



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
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HEARINGS

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

In the Matter of	)	PCH-96-9
	)	
<b>BREWER ENVIRONMENTAL INDUSTRIES, INC.,</b>	)	<b>FINAL ORDER GRANTING</b>
	)	<b>RESPONDENT'S MOTION TO</b>
	)	<b>DISMISS</b>
Petitioner,	)	
	)	
vs.	)	
	)	
<b>COUNTY OF KAUAI,</b>	)	
	)	
Respondent.	)	
	)	

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

This matter having come before the undersigned Hearings Officer on November 8, 1996 for consideration of the Respondent's Motion to Dismiss; with the Petitioner represented by its vice president, David K. Yogi, and with the Respondent represented by Amy I Esaki, Esq., Deputy County Attorney; and, after due consideration of the pleadings filed by the parties and their subsequent 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.

**Findings of Fact**

1. By letter dated July 3, 1996 the Petitioner submitted a Notice Of Protest regarding the Respondent's award of a contract to

Environmental Sciences-Pacific, Inc. on June 25, 1996 pursuant to Solicitation No. 2004 for the furnishing and delivery of a training program for the removal of underground storage tanks, the removal of three underground storage tanks, and the management of an underground storage tank removal program. The Petitioner's letter noted that it did not have the supporting exhibits or additional evidence in support of its protest at that time, and therefore requested certain information from the Respondent which it felt would be relevant to the substance of its protest.

2. By a subsequent letter dated July 31, 1996 the Petitioner sent a second (and final) request for information regarding Solicitation No. 2004 to the Petitioner, which supplemented the request contained in its earlier letter.

3. By letter dated August 23, 1996 the Respondent issued a written agency determination explaining that it could not sustain the allegations raised by the Petitioner and denying the Petitioner's protest. The letter also noted that the Hawaii Administrative Rules provided that a motion for reconsideration of the Respondent's determination could be filed within ten (10) working days after receipt of the denial.

4. The Respondent's August 23, 1996 letter was received by the Petitioner on August 28 or 29, 1996, and September 12 or 13, 1996 was the tenth working day after the Petitioner's receipt of the Respondent's letter denying the bid protest<sup>1</sup>.

5. On September 19, 1996 the Respondent received and filed a letter from the Petitioner dated September 13, 1996 regarding an "Appeal for Reconsideration Solicitation No. 2004." This letter/motion also contained a request for the same and/or similar information from the Respondent which the Petitioner had previously requested to use in support of its protest.

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<sup>1</sup> The pleadings make reference to receipt by the Petitioner of the Respondent's letter of written agency determination on August 29, 1996 as apparently reflected in a postal return receipt, but the letter itself bears a received stamp reflecting the date of August 28, 1996.

6. By letter dated September 26, 1996 the Respondent replied to the Petitioner's motion for reconsideration by stating that the request had not been made within the timeframe required by law and implying that it would therefore not receive any further consideration. The letter also inconsistently noted that there was a right to an administrative appeal (hearing) to the Department of Commerce and Consumer Affairs (DCCA) – incorrectly citing to HAR § 3-126-8 and correctly citing to HRS § 103D-709.

7. On October 7, 1996 the DCCA received and filed a letter from the Petitioner dated October 1, 1996 regarding an “Administrative Appeal for Solicitation No. 2004, County of Kauai.” On the same date, October 7, 1996, the DCCA transmitted a letter via fax to the Petitioner confirming that it had received his letter but noting that the provisions of HAR § 3-126-42 required that requests for administrative appeals (hearings) be filed with the Respondent (chief procurement officer or head of a purchasing agency) which would then transmit the request to the DCCA<sup>2</sup>.

8. On October 17, 1996 the Respondent received and filed a letter dated October 15, 1996 from the Petitioner regarding an “Administrative Appeal for Solicitation No. 2004, County of Kauai.” By a letter of the same date, October 17, 1996, the Respondent forwarded a copy of the Petitioner's letter to the DCCA which received and filed it on October 21, 1996.

### **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 least favorable to the moving party. See, Tillmon v. AIG Hawaii, MVI-94-312 (CFO September 11, 1995).

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<sup>2</sup> The legislative purpose behind this seemingly counterproductive mechanism has yet to be pointed out by the parties in this, or any other, matter.

The Respondent's motion was presented on separate theories that the Petitioner lacked standing to pursue this matter because: 1) the Petitioner had failed to file its request (motion) for reconsideration of the Respondent's denial of its bid protest within ten (10) working days of having received it, and 2) the Petitioner had failed to file its request for an administrative appeal hearing within seven (7) calendar days after issuance of the Respondent's denial of the Petitioner's motion for reconsideration.

