103D (“Code”) 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)*.

There is no dispute that Petitioner received the Specifications on July 7, 2008 and that its protest is based entirely on those Specifications. It therefore follows that Petitioner knew or should have known of the facts giving rise to its protest beginning on that date. As a result, Petitioner’s protest was due within 5 working days or by July 14, 2008. Petitioner’s July 23, 2008 protest is therefore untimely.

In response, Petitioner argues that the limitations period did not commence until July 17, 2008 when it received Respondent’s letter which essentially declined Petitioner’s prior request for substitutions. Until then, Petitioner alleges that it “had no reason to know that a Protest would be warranted or justified”. Petitioner also argues that the

commencement of the limitations period on July 17, 2008 is in keeping with Hawaii Administrative Rule (“HAR”) §3-126-3(a), which states that a “[p]rotestor initially should seek an informal resolution of the protestor's complaint with the procurement officer named in the solicitation”. According to Petitioner, the limitations period should therefore commence only after the protestor has attempted to informally resolve its complaints.

HRS §103D-701(a), however, specifically 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*. Undoubtedly, the facts giving rise to Petitioner’s protest were known or should have been known by Petitioner when it received and had the opportunity to review the Specifications on July 7, 2008. Nothing in either the Code or its implementing rules conditions the commencement of the limitations period on the protestor’s attempts to informally resolve its complaint². If, as a matter of policy, the Legislature desires to delay the commencement of the limitations period set forth in HRS §103D-701(a) until after the protestor’s attempts to informally resolve its complaint prove to be unsuccessful, or enlarge the period³, it can so provide. It has not done so and the Hearings Officer has no authority to establish a policy contrary to that previously established by the Legislature.

² HAR §3-126-3(a) encourages, but does not require a protestor to seek an informal resolution of its complaint prior to filing a protest.

³ In *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, *supra*, the Hearings Officer noted 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.

(Emphasis added).

IV. ORDER

Based on the foregoing considerations, the Hearings Officer orders as follows:

1. Respondent's motion to dismiss is granted and this matter is hereby dismissed; and
2. Each party shall bear its own attorney's fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: OCT - 7 2008.

/s/ CRAIG H. UYEHARA

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