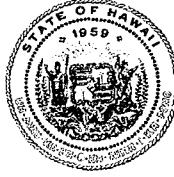


DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2013 MAY - 7 A II: 33



HEARINGS OFFICE

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

In the Matter of)	PDH 2013-004
A's MECHANICAL & BUILDERS,)	HEARINGS OFFICER'S FINAL ORDER
INC.,)	GRANTING RESPONDENT'S MOTION
)	TO DISMISS
Petitioner,)	
)	
vs.)	
)	
DEPARTMENT OF ACCOUNTING AND)	
GENERAL SERVICES, STATE OF)	
HAWAII,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINAL ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On April 16, 2013, A's Mechanical & Builders, Inc. by and through its RME Orlando V. Diniega ("Petitioner") filed a request for hearing to contest the Department of Accounting and General Service's ("Respondent") decision to deny Petitioner's protest. The matter was set for a pre-hearing conference on April 25, 2013 and a hearing on May 6, 2013. The Notice of Hearing and Pre-Hearing Conference ("Notice") was transmitted to the parties by facsimile transmission and by certified mail, return receipt requested. On April 24, 2013, Respondent, by and through its attorney Patricia Ohara, Esq. filed a response to Petitioner's request for hearing. On April 25, 2013, Petitioner filed a response to Respondent's response.

At the pre-hearing conference held on April 25, 2013, Petitioner appeared *pro se* and Respondent was represented by Ms. Ohara. Respondent indicated that it would be

filings a Motion to Dismiss (“Motion”) so a hearing on the Motion was set for May 3, 2013 at 9:00 a.m. A Pre-Hearing order was issued on April 26, 2013.

Respondent filed its Motion on April 30, 2013. Petitioner filed its response on May 2, 2013. The hearing on the Motion was held on May 3, 2013. Petitioner appeared *pro se* and Respondent was represented by Ms. Ohara. The matter was taken under advisement.

By facsimile transmission on May 3, 2013, the Hearings Officer notified the parties that Respondent’s Motion was granted and that the hearing set for May 6, 2013 was taken off the calendar.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order.

II. FINDINGS OF FACT

1. Petitioner was the second lowest bidder (\$841,000) for the Ewa Beach Public/School Library Reroof, Replace A/C and Ductwork, DAGS Job No. 62-36-6523. The lowest bid was \$840,000, submitted by Commercial Sheetmetal Co. Inc.

2. By a letter dated March 29, 2013, Petitioner submitted a protest to Respondent, requesting that the lowest bid be rejected because of an incomplete listing of subcontractors.

3. On April 11, 2013, Respondent issued a letter denying Petitioner’s protest. It was Respondent’s position that the lowest bidder’s subcontractor listing was complete. This letter states in part:

The written request for administrative review must meet the requirements of HAR § 3-126-59. Further, please note that pursuant to HRS § 103D-709 as amended by Act 173, in order to be reviewed by DCCA, the protest must meet a threshold amount, and the protestor must pay to the DCCA a cash or protest bond in the amount, as outlined in HRS § 103D-709. Bond forms are available at <http://hawaii.gov/spo>.

5. On April 16, 2013, the Office of Administrative Hearings, Department of Commerce and Consumer Affairs (“DCCA”) received Petitioner’s request for hearing. Petitioner did not submit a cash or protest bond with the request for hearing.

6. At the pre-hearing conference on April 25, 2013, Petitioner offered to submit a cashier's check in the amount of \$2,000.00 to comply with the cash or protest bond requirement. Petitioner and Respondent were given copies of the decision in *Derrick's Well Drilling and Pump Services, LLC v. County of Maui, Department of Finance*, PDH 2012-001 ("*Derrick's Well Drilling*"). One of the conclusions reached in *Derrick's Well Drilling* was that the cash or protest bond must be filed with the request for hearing or within the seven calendar day limit of Hawai'i Revised Statutes ("HRS") § 103D-712(a). Accordingly, Petitioner was instructed to bring the cash bond to the hearing on the Motion if Petitioner decided to proceed with its request for hearing. Petitioner was informed that the cash bond would not be necessary if Petitioner decided to withdraw its request for hearing prior to the hearing on the Motion.

7. Petitioner submitted the cash bond to the Hearings Officer on May 3, 2013 prior to the commencement of the hearing on the Motion.

III. 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 v. County of Kauai*, PCH 96-9 (November 20, 1996).

Respondent's Motion to Dismiss is based on the assertion that DCCA does not have jurisdiction to hear this matter because: (1) Petitioner did not file a cash or protest bond with its request for administrative hearing or within seven calendar days of the issuance of the denial of the protest (April 18, 2013) and (2) because the request does not concern the requisite amount in controversy.

Hawaii Revised Statutes ("HRS") § 103D-709 provides in relevant part:

(d) Any bidder, offeror or contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that;

(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000[.]

(e) The party initiating a proceeding falling within subsection
(d) shall pay to the department of commerce and consumer affairs
a cash or protest bond in the amount of:

...
(2) \$2,000 for a contract with an estimated value of \$500,000
or more, but less than \$1,000,000[.]

...
If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

Additionally, HRS § 103D-712 provides in relevant part:

103D-712 Time limitation on actions. (a) Requests for administrative review under section 103D-709 shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs within seven calendar days of the issuance of a written determination under section 103D-310, 103D-701, or 103D-702.

Petitioner argued that it presented its cash bond on April 25, 2013, the day of the pre-hearing conference because the above-quoted sections of HRS Chapter 103D did not clearly state when the cash or protest bond must be submitted and/or there was no clear instruction when to submit the cash or protest bond. Petitioner's arguments were addressed by the Hearings Officer in *Derrick's Well Drilling* and it was determined that the filing of a request for hearing must be complete within the seven day calendar period provided in HRS § 103D-712 and that a request for hearing is not complete unless the cash or protest bond is filed within the seven calendar day period. Since Petitioner did not attempt to submit its cash bond until April 25, 2013, the Hearings Officer concludes that Petitioner's request for hearing was untimely and the DCCA lacks jurisdiction to hear and consider Petitioner's request for hearing.

Accordingly, Respondent's Motion is granted and the Hearings Officer need not consider the other arguments raised in the Motion.

The Hearings Officer would note that the substantive arguments raised in Petitioner's request for hearing were also addressed by the parties at the hearing on the Motion. However, the Hearings Officer makes no substantive conclusions as to the merits, if any, of the arguments Petitioner raised in its request for hearing.

IV. FINAL ORDER

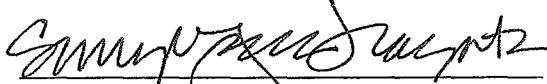
Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss is granted and,

IT IS HEREBY ORDERED that the above-entitled matter is dismissed. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

The parties are ordered to inform the DCCA if an appeal of this decision is filed and if so, the outcome of the appeal so Petitioner's cash bond can be processed according to HRS § 103D-709(e).¹

MAY 7 - 2013

DATED: Honolulu, Hawaii, _____.



SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

¹ Although the untimely filed bond was returned to the petitioner in the *Derrick's Well Drilling* case, the Hearings Officer declines to follow that result as the circumstances in *Derrick's Well Drilling* are not present here. In *Derrick's Well Drilling*, the bond requirement was a new requirement and the request for hearing was filed on the second business day after the bond requirement went into effect. Additionally, there was no case law or guidance from Respondent as to the new requirement. In this case, Petitioner was informed about the bonding requirement in Respondent's denial letter and the *Derrick's Well Drilling* case was presented to Petitioner at the pre-hearing conference. Petitioner was made aware at the pre-hearing conference that the cash bond would be forfeited if it did not sustain its burden to show why the *Derrick's Well Drilling* case is not applicable here.