First, with respect to the timeliness of the Petitioner's motion for reconsideration, it is worth noting that HAR § 3-126-8(b) states:

Requests for reconsideration of a decision of the chief procurement officer or the head of the purchasing agency shall be filed not later than ten working days after receipt of such decision.

In the present matter, the Petitioner received the Respondent's August 23, 1996 written determination denying the Petitioner's protest on August 28 or 29, 1996,<sup>3</sup> but did not file its motion for reconsideration until September 19, 1996 – about a week after the time for doing so had expired. Accordingly, it is clear that the Petitioner did not file its request in a timely manner and thus failed to comply with the ten (10) working days deadline mandated by HAR § 3-126-8(b).

Furthermore, it is equally important to note that the provisions of HRS § 103D-712(a) state:

Requests for administrative review under section 103D-709 [Administrative proceedings for review] shall be made within seven calendar days of the issuance of a written determination under sections 103D-310, 103D-701 [Authority to resolve protested solicitations and awards], or 103D-702.

The mandatory language of this statute is jurisdictional in nature and precludes an untimely protestor from pursuing an administrative hearing. See: Environmental Recycling of Hawaii, Ltd. v. County of Hawaii, PCH-95-4, p. 5,

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<sup>3</sup> See footnote #1

March 20, 1996. Since the Petitioner filed neither a timely motion for reconsideration of the Respondent's August 23, 1996 written agency determination denying its bid protest nor any initial request for an administrative review (hearing) of that denial, the Petitioner was without a subsequent legal basis to pursue either of these options. The Respondent's letter in reply to the Petitioner's motion for reconsideration did not address its merit, if any, but rather noted its procedurally untimely filing and implied that it would receive no substantive consideration. Despite a reference in the Respondent's letter to the administrative review (hearing) process, the Petitioner's untimely filing of a motion for reconsideration – regardless of how it may have been handled by the agency – did not restart the clock for calculating the time to file a request for an administrative review (hearing) under HRS § 103D-712(a).<sup>4</sup>

The initial focus of the Petitioner's argument was that the Respondent allegedly failed to reasonably comply with the Petitioner's request for information – which was contained within its July 3, 1996 Notice of Protest. The timeliness of the protest has never been an issue in this matter and to argue that the Petitioner's alleged failure to provide information (that might support an already filed protest) constituted a legitimate basis for the Petitioner's failure to comply with the time requirements for requesting an agency reconsideration or an administrative hearing is quite without merit.

The Petitioner also argued that the Respondent failed to accurately notify it of the right to an administrative review (hearing) within the Respondent's September 26, 1996 reply letter to the Petitioner's untimely motion for reconsideration. As already noted, however, this right as well as the notification procedures set out in HAR § 3-126-8(d)(2) are only applicable where a timely motion has been filed.

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<sup>4</sup> Similarly, the regulatory language of HAR § 3-126-8(e) does not supercede the statutory language of HRS § 103D-712(a) where an untimely motion has been filed.

Finally, the Petitioner argued that Mr. Yogi was out-of-state from October 2 to October 14, 1996 and was unaware of the DCCA letter of October 7, 1996 until October 15, 1996. This argument is not persuasive since his personal unavailability in no way tolled the time requirements set out by statute and rule, and since even if he had been immediately aware of the DCCA letter it would already have been too late to file a timely request for administrative review (hearing) even if – as was not the case – the Petitioner had filed a timely motion for reconsideration.

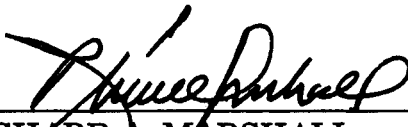
Accordingly, the Hearings Officer concludes that there is no genuine issue of material fact in controversy and, as a matter of law, the Respondent's motion to dismiss should be granted.

Second, since the Respondent established a sufficient basis to prevail in its motion under the above analysis of its first theory it is unnecessary to address its alternative theory. Nevertheless, it may be noted that even calculating from the date of the Petitioner's receipt of the Respondent's reply to the Petitioner's untimely motion for reconsideration, the Petitioner still failed to act within the timeframe allowed for requesting an administrative review (hearing).

### Final Order

Therefore, 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.

DATED: Honolulu, Hawaii, NOV 20 1996

  
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RICHARD A. MARSHALL  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs