OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAI'I

In the Matter of WHALE ENVIRONMENTAL SERVICES, LLC., Petitioner, vs. STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, Respondent.	PDH-2017-006 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS, and DENYING PETITIONER'S MOTION TO TERMINATE HEARING AND VACATE AWARD

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

and

DENYING PETITIONER'S MOTION TO TERMINATE HEARING AND VACATE AWARD

I. INTRODUCTION

On September 8, 2017, Whale Environmental Service, LLC, ("Petitioner") filed its Request for Administrative Hearing ("Request") to contest the State of Hawaii, Department of Land and Natural Resource's ("Respondent") decision to deny Petitioner's protest of Respondent's July 3, 2017 award of Project No. Q17001475 to another bidder. A September 12, 2017 Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On September 19, 2017, a pre-hearing conference was conducted by the undersigned Hearings Officer. Petitioner was represented by Mark Howland, *pro se*, and Respondent was represented by Cindy Young, Esq. At the pre-hearing conference, Respondent represented that it would be filing a motion to dismiss. After a discussion regarding the time needed to file and respond to any motion filed, the hearing on any motion filed was scheduled on September 26, 2017.

Respondent filed its Motion to Dismiss on September 22, 2017. Petitioner also filed its Motion to Terminate Hearing and Vacate Award on September 22, 2017.

On September 26, 2017, oral arguments on both motions were heard by the undersigned Hearings Officer. Petitioner was not present, and did not call the Office of Administrative Hearings regarding his failure to appear at the motions hearings scheduled for 10:00 a.m. Respondent was timely represented by Ms. Young. At approximately 10:30 a.m., the Hearings Officer commenced the hearing on the motions. The Hearings Officer orally denied Petitioner's Motion, and orally granted Respondent's Motion. The scheduled September 29, 2017 hearing date was vacated. Having reviewed and considered the evidence and arguments presented, the Hearings Officer renders the following findings of fact, conclusions of law and final order granting Respondent's Motion to Dismiss; and denying Petitioner's Motion to Terminate Hearing and Vacate Award.

II. FINDINGS OF FACT

Based upon the pleadings, exhibits, and the representations made through the pleadings, exhibits, and correspondence, the Hearings Officer finds the following facts:

1. On July 3, 2017, Respondent awarded solicitation Q17001475, a habitat conservation plan for nene on Kauai, to Christen Mitchell, whose bid was $42,000.00.

2. On July 5, 2017, Petitioner protested this award as it was the low bidder on solicitation Q17001475, with a bid of $13,250.00.

3. Through an August 28, 2017 letter from Respondent, Petitioner was informed that its protest was denied as the DLNR had determined that Petitioner's bid was a material deviation from the requirements of the small purchase procurement.

4. The Declaration of Katherine Cullison, conservation initiatives coordinator of the Division of Forestry and Wildlife ("DFW"), DLNR, State of Hawaii, attached to Respondent's Motion to Dismiss, states that she placed the August 28, 2017 written decision in the mail to Mr. Howland on the morning of August 28, 2017. Additionally, the declaration states that the August 28, 2017 written decision was e-mailed to Mr. Howland on August 30, 2017.

5. Ms. Cullison's declaration further states that Mr. Howland E-mailed the DFW administrator on September 1, 2017, confirming that he had received the August 28, 2017 written decision.

6. In this September 1, 2017 letter to the DFW administrator, Petitioner writes, in part, "We are in receipt of your denial of our protest. Please be advised that the denial letter did not address any of our reasonings for the error in award..."

7. However, in its letter to the DCCA, Office of Administrative Hearings file-marked on September 8, 2017, Petitioner states that he did not receive the August

28, 2017 letter from Respondent until September 5, 2017. *See, Exhibit 2, attached to Respondent's Motion to Dismiss.*

8. In its Motion to Terminate Hearing and Vacate Award, Petitioner again states that he did not receive Respondent's August 28, 2017 letter denying Petitioner's protest until September 5, 2017.

9. Through a letter file-marked on September 8, 2017, Petitioner requested a hearing with the Department of Commerce and Consumer Affairs, Office of Administrative Hearings regarding the denial of its protest.

10. In its letter, Petitioner states that its protest should have been granted as Petitioner was the lowest bidder, and Petitioner was qualified to perform the solicitation.

11. The last sentence of Petitioner's file-stamped September 8, 2017 letter states, "We will await the date scheduled for the administrative hearing, and post a $1,000.00 bond for that hearing."

12. It is noted that the September 12, 2017 Notice of Hearing and Pre-Hearing Conference scheduled the pre-hearing for September 19, 2017, and the hearing for September 29, 2017. It is further noted that at the September 19, 2017 pre-hearing conference, Petitioner stated that he did not receive the Notice of Hearing and Pre-Hearing Conference until September 18, 2017.

13. Petitioner did not post a $1,000.00 bond, or a bond in any amount, with the Office of Administrative Hearings regarding this matter.

III. CONCLUSIONS OF LAW

Respondent's September 22, 2017 Motion to Dismiss asserts 4 reasons why its motion should be granted:

1. Administrative appeal of the award of a small purchase procurement is not allowed;
2. The Office of Administrative Hearings has no jurisdiction over this appeal under Hawaii Revised Statutes ("HRS") Section 103D-709;
3. The appeal is untimely as the appeal was filed more than seven calendar days after the written decision was issued; and
4. No bond was submitted to the Hearings Office.

Petitioner's September 22, 2017 Motion to Terminate Hearing and Vacate Award asserts that Petitioner was not timely served with documents by Respondent; and that the scheduling of motions, responses, and hearing on motions did not give Petitioner adequate time to respond.

