

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE MATTER OF:)
)
 MILICI VALENTI NG PACK,)
)
) Petitioner-Appellant,)
)
) vs.)
)
) STATE OF HAWAII, DEPARTMENT OF)
) ACCOUNTING & GENERAL SERVICES,)
)
) Respondent-Appellee,)
)
) and)
)
) RFD PUBLICATIONS, INC.,)
)
) Intervenor.)

PCH-99-3
 THE OFFICE OF -
 ADMINISTRATIVE HEARINGS,
 DEPARTMENT OF COMMERCE
 AND CONSUMER AFFAIRS

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 STATE OF HAWAII

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IN THE MATTER OF:)
)
 HAWAII NEWSPAPER AGENCY,)
)
) Petitioner-Appellant,)
)
) vs.)
)
) STATE OF HAWAII, DEPARTMENT OF)
) ACCOUNTING & GENERAL SERVICES,)
)
) Respondent-Appellee,)
)
) and)
)
) RFD PUBLICATIONS, INC.,)
)
) Intervenor.)

PCH-99-2

DEPARTMENT OF COMMERCE
 ADMINISTRATIVE HEARINGS
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 HEARINGS OFFICE

SUMMARY DISPOSITION ORDER

Petitioner-appellant Milici Valenti Ng Pack (Milici)
 and Petitioner-appellant Hawaii Newspaper Agency (collectively

appellants) appeal from the Department of Commerce and Consumer Affairs (DCCA) administrative hearing officer's findings of fact, conclusions of law, and decision, issued on April 16, 1999, dismissing their protests for lack of standing. On appeal, appellants argue that the hearings officer erred in: 1) concluding that Milici did not have standing as an actual offeror; 2) concluding that Hawai'i Revised Statutes (HRS) Chapter 103D (Procurement Code) did not recognize taxpayer standing; and 3) sua sponte raising the issue of standing because a hearings officer does not have authority to raise issues sua sponte, the State waived the issue of standing, and raising the issue sua sponte violated appellants' right to due process.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties,

IT IS HEREBY ORDERED that the DCCA's decision is hereby affirmed for the following reasons: 1) Milici was not an actual offeror because its proposal was untimely and, therefore, Milici was not aggrieved when the State awarded the contract to RFD; Hawai'i Administrative Rules § 3-122-29 (1997) (providing that late bids are not considered); Hawai'i Revised Statutes (HRS) § 103D-701(a) (1993 & Supp. 1999); 2) the Procurement Code does not recognize taxpayer standing; HRS § 103D-701(a); and 3) the hearings officer did not err in sua sponte raising the issue of




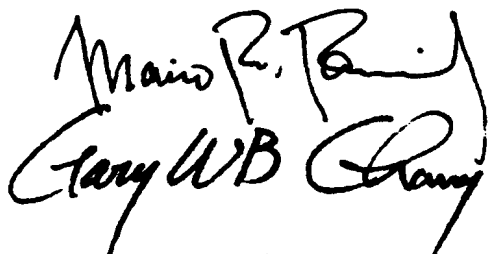
petitioners' standing; Akinaka v. Disciplinary Board of the
Hawai'i Supreme Court, 91 Hawai'i 51, 55, 979 P.2d 1077, 1081
(1999) (stating that standing is an essential element of
jurisdiction).

DATED: Honolulu, Hawai'i, March 8, 2000.

On the briefs:

Jeffery S. Portnoy and
Jodi H.S. Yamamoto, Cades
Schutte Fleming & Wright,
for petitioners-appellants

Russell A. Suzuki and
James J.S. Chang, Deputy
Attorneys General, for
respondent-appellee



DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS

APR 16 9 39 AM '99

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

In the Matter of)	PCH-99-2
)	
HAWAII NEWSPAPER AGENCY,)	[Consolidated]
THE MAUI NEWS, KAUAI)	
PUBLISHING COMPANY, HAWAII)	HEARINGS OFFICER'S
TRIBUNE HERALD, and WEST)	FINDINGS OF FACT,
HAWAII TODAY,)	CONCLUSIONS OF LAW,
)	AND DECISION
Petitioners,)	
vs.)	
)	
STATE OF HAWAII, DEPARTMENT OF)	
ACCOUNTING & GENERAL SERVICES,)	
)	
Respondent,)	
)	
and)	
)	
RFD PUBLICATIONS, INC.,)	
)	
Intervenor.)	

In the Matter of)	PCH-99-3
)	
MILICI VALENTI NG PACK,)	
)	
Petitioner,)	
vs.)	
)	
STATE OF HAWAII, DEPARTMENT OF)	
ACCOUNTING & GENERAL SERVICES,)	
)	
Respondent.)	
)	
and)	
)	
RFD PUBLICATIONS, INC.,)	
)	
Intervenor.)	

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On January 19, 1999, Milici Valenti Ng Pack ("Milici"), filed a Request for an Administrative Hearing with the Department of Accounting and General Services, State of Hawaii ("Respondent"), to contest Respondent's decision denying Milici's protest in conjunction with a request for proposals designated as RFP-99-033-SW. On the same date, Hawaii Newspaper Agency, The Maui News, Kauai Publishing Company, Hawaii Tribune Herald, and West Hawaii Today collectively filed a Request for an Administrative Hearing to contest Respondent's denial of their protest in conjunction with RFP-99-033-SW.

On February 2, 1999, both requests were received and filed with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, and designated as PCH-99-3 and PCH-99-2, respectively. Each matter was thereafter set for hearing and separate notices of hearing and pre-hearing conference were duly served on the parties.

On February 8, 1999, a pre-hearing conference was held in PCH-99-3. Charles W. Key, Esq. appeared on behalf of Milici; Vernon F.L. Char, Esq. and Carolyn Miki Oshiro, Esq. appeared for The Maui News, Kauai Publishing Company, Hawaii Tribune Herald and West Hawaii Today; Jeffrey S. Portnoy, Esq. and Jodi Shin Yamamoto, Esq. appeared for Hawaii Newspaper Agency; and Patricia Ohara, Esq. appeared on behalf of Respondent. Lex R. Smith, Esq. also attended the conference on behalf of RFD Publications, Inc. ("RFD").

At the conference, the parties agreed to the consolidation of PCH-99-2 and PCH-99-3 and to the hearing date of February 23, 1999. The parties also agreed to allow RFD to intervene as an additional respondent in both cases.

On February 10, 1999, Respondent filed responses to the requests for administrative hearing. On February 11, 1999, a stipulation to consolidate PCH-99-2 and PCH-99-3 and a stipulation to intervene by RFD were filed.

On February 17, 1999, a Withdrawal and Substitution of Counsel was filed by Milici and provided for the withdrawal of Charles W. Key, Esq. and his law firm as counsel for Milici and the substitution of Vernon F.L. Char, Esq., Carolyn Miki Oshiro, Esq., Jeffrey

S. Portnoy, Esq., Jodi Shin Yamamoto, Esq. and their respective law firms as co-counsel for Milici.

On February 23, 1999, Respondent filed a motion to quash subpoenas that had been served upon Raymond Sato, the comptroller for Respondent and Lloyd Unebasami, the State's Chief Procurement Officer, and required them to appear and testify at the hearing. After providing the parties with an opportunity to be heard, the Hearings Officer granted the motion and quashed the subpoenas based upon Hawaii Administrative Rule ("HAR") §3-126-53(c).

Thereafter, the hearing commenced with Vernon F.L. Char, Esq. and Carolyn E. Hayashi, Esq. appearing on behalf of The Maui News, Kauai Publishing Company, Hawaii Tribune Herald, and West Hawaii Today and as co-counsel for Milici; Jeffrey S. Portnoy, Esq. and Jodi Shin Yamamoto, Esq. appearing for Hawaii Newspaper Agency and as co-counsel for Milici; Patricia Ohara, Esq. appearing on behalf of Respondent; and Lex R. Smith, Esq. appearing for RFD. On the same date, the parties filed a stipulation as to the admissibility of evidence and submission of Milici's proposal with the State.¹

At the conclusion of the hearing, the parties requested leave to file written closing arguments. Additionally, the Hearings Officer requested that the parties submit Proposed Findings of Fact and Conclusions of Law. On March 2, 1999, a closing brief was filed jointly by Milici, and Hawaii Newspaper Agency, The Maui News, Kauai Publishing Company, Hawaii Tribune Herald, and West Hawaii Today ("Newspapers"). On March 10, 1999, Respondent filed its closing brief and on March 15, 1999, Milici and the Newspapers filed their reply. On March 19, 1999, Proposed Findings of Fact and Conclusions of Law were filed jointly by Milici and the Newspapers. Respondent filed its Proposed Findings of Fact and Conclusions of Law on the same date.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' proposed findings and conclusions were adopted to the extent that they

¹ Among other things, the parties stipulated that Milici's proposal in response to RFP-99-033-SW was submitted with the State of Hawaii on October 9, 1998 at 2:04 p.m.

were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

II. FINDINGS OF FACT

1. On September 4, 1998, Respondent issued a request for proposals for the publication of government public notices for state and county agencies, identified as Request for Proposals No. RFP-99-033-SW ("RFP").

2. The RFP required, among other things, that the contractor provide services to meet both statewide and countywide publication needs and agree to fixed prices for a minimum of three years. The deadline to submit proposals was set for October 5, 1998 at 2:00 p.m.

3. On September 25, 1998, Respondent issued Addendum A to the RFP. Addendum A extended the RFP's deadline for Respondent to respond to written questions, for the submission of proposals, the evaluation of proposals, and the award and issuance of any contract, to October 9, 1998 at 2:00 p.m. Addendum A also included the questions and answers between the prospective offerors and Respondent, and clarification of the scope of work, proposal format, and special provisions sections of the RFP.

4. On October 2, 1998, Addendum B to the RFP was issued by Respondent. Addendum B amended the scope of work and special provisions sections of the RFP.

5. RFD submitted its proposal on October 9, 1998 prior to the 2:00 p.m. deadline. Milici's proposal was filed on October 9, 1998 at 2:04 p.m.

6. By letter dated October 12, 1998, Respondent informed Milici that its proposal had been rejected as untimely and returned the proposal to Milici unopened.

7. On November 10, 1998, Addendum C to the RFP was issued which changed the initial term of the contract from three years to one year.

8. On December 1, 1998, Respondent awarded the contract to RFD. On the same date, Milici was notified by the State Procurement Office that RFD had been awarded the contract.

9. On December 8, 1998, Respondent received two letters protesting the award to RFD. One of the protests was from Milici; the other protest was filed by the Newspapers.

10. The Newspapers' protest was brought in their capacity as taxpayers,² asserted that RFD's proposal was nonresponsive to the RFP, and sought to have the RFP canceled and the solicitation rebid. Milici's protest was brought in its capacity as an offeror and as a taxpayer³ and sought to have RFD's proposal rejected and to have the rejection of its own proposal withdrawn.

11. By letter dated January 12, 1999, Respondent denied the Newspapers' protest on the basis that Hawaii Revised Statutes ("HRS") Chapter 103D does not provide relief for taxpayers.

12. By letter dated January 12, 1999, Respondent denied Milici's protest to the extent that the protest was based upon Milici's standing as a taxpayer. The letter went on to state, "We will then consider your protest as one submitted by an aggrieved actual bidder."

13. After considering Milici's protest in its capacity as an aggrieved actual bidder, Respondent denied the protest. The stated reasons for the denial were that the protest was untimely and because RFD's proposal was responsive to the RFP.

14. Respondent and RFD entered into an Agreement in connection with the RFP on January 19, 1999. Respondent issued a Notice to Proceed in connection with the RFP to RFD on or about February 2, 1999.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

A. Jurisdiction.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee

² The Newspapers' protest stated: "The Protestors submit their notice of protest as taxpayers of the State of Hawaii."

³ Milici's protest stated: "Milici submits its notice of protest as both a taxpayer of the State of Hawaii and as a participant in the bidding process."

of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. **Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997)**. And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f). In the instant case, the Hearings Officer must determine whether the denial of Milici's and the Newspapers' protests were proper and in accordance with the State Procurement Code ("Procurement Code").

B. Standing To Protest as Taxpayers.

On December 8, 1998, the Newspapers lodged a protest in connection with the RFP in their capacities "as taxpayers of the State of Hawaii." On the same date, Milici also protested, both as a taxpayer and as a bidder.⁴ According to Milici and the Newspapers, Respondent's award of the contract to RFD constituted an illegal act that would result in the waste of public funds for which all taxpayers, including Milici and the Newspapers, would suffer. On the other hand, Respondent and RFD point out that under the Procurement Code and its implementing rules, standing to protest is limited to actual or prospective bidders, offerors and contractors. HRS §103D-701(a) provides 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.

(Emphasis added).

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

. . . . any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with

⁴ Respondent and RFD acknowledge Milici's standing to protest the rejection of its proposal as an offeror.

the solicitation or the award of a contract and who files a protest.

(Emphasis added).

In *Concerned Taxpayers of Brunswick County, et al., v. County of Brunswick*, 455 S.E.2d 712 (Va. 1995), Concerned Taxpayers brought an action against the county in connection with the planned construction of a landfill. Concerned Taxpayers alleged that the county's award of the contract for the construction work to a private company was void because the county did not comply with the state public procurement act.⁵ More specifically, Concerned Taxpayers alleged that the county negotiated and contracted with the private company even though the company's proposal was not responsive to the request for proposals. In affirming the trial court's ruling that Concerned Taxpayers lacked standing to bring suit for the enforcement of the procurement act, the Virginia Supreme Court said:

[When] a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise (citations omitted). The Procurement Act "confers certain rights and obligations upon citizens of the Commonwealth, nongovernmental contractors, and governmental entities." (citations omitted). These rights and obligations did not exist in the common law and were created through the statutory scheme of the Procurement Act.

The Procurement Act also provides remedies for individuals or entities who have been denied rights conferred by the Act. Remedies for the violations alleged by Concerned Taxpayers are contained in Code §§ 11-63 through -70. **These sections permit only bidders, offerors, and contractors, within the meaning of the Act, to invoke those remedies by protesting an award, initiating administrative procedures, or bringing an action to challenge a decision to award a contract. The Procurement Act does not provide a right of action to those not involved in the bidding and procurement process. Since Concerned Taxpayers are not among those**

⁵ Virginia adopted the ABA Model Procurement Code on January 1, 1983.

afforded remedies under Code §§ 11-63 through -70, they do not have standing to challenge the Board's alleged violations of the Procurement Act.

Concerned Taxpayers at 717-18. (Emphasis added).

In construing the various provisions of the Procurement Code, the foremost obligation is to ascertain and give effect to the intention of the legislature which is to be construed primarily from the language of the statute itself. The language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose. See, **Housing Finance & Development Corp. v. Castle**, 898 P.2d 576 (Haw. 1995); **State v. Ramela**, 885 P.2d 1135 (Haw. 1994). And unless there are clearly expressed legislative intentions to the contrary, the words of the statute are conclusive. **Thousand Friends, Life of the Land, Inc. v. City & County of Honolulu**, 806 F.Supp. 225 (D. Haw. 1992).

