



DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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


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In the Matter of)	PCH-96-6
)	
BIG ISLAND RECYCLE & RUBBISH,)	HEARINGS OFFICER'S ORDER OF DISMISSAL
)	
Petitioner,)	
)	
vs.)	
)	
COUNTY OF HAWAII, DEPARTMENT OF FINANCE)	
)	

HEARINGS OFFICER'S ORDER OF DISMISSAL

On March 14, 1997, the undersigned Hearings Officer issued a Notice of Proposed Dismissal in accordance with the provisions of Hawaii Administrative Rules § 3-126-67(c). Petitioner received the Notice on March 17, 1997, but no request for a hearing to contest the proposed dismissal had been received to date. Accordingly, the Hearings Officer orders that the above-entitled matter is hereby dismissed with prejudice.

DATED: Honolulu, Hawaii, APR 3 1997



GEORGE M. NAKANO
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

MAR 14 12 01 PM '97

HEARINGS OFFICE



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

In the Matter of)	PCH-96-6
)	
BIG ISLAND RECYCLE & RUBBISH,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND NOTICE OF PROPOSED
)	DISMISSAL; APPENDIX A
vs.)	
)	
COUNTY OF HAWAII, DEPARTMENT)	
OF FINANCE,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND NOTICE OF PROPOSED DISMISSAL

I. INTRODUCTION

This matter came on for a hearing of the Respondent's Motion To Dismiss on December 11, 1996 with the Petitioner represented by Alan H. Tuhy, Esq., and the Respondent represented by Frederick Giannini, Esq.. The Hearings Officer having reviewed the entire file and having considered the motion and memoranda filed by the parties as well as the arguments of counsels hereby renders the following findings of fact, conclusions of law, and notice of proposed dismissal.

II. FINDINGS OF FACT

1. On November 28, 1994, Respondent published REQUEST FOR PROPOSAL NO. 1533: CONTRACT SERVICES RELATED TO RECYCLING PROGRAMS AND ACTIVITIES FOR THE DEPARTMENT OF PUBLIC WORKS, COUNTY OF HAWAII ("RFP #1533"), which invited submission of sealed proposals.

2. Under the heading SPECIFICATIONS, RFP #1533 in item III. INSTRUCTIONS TO PROPOSERS, Respondent noted under A. TIME SCHEDULE, . . . "3. January 5, 1995: Deadline for receipt of proposals"[.] and "4. Award will be made, if acceptable response received, as soon as possible after bid opening."

3. Petitioner had not submitted a proposal for any contract services related to any recycling program and activity for the Department of Public Works, County of Hawaii pursuant to Respondent's RFP #1533.

4. On August 15, 1995, Respondent entered into Consultant Services Contract No. 96046 ("Contract #96046") with Bio-Comp for the development of a green waste program to service the needs of West Hawaii.

5. Bio-Comp was a partnership comprised of Daniel Hathaway and Richard Walton.

6. Petitioner, Big Island Recycle & Rubbish was owned by Richard Walton, also known as Rick Walton, as a sole proprietorship and was a separate entity from Bio-Comp.

7. On November 3, 1995, Respondent entered into Consultant Services Contract No. 96112 ("Contract #96112") with Recycling Systems Hawaii, Inc. ("RSHI") for the development of a glass recycling program for the County of Hawaii.

8. On February 11, 1996, Petitioner through its owner Richard Walton learned that a glass recycling bid had been available for the County of Hawaii and a contract had been awarded to RSHI.

9. By letter dated February 12, 1996, Petitioner over Richard Walton's signature protested the award of Contract #96112 to RSHI and RFP #1533. The protest was addressed to Mr. Harry Takahashi, Director of Finance, County of Hawaii, the head of the purchasing agency ("Takahashi"). The protest was received by Respondent on or about February 14, 1996.

10. Takahashi by letter, dated March 1, 1996 addressed to Petitioner, informed Petitioner that the protest it submitted was a "late protest" and pursuant to the Hawaii Administrative Rules ("HAR") § 3-126(a) could not be considered.

11. Petitioner by letter dated March 5, 1996 addressed to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, ("OAH") requested "a formal contested case hearing against the County of Hawaii, regarding the County's glass recycling project Contract No. 96112 and Request for Proposal 1533[.]" and noted that its written protest to the County of Hawaii had been earlier denied.

12. Petitioner by letter dated April 1, 1996 addressed to Takahashi stated:

A copy of my Request for a Formal Case Hearing with the Department of Finance (sic) has been filed with the Department of Commerce and Consumer Affairs (DCCA) on March 5, 96 (sic) regarding your denial of my protest of Contract 96112.

13. Although a copy of Petitioner's request for a hearing which was sent to the OAH was sent to Takahashi the head of the purchasing agency, with its letter of April 1, 1996, Petitioner failed to file a request for a hearing concerning the denial of its protest of RFP #1533 and Contract #96112 with Takahashi.

14. By letter dated July 3, 1996, filed with the OAH on July 8, 1996, Petitioner "resubmitted" its Request For A Formal Contested Case Hearing stating that Takahashi had said that Respondent had not replied to Petitioner's letter of April 1, 1996 because Petitioner had sent its request for a hearing to DCCA and Respondent did not need to do so.

15. Petitioner did not submit a request for a hearing that was addressed to the head of the purchasing agency concerned.

16. Based upon Petitioner's letter to the OAH, dated July 3, 1996, which requested a hearing and stated that "[t]he County of Hawaii, Department of Finance Director Mr. Harry Takahashi refused to submit my request to your office[.]" the OAH assigned a docket number to Petitioner's request for a hearing and the matter was scheduled for a pre-hearing conference and hearing. The parties were thereupon notified of the respective dates therefor.

III. CONCLUSIONS OF LAW

Respondent's Motion To Dismiss was premised upon two theories:

- (1) That Petitioner's protest was untimely filed, and,
- (2) That Petitioner was not a "protestor" or an "interested party" as defined in Hawaii Administrative Rules ("HAR") § 3-126-1.

A motion for dismissal or other summary disposition of the matter may be granted where there is no genuine issue as to any material fact when the inferences to be drawn from the record are viewed in the light most favorable to the party opposing the motion, and, the moving party is entitled to a judgment as a matter of law. Hulsman v. Hemmeter Dev. Corp. 65 Haw 58 (1982). However, prior to addressing Respondent's Motion To Dismiss, it was necessary to determine whether the matter was properly before the Hearings Officer for a decision. Consequently, during the hearing on Respondent's motion the Hearings Officer requested the parties to address such issue by memoranda which were thereafter duly filed by the parties.

The Hawaii Revised Statutes ("HRS") § 103D-709(a) provided that the Hearings Officers appointed by the Director, Department of Commerce and Consumer Affairs,

... shall have jurisdiction to review and determine de novo any request from any bidder, offerer, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a

designee of either officer under §§ 103D-310, 103D-701 or 103D-702.

The statute did not provide the procedure that must be followed by an aggrieved party desiring to submit a request for a review of a chief procurement officer or head of a purchasing agency determination. However, HRS § 103D-709(g) provided that "[t]he policy office shall adopt such other rules as may be necessary to insure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard." Pursuant to such provision the Department of Accounting and General Services, the policy office concerning these matters, implemented HRS § 103D-709 by adopting administrative rules which in HAR § 3-126-42 provided:

Commencement of Proceedings. An administrative proceeding authorized by this subchapter shall commence by the *filing of a request for hearing with the chief procurement officer or the head of a purchasing agency.* Upon the request for hearing, the chief procurement officer or the head of a purchasing agency shall, within three business days, *transmit the request for hearing to the office of administrative hearings, department of commerce and consumer affairs.* The office of administrative hearings shall docket the request for hearing, assign a docket number to the request for hearing, and schedule the matter for hearing.

(Emphasis added)

In this matter, Petitioner having received the head of the purchasing agency's (Takahashi's) written determination, dated March 1, 1996, submitted its request for a hearing, dated March 5, 1996, to the OAH. It failed to file its request for a hearing with the head of the purchasing agency. Instead, Petitioner by a letter dated April 1, 1996, sent Takahashi a copy of the request for a hearing that it had previously sent to the OAH. Arguably, such letter, with the enclosed copy of the request that Petitioner had sent to the OAH, might be considered a request for a hearing filed with the head of the purchasing agency. Nonetheless, assuming arguendo that it was a proper request, the date of filing exceeded the seven calendar days within which it had to be filed after the date the purchasing agency head issued his written determination. See: HRS § 103D-712(a). The implementing rules as noted above clearly stated that an administrative proceeding shall commence with a filing of a request for a hearing with the chief procurement officer or the head of a purchasing agency. The rules did not provide for any exceptions. Petitioner's request for hearing was neither filed with the proper agency, nor was its April 1, 1996 timely filed with the head of the purchasing agency as required by HAR § 3-126-42.

The Hearings Officer concludes that the initiation of proceedings must comply with the rules, and the satisfaction of the rules is jurisdictional in nature and precludes proceedings where Petitioner had failed to comply with the prescribed procedure. The request for a hearing sent to the OAH, for whatever reason, failed to satisfy the regulatory requirements and the subsequent letter of April 1, 1996 to

Takahashi failed to satisfy the requirements of HRS § 103D-712(a). Consequently the Hearings Officer further concludes that as a matter of law the Petitioner's request for a hearing should be dismissed.

Accordingly, the Hearings Officer hereby provides notice to the parties that this matter will be dismissed with prejudice pursuant to HAR § 3-126-67(c) for failure of Petitioner to comply with the Hawaii Administrative Rules Title 3, Chapter 126 unless Petitioner requests within fifteen (15) days from the date of receipt of this notice, a hearing to contest the proposed dismissal.

In addition to the jurisdictional issue above, the Hearings Officer has considered Respondent's Motion To Dismiss as well. Upon review of the motion with memoranda in support and in opposition thereto with exhibits, the arguments of counsels and the entire record in this matter, the Hearings Officer determined that the likely conclusion concerning Respondent's Motion To Dismiss on the first theory would be that there were material facts in issue which precluded summary disposition of the matter as requested by Respondent. On the other hand, the likely conclusion as to Respondent's second theory for its motion to dismiss presented no genuine issue as to any material fact and as a matter of law Petitioner had no standing to pursue the matter as it had not qualified either as an "interested party" or "protestor". Petitioner had never submitted a bid or offer to nor was awarded a contract by Respondent, and, since the deadline for submission of proposals under RFP #1533 was January 5, 1995 a date which had expired over a year prior to Respondent's submission of his protest on February 12, 1996, nor could Petitioner be considered a prospective bidder, offerer or contractor. See: Browning Ferris Industries of Hawaii, Inc. v. County of Kauai, Department of Finance, PCH-96-11 (HOFO Jan. 29, 1997) attached hereto as Appendix "A".

MAR 14 1997

DATED: Honolulu, Hawaii, _____.



GEORGE M. NAKANO
Hearings Officer
Department of Commerce
and Consumer Affairs



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HEARINGS OFFICE

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

In the Matter of)	PCH-96-11
)	
BROWNING FERRIS INDUSTRIES)	FINAL ORDER GRANTING
OF HAWAII, INC., dba BFI,)	RESPONDENT'S MOTION
)	TO DISMISS
Petitioner,)	
)	
vs.)	
)	
COUNTY OF KAUAI,)	
DEPARTMENT OF FINANCE,)	
)	
Respondent.)	

**FINAL ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS**

This matter having come before the undersigned Hearings Officer on January 17, 1997, for consideration of the Respondent's Motion to Dismiss; with the Petitioner represented by Patrick J. Childs, Esq.; and the Respondent represented by Galen T. Nakamura, Esq.; and after due consideration of the pleadings filed by the parties and their arguments in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Final Order.

I. FINDINGS OF FACT

1. On July 12, 1996, the Respondent published a Notice of Solicitation ("Notice") inviting bidders to submit bids to operate the Kauai Recycles Program, an islandwide residential drop-off recycling program.

2. This solicitation was designated as Solicitation Document No. 2026 ("Solicitation").

3. The deadline for the submission of bids in response to the Solicitation was July 29, 1996.

4. The Respondent received a total of one bid by the July 29, 1996 deadline.

5. The lone bid was submitted by Garden Isle Disposal ("GID").

6. After the Respondent determined GID to be the lowest responsible, responsive bidder, and that its prices were fair and reasonable, the Respondent entered into a contract with GID.