A. Respondent's Motion to Dismiss

One of the arguments Respondent makes to dismiss this request for administrative hearing is that the appeal is untimely as the appeal was filed more than seven calendar days after the written decision was issued.

The applicable statute is HRS Section 103D-712(a), which states:

"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."

In this case, Respondent issued its written decision denying Petitioner's protest on August

28, 2017. As Respondent argues, the deadline for Petitioner to submit its request for an administrative hearing was September 4, 2017. However, the Office of Administrative Hearings did not receive Petitioner's request for a hearing until September 8, 2017 – 4 days after the deadline.

Petitioner argues that it did not receive Respondent's August 28, 2017 letter until September 5, 2017. However, as noted above, Petitioner's own September 1, 2017 e-mail noting that it is in receipt of the denial of protest, shows that Petitioner received notice of the denial by at least September 1, 2017. Additionally, the Declaration of conservation initiatives coordinator with the DFW, DLNR, State of Hawaii, Katherine Cullison, states that she placed the August 28, 2017 written decision in the mail to Mr. Howland on the morning of August 28, 2017. Further, the declaration states that the August 28, 2017 written decision was e-mailed to Mr. Howland on August 30, 2017. Therefore, even if the day the denial of protest was e-mailed to Petitioner is considered, Petitioner's September 8, 2017 request for a hearing does not meet the 7-day requirement of HRS Section 103D-712(a).

However, the applicable date under HRS Section 103D-712(a), is the date of the issuance of the denial. This date of issuance is August 28, 2017. Clearly, Petitioner's September 8, 2017 request for a hearing is outside the statutory 7-day requirement.

The Hearings Officer concludes that because Petitioner's request for an administrative review was filed more than seven calendar days after the written decision was issued, Petitioner's request for an administrative hearing was not timely filed.

Another issue raised in Respondent's Motion to Dismiss is whether Petitioner properly submitted a protest bond. Under HRS Section 103D-709(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:

(1) $1,000.00 for a contract with an estimated value of less than $500,000.00."

As noted above, Petitioner has not paid a protest bond to the Department of Commerce and Consumer Affairs. Petitioner's file-marked September 8, 2017 letter requesting an administrative hearing confirms this, stating, in part, "We will await the date scheduled for the administrative hearing and post a $1,000.00 bond for that hearing."

Further, although the September 12, 2017 Notice of Hearing and Pre-Hearing Conference scheduled the pre-hearing for September 19, 2017, and the hearing for September 29, 2017; even after the hearing was scheduled, Petitioner did not submit the $1,000.00 protest bond. At the September 19, 2017 pre-hearing conference, Petitioner admitted that he received the Notice of Hearing and Pre-Hearing Conference on September 18, 2017. Still, Petitioner did not post a $1,000.00 bond, or a bond in any amount, with the Office of Administrative Hearings regarding this matter.

As Respondent argues in its motion to dismiss, "Until such bond is posted, the request for hearing is incomplete and the time limitation for filing a valid request for hearing is not tolled by an initial incomplete filing." *Friends of He'eia State Park v. Department of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009).*

The Hearings Officer concludes that because no protest bond has been posted, the request for hearing has not been properly filed, and is therefore, untimely.

Based upon the Hearings Officer's conclusion that Petitioner did not timely file his Request for a hearing within the 7 days allotted from the issuance of Respondent's August 28, 2017 denial of Petitioner's protest, and the Petitioner's failure to submit a protest bond at the

time of his request for an administration hearing, the issues as to whether an administrative appeal of the award of a small purchase procurement is allowed, and whether the Office of Administrative Hearings has jurisdiction over this appeal are not reached, and do not need to be addressed.

B. Petitioner's Motion to Terminate Hearing and Vacate Award

In its September 22, 2017 Motion to Terminate Hearing and Vacate Award, Petitioner asserts that Petitioner was not timely served with documents by Respondent; and that the scheduling of motions, responses, and hearing on motions did not give Petitioner adequate time to respond.

Petitioner claims that it did not receive Respondent's August 28, 2017 letter informing Petitioner that its protest was denied as the DLNR had determined that Petitioner's bid was a material deviation from the requirements of the small purchase procurement until September 5, 2017. However, the Declaration of Katherine Cullison states that she placed the August 28, 2017 written decision in the mail to Mr. Howland on the morning of August 28, 2017. Additionally, the declaration states that the August 28, 2017 written decision was e-mailed to Mr. Howland on August 30, 2017.

Further, Ms. Cullison's declaration states that Mr. Howland E-mailed the DFW administrator on September 1, 2017, confirming that he had received the August 28, 2017 written decision. In this September 1, 2017 letter Petitioner writes, in part, "We are in receipt of your denial of our protest."

This E-mail shows that Petitioner's claim that it did not receive Respondent's August 28, 2017 letter until September 5, 2017, as claimed in Petitioner's September 8, 2017 letter to the

DCCA, Office of Administrative Hearings, and in Petitioner's Motion to Terminate Hearing and Vacate Award, is not correct. Mr. Howland's September 1, 2017 E-mail to the DFW administrator, confirms that he had received the DLNR's denial of Petitioner's protest by at least September 1, 2017.

Further, at the September 19, 2017 prehearing conference, when the scheduling of the motions filing, responses, and hearing on motions was discussed, both parties were allowed input regarding the scheduling dates, and Petitioner did not object to the dates scheduled.

Based upon the above, the Hearings Officer denies Petitioner's September 22, 2017 Motion to Terminate Hearing and Vacate Award.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer grants Respondent's Motion to Dismiss; and denies Petitioner's Motion to Terminate Hearing and Vacate Award.

DATED: Honolulu, Hawaii, OCT - 6 2017.

Richard A. Young

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