In this case, a plain reading of HRS §103D-701(a) and HAR §3-126-1 leads the Hearings Officer to conclude that only actual or prospective bidders, offerors, and contractors who are aggrieved have standing to bring a protest under the Procurement Code. Consequently, the Hearings Officer finds and concludes that the Newspapers and Milici lacked standing as taxpayers to protest an alleged violation of the Procurement Code. On the other hand, Milici had standing to protest the rejection of its proposal as an actual or prospective offeror.

C. Timeliness of Milici's Proposal.

Respondent's rejection of Milici's proposal was based upon the fact that the proposal was submitted some four minutes after the designated deadline. HAR §3-122-50 addresses the disposition of late proposals and states as follows:

§3-122-50 Late proposals, late withdrawals, and late modifications. (a) Any proposal, withdrawal request, or modification received after the established due date as defined in section 3-122-49 at the place designated for receipt of proposals is late.⁶ They may only be considered in accordance with section 3-122-29(1).

(b) A late bid or late modification shall be disposed of in accordance with paragraph 3-122-29(2).

⁶ HAR §3-122-49 provides that, "[f]or the purposes of this section and section 3-122-50, the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any"

HAR §3-122-29 provides in pertinent part:

§3-122-29 Late bids, late withdrawals, and late modifications. Any notice of withdrawal, notice of modification of a bid with the actual modification, or any bid received at the place designated for receipt and opening of a bid after the time and date set for receipt and opening is late.

- (1) A late bid, late modification, or late withdrawal shall not be considered late if received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity.
- (2) A late bid or late modification will not be considered for award and shall be returned to the bidder unopened as soon as practicable, accompanied by a letter from the activity stating the reason for its return.

* * * *

The foregoing rules expressly provide that any proposal received after the time set in the RFP is late and will not be considered unless there is a showing that the untimely submission was due to the action or inaction of state procurement personnel. Milici does not dispute that its proposal was submitted after the time designated in the RFP; nor does Milici contend that the late filing of its proposal was the result of the actions or inactions of state personnel.

In *Holly's, Inc. v. County of Greensville*, 458 S.E.2d 454 (Va. 1995), the second lowest bidder for a solid waste collection contract filed an action seeking to have the county's award of the contract to the lowest bidder voided. The trial court held that the county's acceptance of the low bid even though it had been received after the designated deadline was a proper exercise of its right to waive minor informalities. In reversing the trial court, the Virginia Supreme Court stated:

We think the non-waiver decisions express the better view for it fosters the establishment of a bright-line rule for determining whether a bid is timely. As we said in **Newport News v. Doyle & Russell, Inc.**, 211 Va. 603, 179 S.E.2d 493 (1971), where we enforced a provision in a bid form prohibiting a plea of mistake:

“To hold otherwise would . . . seriously jeopardize the sanctity of the system for bidding on public contracts and lead to the uncertainty and unreliability of bids. The system followed here for awarding such contracts saves the public harmless, as well as the bidders themselves, from favoritism or fraud in its varied forms. *Id.* at 608, 179 S.E.2d at 497.”

In our opinion, a requirement in an invitation to bid that fixes the time within which bids must be received is not a minor defect or an informality that may be waived but, rather, a material and formal requirement that, under the circumstances present here, must be fulfilled to the letter of the law.

Under the circumstances presented in this case, Respondent was obligated to reject and return Milici's proposal. Any other conclusion would fly in the face of the express and mandatory language contained in the foregoing rules. See generally, **In the Matter of Southern Foods Group, L.P., dba Meadow Gold Dairies, v. State of Hawaii et. al.**, ___ Haw. ___ (1999) (where the court recognized the mandatory language contained in HAR §3-122-97 requiring the rejection of unresponsive bids). Hence, the Hearings Officer finds that Milici's proposal was properly rejected by Respondent.

D. Timeliness of Milici Protest.

Milici filed its protest on December 8, 1998, 5 working days after the award of the contract to RFD. Thus, Milici contends that its protest of the awarding of the contract to RFD was timely under HAR §3-126-3. According to this theory, Milici is therefore entitled to pursue its protest that RFD's proposal was unresponsive to the RFP notwithstanding that its own proposal was rejected as untimely and that Milici did not bother to protest its rejection until some two months later. Clearly, Milici's right to protest the rejection of its own proposal lapsed 5 working days after Respondent learned that its proposal had been rejected.

E. Standing To Protest Award of Contract.

Nevertheless, because Milici's protest was filed within 5 working days of the award of the contract to RFD, Respondent apparently considered Milici's protest of the award to have been timely filed and proceeded to address the issues raised in the protest. For the following reasons, however, the Hearings Officer finds that Milici lacked standing to protest the award of the contract.⁷

HAR §3-120-2 defines an "offeror" as "any individual, partnership, firm, corporation, joint venture, or other entity submitting, directly or through a duly authorized representative or agent, an offer for the good, service or construction contemplated." Under this definition, Milici could no longer be considered an "offeror" for purposes of HRS §103D-701(a) after its proposal was rejected and returned and once the deadline for the submission of proposals passed. Nor could Milici qualify as a "prospective offeror".

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.⁸ The holding of **MCI Telecommunications Corp.** is persuasive.

⁷ The question of standing to bring an action may be raised *sua sponte* by the court having jurisdiction over the case. **Waikiki Discount Bazaar v. City & County**, 5 Haw. App. 635, 640 (1985), citing **Secretary of State of Maryland v. Joseph H. Munson Co.**, 467 U.S. ___, 104 S. Ct. 2839, 81 L.Ed.2d 786 (1984); **Brown v. Edwards**, 721 F.2d 1442 (1984); 13A Wright, Miller & Cooper, **Federal Practice and Procedure; Jurisdiction 2d § 3531.15 (1984)**.

⁸ **MCI Telecommunications Corp.** also made clear that the protestor's "stated intention to submit a proposal in response to any resolicitation, and its efforts to secure resolicitation by filing a protest, can do nothing to create the necessary interested party status." The court explained that:

By the close of the proposal period, MCI had placed itself outside the boundaries of interested party status. That is where it must remain unless, owing to the acts of an interested party which actually submitted a proposal or filed a timely protest, a resolicitation results. Nothing later proven could alter the fact that MCI did not act on time to become an interested party with regard to the solicitation; since, at this point, that is the only solicitation that ever was, nothing alters the fact that MCI was not an actual or prospective bidder and, therefore, is not an interested party.

Id. at 365.

In the case at hand, Milici no longer had any realistic expectation of submitting a proposal in response to the RFP once the submission deadline expired and the time for protesting the rejection of its proposal passed. At that point, Milici could no longer be considered an "offeror" or "prospective offeror." Moreover, under HRS §103D-701(a), standing to protest is conferred upon any "actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract."⁹ (emphasis added). Because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party when the contract was subsequently awarded to RFD. Thus, having failed to file a timely protest to the rejection of its proposal, Milici lacked standing to challenge Respondent's subsequent award of the contract.¹⁰

IV. DECISION

For the reasons set forth herein, it is hereby ordered that:

1. Milici's and the Newspapers' Protests are dismissed; and
2. Each party shall bear its/their own attorney's fees, costs, and expenses.

Dated at Honolulu, Hawaii: APR 16 1999



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

⁹ A "person aggrieved" has been defined as one who has been specially, personally and adversely affected by a special injury or damage to his personal or property rights. *Jordan v. Hamada*, 54 Haw. 451 (1982). In *Jordan*, the appellant was deemed not to be aggrieved by an agency action where the agency's decision was not implemented until the appellant was no longer in a position to be affected thereby.

¹⁰ Under the circumstances, it is unnecessary to address the question whether RFD's proposal was responsive to the RFP.