7. The Petitioner, although aware of the Solicitation and present at the bid opening, did not submit a bid.

8. On August 6, 1996, the Petitioner filed a protest of the Solicitation. The protest was not filed in duplicate.

9. By letter dated August 6, 1996, the Respondent denied the protest.

10. On October 2, 1996, the Petitioner filed a request for reconsideration of the Respondent's decision. On December 11, 1996, the request for reconsideration was denied by the Respondent.

11. On December 17, 1996, the Petitioner submitted to the Respondent a Request for Administrative Review to the Department of Commerce and Consumer Affairs.

II. CONCLUSIONS OF LAW

A motion for dismissal, or other summary disposition, may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. Brewer Environmental Industries, Inc. v. County of Kauai, PCH-96-9 (HOFO November 20, 1996).

The Respondent's motion was based on the theory that the Petitioner was not a "prospective bidder" under Hawaii Revised Statutes ("HRS") Chapter

103D and therefore lacked standing to pursue the instant protest. Alternatively, the Respondent asserts that this action should be dismissed because the Petitioner failed to file its protest in accordance with the requirements set forth in HAR 3-126-3(a).

HRS §103D-701(a) states in relevant part:

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 the head of a purchasing agency. The 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.

Similarly, HAR §3-126-1, defines a "protestor" as:

. . . . any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.

According to the foregoing rule and statutory provisions, standing to file a protest under HRS Chapter 103D is conferred upon and limited to actual or prospective bidders, offerors, or contractors.

HAR §3-120-2 defines a "bidder" as a "business submitting a bid in response to an invitation for bids," while an "offeror" is "a business submitting a bid or proposal in response to an invitation for bids or a request for proposals, or an unpriced technical offer in response to an expression of interest." A "contractor" is defined in HRS §103D-104 as any person **having a contract** with a governmental body. (Emphasis added).

In this case, the Petitioner does not dispute the fact that it did not submit a bid and did not enter into a contract with the Respondent in response to or as a result of the Solicitation. As such, it is clear that the Petitioner was not an actual bidder, offeror or contractor under HRS Chapter 103D.

Instead, the Petitioner argues that it was a "prospective bidder" prior to the July 29, 1996 deadline and as such, HRS §103D-701 "merely requires a protest to be submitted in five working days after the aggrieved person knows or should have known of the facts giving rise thereto." The Petitioner asserts that once the status of "prospective bidder" was conferred upon it, it cannot be "de-conferred" of such bidderhood.

The Respondent, on the other hand, argues that although the Petitioner may have been a "prospective bidder", that status ended upon the expiration of July 29, 1996 deadline. The Respondent correctly points out that once the deadline for bid submittals passed, there was no longer any likelihood or prospect that the Petitioner would become a bidder with respect to the Solicitation.

In MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed Cir. 1989), it was stated that in order to qualify as a prospective bidder, one who has not actually submitted an offer must be expecting to submit an offer prior to the closing date of the solicitation; and that once the date for submission passed, the would-be protestor can no longer realistically expect to submit a bid on the proposed contract and therefore, cannot achieve prospective bidderhood with regard to the original solicitation. The holding of MCI Telecommunications Corp. is persuasive.

In the case at hand, the Petitioner no longer had any realistic expectation of submitting a bid in response to the Solicitation once the deadline expired. As such, the Hearings Officer finds that the Petitioner was not a "prospective bidder" when it filed the instant protest. Thus, because the Petitioner neither filed a timely bid protest nor submitted a bid, it lacked standing to challenge the Respondent's solicitation of bids and award of the contract to GID.

The Respondent also argued that the initial protest was not properly filed under HAR §3-126-3(a) since the protest was not filed in duplicate. Because the Respondent has established a sufficient basis to prevail

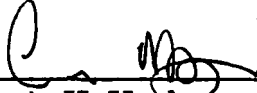
in its motion under the above analysis of its first theory, it is unnecessary to address this alternative theory.

III. FINAL ORDER

Accordingly, based upon the above findings of fact and conclusions of law, the Respondent's Motion to Dismiss is granted and the above-entitled matter is hereby dismissed.

JAN 29 1997

DATED at Honolulu, Hawaii: _____.



Craig H. Uyehara
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs