

2020 DEC 16 P 12:45



HEARINGS OFFICE

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

In the Matter of)	PDH-2020-005
)	
K & S HELICOPTERS, INC. dba)	
PARADISE HELICOPTERS,)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF LAW,
Petitioner,)	AND ORDER GRANTING
)	RESPONDENT'S MOTION TO
vs.)	DISMISS
)	
DEPARTMENT OF FINANCE,)	
COUNTY OF HAWAII,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On November 2, 2020, K & S Helicopters, Inc. dba Paradise Helicopters ("Petitioner") filed a request for administrative review to contest Respondent Department of Finance, County of Hawaii's ("Respondent") denial of Petitioner's protest in connection with the award of Invitation for Bid ("IFB") No. 3985 for managing, administering and furnishing flight operations, maintenance and support for Hawaii County helicopters for the Hawaii County Fire Department. The matter was thereafter set for a pre-hearing conference on November 10, 2020 and hearing on November 17, 2020. A Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

An order was issued providing deadlines for the parties to file motions and responses, and setting hearing on all motions for November 12, 2020. The deadline to file motions was November 6, 2020, and responses were due by November 10, 2020. On

November 6, 2020, Respondent filed Respondent Department of Finance, County of Hawaii's Motion to Dismiss Petitioner K & S Helicopters, Inc. dba Paradise Helicopters' Request for Hearing Filed on July 28, 2020; Memorandum of Law in Support of Motion; Declaration of Counsel; Exhibits "A" – "H"; Notice of Motion.

On November 9, 2020, Petitioner, through its attorney Charles M. Heaukulani, Esq., submitted a request to continue all deadlines in the matter until January 2021. The request was denied.

On November 10, 2020, pre-hearing conference was held by telephone with Mr. Heaukulani for Petitioner and J. Yoshimoto, Esq. appearing for Respondent. Hearing in the matter was confirmed for November 17, 2020, and by agreement of the parties, scheduled to be held by telephone conference. Hearing on Respondent's motion to dismiss was confirmed for November 12, 2020 and also scheduled to be heard by telephone conference. A pre-hearing order was issued on November 20, 2020 confirming the hearing dates, providing the parties with telephonic conference instructions, and providing a November 12, 2020 deadline to file and exchange final witness and exhibit lists. The parties were further ordered to submit a hard copy of their exhibits to the Office of Administrative Hearings by mail, postmarked no later than November 12, 2020.

On November 10, 2020, Respondent filed Respondent Department of Finance, County of Hawaii's Response to Petitioner K & S Helicopters, Inc.'s Request for an Administrative Hearing; Exhibits "A"- "O".

Respondent's motion to dismiss came on for hearing before the undersigned Hearings Officer on November 12, 2020. Respondent was represented by Deputy Corporation Counsel J. Yoshimoto, Esq. along with Finance Director Deanna Sako, Purchasing Agent Diane Nakagawa, Procurement Specialist Steve Wilhelm and Deputy Fire Chief Robert Perreira. Petitioner was represented by its CEO Calvin Dorn and Administrative Vice President Domino Cohn. Counsel for Petitioner, Charles Heaukulani, Esq., was not present. Mr. Dorn represented that Mr. Heaukulani had a medical emergency and requested a continuance on behalf of Petitioner. Respondent did not object and hearing on Respondent's motion to dismiss was continued to November 17, 2020.

On November 13, 2020, the Hearings Officer received a correspondence from Petitioner's Administrative Vice President Domino Cohn requesting a continuance, indicating that Petitioner's counsel would be unavailable for hearing on November 17, 2020, for medical reasons. Respondent did not object and an order was issued granting Petitioner's request and continuing Respondent's motion to dismiss and hearing in the matter to November 23, 2020.

On November 16, 2020, Petitioner, through its attorney Mr. Heaukulani, filed its memorandum in opposition to Petitioner's motion to dismiss.¹

On November 19, 2020, Rex Y. Fujichaku, Esq. and Kelly A. Higa Brown, Esq. filed a notice withdrawal and substitution of counsel for Petitioner. Along with the notice, on November 19, 2020, Petitioner filed Petitioner K & S Helicopters, Inc. dba Paradise Helicopters' Supplemental Memorandum in Opposition to Respondent Department of Finance, County of Hawaii's Motion to Dismiss Request for Hearing, filed on July 28, 2020, Dated November 6, 2020; Declaration of Rex Y. Fujichaku; Exhibits "14" & "15"; Certificate of Service.

On November 19, 2020, Respondent filed Respondent Department of Finance, County of Hawaii's Supplemental Memorandum in Support of its Motion to Dismiss Petitioner K & S Helicopters, Inc.'s dba Paradise Helicopter's Request for Hearing filed on July 28, 2020; Declaration of Counsel; Exhibits "I".

On November 23, 2020, oral arguments on Respondent's motion to dismiss came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by Rex Y. Fujichaku, Esq. and Respondent was represented by J. Yoshimoto, Esq. By stipulation, Petitioner's Exhibits "1"- "15" and Respondent's Exhibits "A"- "I" were received into evidence. After hearing arguments on the motion to dismiss, the parties were informed that the Hearings Officer would take the matter under advisement.

¹ Petitioner's memorandum in opposition was filed by mail. The signature page of the memorandum was dated November 10, 2020 with " s/s Charles M. Heaukulani" typewritten on the signature line. There is no record of the memorandum in opposition filed electronically November 10, 2020. Neither a declaration nor affidavit were attached to Petitioner's memorandum, and although the caption did not indicate any attachments, thirteen exhibits were included in the mailed filing.

Hearing in the matter was thereafter convened by the undersigned Hearings Officer with Petitioner represented by its CEO Calvin Dorn and Mr. Fujichaku, and Respondent represented by County of Hawaii Finance Director Deanna Sako and Mr. Yoshimoto. By stipulation of the parties, Petitioner's Exhibits "1"- "18" were received into evidence and Respondent's Exhibits "A"- "P" were received into evidence. Petitioner called Calvin Dorn to testify as well as Deanna Sako, County of Hawaii Finance Director. Respondent called Lowell "Kalani" Ching and Diane Nakagawa.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing briefs by November 25, 2020. Accordingly, both parties submitted their closing briefs on November 25, 2020.

Having considered the evidence and arguments presented, along with the memorandum, declaration of counsel, and exhibits attached thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision granting Respondent's motion to dismiss.

II. FINDINGS OF FACT

1. On May 27, 2020, Respondent requested bids/proposals under IFB No. 3985, Proposal and Specifications for a Price Term Agreement for Managing, Administering and Furnishing Flight Operations, Maintenance and Support for Hawaii County Helicopters, Including all Necessary Pilots Personnel, Inspectors, Manuals, Parts Petroleum Products, Labor, Equipment, Tools, Supplies, Library, Appurtenances and Incidentals for the Hawaii County Fire Department, County of Hawaii.

2. Two contractors submitted proposals for IFB 3985: Petitioner, the incumbent contract provider, and Manuiwa Airways, Inc. dba Volcano Helicopters ("Manuiwa").

3. On June 18, 2020, Respondent posted a Notice of Award for Invitation for Bid No. 3985: Price Agreement for Chopper 2 Flight Operations and Repair Services, Hawaii County Fire Department, County of Hawaii, awarding the bid to Manuiwa .

4. By letter dated June 23, 2020, Petitioner protested the award of IFB 3985 to Manuiwa. The June 23, 2020 letter listed three protest items:

1. Protest Item 1. IFB 3985 SPECIFICATIONS Page 5 of 12, Paragraph 9. Experience and Qualifications, Subparagraph 3)

states: "The contractor shall have a minimum three years' experience in the maintenance of Bell 206 series helicopters."

a. Having flown on the Island of Hawaii beginning in 1992, I have not been aware of Manuiwa Airways operating or maintaining Bell 206 series helicopters. Manuiwa Airways has operated MD500 helicopters and currently operates one MD500 helicopter in addition to servicing the contract to Chopper 1 in Hilo, Hawaii. K&S Helicopters, Inc. by contrast has operated up to 6 Bell 407 helicopters since 2002. The Bell 407 is a variant of the bell 206 Type Certificate.

b. If Manuiwa Airways had operated Bell 206 helicopters prior to 1992 that would raise questions of recency that should be addressed in the IFB.

2. Protest Item 2. IFB 3985 SPECIFICATIONS Paragraph 10. PILOTS subparagraph 5). On Page 7 of 12 states: "The contractor must submit pilot resumes that verify relevant experience to be considered for this bid..." Subparagraph 6) states that: "Pilot(s) proposed for this contract must pass a competency check administered by the Department..."

a. K&S Helicopters, Inc. currently employs the Chopper 2 pilots and the pilots have passed the competency checks required annually.

b. To my knowledge no competency checks were conducted for potential pilots and only the current pilots would be acceptable for the contract.

3. Protest Item 3. IFB 3985 SPECIFICATIONS paragraph 15. CONTRACT PRICE AND ADJUSTMENTS subparagraph f. on Page 11 of 12 states that the bid price for item 1 will be fixed for the first year of the Contract and subject to negotiation during the following four option years, based on price index data and other information provided by the bidder "WITH THE BID."

a. The bid proposed by Manuiwa Airways did not appear to have a price increase in subsequent years. Subparagraph f. further states that "FAILURE TO PROVIDE SUCH INFORMATION WILL RESULT IN THE PRICES LISTED BEING CONSIDERED THE MAXIMUM TO BE PAID IF THE COUNTY ACCEPTS ANY GIVEN OPTION YEAR."

b. It is the opinion of K&S Helicopters Inc. that bidding with no price increase while knowing that required wage increases are inevitable can cause a skewed overall bid evaluation and not adequately address the four option years. It is assumed that Manuiwa Airways would not be afforded the ability to negotiate a price increase since none was indicated in the four option years in the bid process. Any presentation of documentation of a price index data or other rate increase information should have been reflected in the bid process for the four option years.

4. By letter dated July 10, 2020, from Deanna Sako, Director of Finance, County of Hawaii, Respondent rejected Petitioner's protest:

After reviewing the facts, circumstances, relevant applicable law, and in accordance with Section 103D-701(c), Hawaii Revised Statutes ("HRS"), I am denying your protest for the reasons set forth below.

B. Manuiwa Airways, Inc., dba Volcano Helicopters has the required minimum three years of experience in the maintenance of Bell 206 helicopters.

By letter dated June 2, 2020, Manuiwa submitted bid proposal information for IFB 3985 that included their plan for maintenance of Bell 206 helicopters. Specifically, Manuiwa will utilize Tim Anderson as the primary mechanic for field maintenance support on Hawaii Island. Mr. Anderson has worked on Bell 206 helicopters and his resume was submitted by Manuiwa. Furthermore, Manuiwa has a service agreement with Specialty Aviation Services, LLC (Marcus Dunn), and Logic Aviation Services, LLC, with over forty years of experience in maintenance of Bell helicopters. They are capable of performing the overhaul and repair of all major components in compliance with 1200/2400/4800 hour inspection items for the Bell 206L-3. Therefore, I find that Manuiwa has the required minimum three years of experience in the maintenance of Bell 206 helicopters.

C. The pilots listed by Manuiwa meet the qualification and experience requirements for IFB 3985.

In its bid proposal, Manuiwa submitted the resumes of pilots that will fly the Bell 206 helicopters. The County reviewed the resumes of the pilots submitted by Manuiwa and found that they meet the qualifications and experience required by IFB 3985 as they are currently flying Chopper 2. Per IFB

Section 10, paragraph 6, the County will administer a competency check for any additional pilots as needed prior to operations. Therefore, I find that the pilots listed by Manuiwa meet the qualification and experience requirements for IFB 3985.

D. Manuiwa's decision to not increase their bid for option years is appropriate.

The fact that Manuiwa did not increase their bid for option years is their business decision.

5. The letter denying Petitioner's protest was mailed to Petitioner on July 10, 2020, by certified mail, return receipt requested.

6. By letter dated July 21, 2020, Petitioner sent a request for administrative hearing review of its protest denial to the Office of Administrative Hearings ("OAH") by mail.

7. By letter dated July 28, 2020, OAH returned Petitioner's request for hearing and informed Petitioner of the following:

This acknowledges our receipt of your Request for Administrative Review on July 28, 2020, concerning IFB No, 3985 issued by Hawaii County. For your information, Hawaii Revised Statutes Chapter 103D was suspended by the Governor's Proclamation on March 4 and the suspension has since been extended to the present time. Therefore, the Office of Administrative Hearings presently lacks authority to accept, process, review or hear cases arising from Chapter 103D. As such, we are returning your request and check which are enclosed.

Of course, once the suspension is lifted, all parties will be subject to all of the rights and obligations set forth in Chapter 103D and its implementing rules. *At that time, any party*

seeking an administrative review pursuant to HRS §103D-709 will be required to file an appropriate request in accordance with HRS Chapter 103D, including, but not limited to, any required filing fee and bond. Thank you.

8. The Governor of the State of Hawaii issued the Fourteenth Proclamation Related to the COVID-19 Emergency (“Fourteenth Proclamation”) on October 13, 2020. The Fourteenth Proclamation states, in pertinent part:

The following specific provisions of law are suspended, as allowed by federal law, pursuant to section 127A-13(a)(3), HRS:

Chapter 103D, HRS, **Hawaii public procurement code**, only to the limited extent necessary to procure goods and services in direct response to COVID-19; to procure goods and services using funding that must be expended on or before December 31, 2020; and to procure goods and services not in direct response to COVID-19 but for which certain procurement requirements cannot reasonably be met through the regular procurement process due to the emergency.

(Emphasis in original).

9. By letter dated October 14, 2020, OAH notified Petitioner:

On October 13, 2020, Governor Ige issued his Fourteenth Emergency Proclamation which, among other things, limited the suspension of Hawaii Revised Statutes Chapter 103D to solicitations necessary to procure goods and services in direct response to COVID-19; to procure goods and services using funding that must be expended on or before December 31, 2020; and to procure goods and services not in direct response to COVID-19 but for which certain procurement requirements cannot reasonably be met through the regular procurement process due to the emergency.

As such, requests for administrative review hearings in connection with all other solicitations issued under Chapter 103D may not be filed with the Office of Administrative Hearings. Accordingly, if you wish to pursue this matter, please file your request along with any required bond and/or filing fee. Thank you.

10. None of the conditions identified in the Fourteenth Proclamation suspending HRS Chapter 103D apply to IFB 3985.

11. On November 2, 2020 Petitioner filed its request for administrative hearing in response to Respondent's July 10, 2020 protest denial.

12. Since receiving a copy of Petitioner's July 21, 2020 letter to OAH requesting administrative review of the protest denial, Respondent has stayed action on IFB 3985. During the time Respondent has stayed action on IFB 3985, Respondent has issued extensions of the current contract with Petitioner.

13. The paragraph entitled "QUALIFIED FAA CERTIFIED HELICOPTER MECHANICS" under the PROPOSAL of the IFB states:

The Contractor shall have a minimum of two (2) qualified FAA certified licensed mechanics each having a minimum of two (2) years of continuous service preceding the bid opening date.

14. Paragraph 9 of the Specifications of the IFB, entitled "MAINTENANCE", states in part:

Experience and Qualifications

3) The Contractor shall have a minimum three years' experience in the maintenance of Bell 206 series helicopters.

15. Manuiwa is the contracted vendor for the Hawaii County Fire Department, Chopper 1. In Manuiwa's bid for service for Chopper 2 under IFB 3985, Manuiwa named David Okita as the program administrator for IFB 3985.

16. Under the "Maintenance and Support" section of its proposal, Manuiwa listed Tim Anderson as its primary mechanic, along with mechanics Aaron Moniz, David Okita and Richard Bridges.

17. Included in Manuiwa's proposal was the resume and cover letter of Tim Anderson. The cover letter indicates that Mr. Anderson has been working on the Bell 206L3 model helicopter over the last three years. The resume states that Mr. Anderson was the

shop/line mechanic for Petitioner from 2016-2020 for aircraft models Bell-407, 206L3 and 430.

18. Tim Anderson was employed as a mechanic with Petitioner from March 3, 2017 until the pay period ending January 4, 2020.

19. By letter dated November 5, 2020, Manuiwa submitted supplemental information to its IFB 3985 proposal. In its letter, Manuiwa states that the delay on the award of the contract caused Manuiwa to lose Tim Anderson as a member of its contract proposal. In place of Tim Anderson, Manuiwa included Luka Dayton-Smith as part of Manuiwa's mechanic roster.

20. Luka Dayton-Smith holds an Airframe and Powerplant ("A&P") Certificate and has over three years of experience in the maintenance of Bell 206 type helicopters.

21. David Okita previously worked as the Director of Operations for Chopper 2 while working for Rotor Wing Hawaii, Inc. from 1990-2011, under contract with the Hawaii County Fire Department Helicopter Division. Mr. Okita's duties included maintenance of two helicopters, the Bell 206L-3 and the MD 500D.

22. Paragraph 10 of the Specifications of the IFB, entitled "PILOTS", states in part:

Qualifications and Experience

5) The Contractor must submit pilot resumes that verify relevant experience to be considered for this bid and include any accident record and history of any violations determined by the FAA.

6) Pilot(s) proposed for this contract must pass a competency check administered by the Department that will include, but not limited to, high altitude operations, long-line short haul, Billy Pugh Net water rescue, water bucket operations, confined area operations, and any other flight checks as determined necessary by the Fire Chief. Pilot(s) will re-qualify annually.

23. Manuiwa included resumes for the proposed pilots in its bid for IFB 3985.

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 and burden of proof.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702. 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(i).

Petitioner has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of proof shall be a preponderance of the evidence. HRS § 103D-709(c).

B. Petitioner's request for administrative hearing was untimely and therefore OAH lacks jurisdiction to hear the matter.

In bringing its motion to dismiss, Respondent contends that Petitioner failed to file its request for administrative hearing within the time requirements of HRS §103D-712(a) and therefore, the Hearings Officer lacks jurisdiction over this matter.

The provisions of HRS §103D-712(a) state that:

HRS §103D-712 Time limitations 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.

(Emphasis added).

The salient facts are not in dispute. On June 23, 2020, Petitioner protested the award of the bid to Manuiwa, in response to Respondent's June 18, 2020 posting of the Notice of Award for IFB 3985. On July 10, 2020, Respondent issued its denial of

Petitioner's protest. Petitioner submitted a request for administrative review of the protest denial to the Office of Administrative Hearings ("OAH"). By letter dated July 28, 2020, OAH notified Petitioner that it received Petitioner's request for hearing and that OAH lacked authority to accept, process, review or hear cases arising from HRS Chapter 103D (also referred to as "Procurement Code") as a result of the March 4, 2020 Governor's Proclamation suspending the Procurement Code. Petitioner's request for hearing and check were returned. On October 13, 2020, the Governor of the State of Hawaii issued his Fourteenth Proclamation which limited the suspension of HRS Chapter 103D. Petitioner filed its request for administrative review on November 2, 2020.

Respondent argues that OAH lacks jurisdiction to hear this case because Petitioner's filing for administrative review was untimely pursuant to HRS §103D-712. Respondent argues that Petitioner's request for review was untimely because Petitioner first submitted its request July 28, 2020, more than seven days after Respondent issued the July 10, 2020 protest denial. Respondent contends the contract at issue was not subject to the suspension of Procurement Code and therefore, Petitioner was required to file its request for administrative review by July 17, 2020.² Petitioner, on the other hand, acknowledges that the statutory time limitations under the Procurement Code were suspended pursuant to the Governor's Proclamation when it submitted its request for administrative review in July. Petitioner argues it was not obligated to satisfy the statutory time limitations under HRS §103D-712 during the period the Procurement Code was suspended.

Petitioner argues that once the suspension was lifted by operation of the Fourteenth Proclamation, Petitioner satisfied HRS §103D-712, having previously mailed its request for administrative review July 21, 2020. In its supplemental memorandum in opposition to Respondent's motion to dismiss, Petitioner argues that it complied with the requirement of HRS §103D-712(a) that requests for administrative review "shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs." Petitioner opines that "it is irrelevant that OAH returned the request to Petitioner.

² Respondent argues that the suspension of the procurement code only related to COVID-19, despite no limiting language in the March 4, 2020 Governor's Proclamation. Respondent further argues that the limiting language in the Fourteenth Proclamation only served to clarify its position that the suspension was only related to COVID-19 related procurement contracts. Respondent's argument is unpersuasive.

Under Section 103D-712, all that is required is that the request ‘shall be made directly to’ OAH.” Having mailed its request to OAH during the period of suspension of the statute of limitations, “Petitioner’s compliance with the statute is adjudged at the end of the tolling period.” Although Petitioner acknowledges the statute of limitations was tolled during the suspension of the Procurement Code, Petitioner argues that because it was “literally unable to ‘file’ its review for administrative review with the OAH, its request must be deemed timely performed under the doctrine of equitable tolling.” This argument is inconsistent and contradictory with Petitioner’s position that the Procurement Code was suspended. OAH’s jurisdiction to hear procurement cases is statutorily authorized by the Procurement Code. Petitioner cannot pick and choose what provisions of the Procurement Code are tolled while the Procurement Code is suspended.

It is clear that requests for administrative review of a protest denial must be made within seven days of the issuance of a written determination. In this case, Respondent issued its denial letter on July 10, 2020, during the period the Procurement Code was suspended by the Governor’s Proclamation. Petitioner correctly argues that the statute of time limitations was tolled during the relevant time period. The Fourteenth Proclamation partially lifted the suspension of the Procurement Code on October 13, 2020. Thus, the clock began ticking on October 13, 2020, and the HRS §103D-702 time limitation on actions was in effect. In order to make its request for administrative review within the seven-day calendar limitation set out in HRS §103D-702(a), Petitioner would have had to make its request no later than October 20, 2020, seven days after the suspension of Chapter 103D had been lifted. Petitioner’s November 2, 2020 request for hearing was untimely.

Petitioner further argues that its November 2, 2020 filing “relates back” to its July 28, 2020 submission for administrative review. In support of its argument, Petitioner cites *Mauian Hotel, Inc. v. Maui Pineapple Co.*, 52 Haw. 563, 565, 481 P.2d 310, 312 (1971) for the proposition that its November 2, 2020 filing “arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original [request], the amendment relates back to the date of the original [request].” Petitioner argues that it is appropriate that its November 2, 2020 filing relate back to its unfiled July 28, 2020, because

Respondent was put on notice regarding what evidence to gather in preparing for administrative review.

In enacting HRS Chapter 103D, the Legislature sought to establish a comprehensive code that would, among other things, ensure efficiency in the procurement process. *Standing Committee Report No. S8-93, 1993, Senate Journal at 39; HAR §3-120-1.* This office has consistently held that the accomplishment of the underlying objections of the Procurement Code requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998).* See also, *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget and Fiscal Services, PCH-2000-8 (October 17, 2000)(strict, rather than substantial compliance with the time constraints set forth in HRS 103D-701 (a) required in order to effectuate the state's underlying purpose); CR Dispatch Service, Inc., dba Security Armored Car & Courier Services v. DOE, et al., PCH-2007-7 (December 12, 2007); Ludwig Construction, Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009).*

The rationale for requiring protests to be submitted to the procuring agency on or before the close of business on the last day on which filings could be made applies equally to the filing of requests for administrative review under HRS §103D-709. *Maui County Community Television Inc. v., State of Hawaii, PCX-2010-3 (July 9, 2010).* (*request for administrative review file-stamped at 4:31pm was late and untimely, therefore the Hearings Officer lacked jurisdiction over the matter*). The strict timelines for filing protests and requests for administrative review are intended to expedite the resolution of protests and provide agencies with some degree of certainty as to when protests may be filed.

HRS §103D-701(f) provides that in the event of a timely protest, “no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.” Therefore, the seven-day filing timeline is critical because work cannot commence until the matter is expeditiously resolved.

In this case, Petitioner attempted to file a request for administrative review on in July 2020, during a period the Procurement Code was suspended. Petitioner thereafter

filed its request on November 2, 2020, twenty days after the Fourteenth Proclamation partially lifted the suspension of the Procurement Code on October 13, 2020. As stated above, a fundamental purpose of the time constraints in the Procurement Code is to allow the government to know, with some certainty, when a protest or appeal of the awarding of a government contract will occur. Petitioner argues that its November 2, 2020 filing is timely because it relates back to its July submission, and therefore Respondent had “notice regarding what evidence to gather in preparing for the administrative review”. The practical effect of such finding would be that Petitioner could file its request at any time, causing the contract at issue to be held in abeyance indefinitely. The result contravenes the purpose of the Procurement Code. For the above reasons, the Hearings Officer concludes that Petitioner’s November 2, 2020 appeal was untimely.

Petitioner finally argues, in the alternative, if the filing of its request for administrative hearing is deemed untimely, it is not a jurisdictional matter, but rather an affirmative defense.³ The mandatory language of HRS §103D-712 is jurisdictional in nature and precludes an untimely protestor from pursuing an administrative hearing. *Brewer Environmental Industries, Inc. v. County of Kauai, PCH-96-9 (November 20, 1996)* and *Environmental Recycling of Hawaii, Ltd. v. County of Hawaii, PCH-95-4 (March 20, 1996)*. See also, *GTE Hawaiian Telephone Co. Inc. at p. 13*. See also, *Diversified Plumbing & Air Conditioning v. Hawaii Housing Finance and Development Corporation, Department of Business, Economic Development and Tourism, State of Hawaii, PCH-2009-11 (June 30, 2009)*(deadline requirement established by HRS §103D-701(a) is mandatory and not an affirmative defense).

Based on the foregoing, the Hearings Officer concludes Petitioner’s filing of its request for administrative review was not in compliance with the time limitations set forth in HRS §103D-701(a) and therefore, OAH does not have jurisdiction in this matter.

C. Even if OAH had jurisdiction to hear the issues raised in Petitioner’s protest, Petitioner failed to meet its burden of proving Respondent’s denial of Petitioner’s protest was improper.

³ Petitioner also argues it was confused with the effect of the suspension of the Procurement Code; OAH did not inform Petitioner of the deadlines in its October 14, 2020 letter; and that it was confused because its prior contract had been extended. None of these arguments are with merit.

Petitioner listed three items of protest in its June 23, 2020 protest letter. In its closing brief, Petitioner argues that Manuiwa was not a responsible bidder or responsive bidder, and that Manuiwa did not satisfy the IFB requirements that the contractor have a minimum of three years' experience in the maintenance of Bell 206 series helicopters; and two FAA certified licensed mechanics, each having a minimum of two years continuous service preceding the opening bid date.

1. Manuiwa fulfilled the IFB requirement that the contractor have a minimum three years' experience in the maintenance of Bell 206 series helicopters

In its first item of protest, Petitioner challenges Respondent's determination that Manuiwa met the minimum three years' experience in the maintenance of Bell 206 series helicopters. Petitioner's first protest item states:

Protest Item 1. IFB 3985 SPECIFICATIONS Page 5 of 12, Paragraph 9. Experience and Qualifications, Subparagraph 3) states: "The contractor shall have a minimum three years' experience in the maintenance of Bell 206 series helicopters."

a. Having flown on the Island of Hawaii beginning in 1992, I have not been aware of Manuiwa Airways operating or maintaining Bell 206 series helicopters. Manuiwa Airways has operated MD500 helicopters and currently operates one MD500 helicopter in addition to servicing the contract to Chopper 1 in Hilo, Hawaii. K&S Helicopters, Inc. by contrast has operated up to 6 Bell 407 helicopters since 2002. The Bell 407 is a variant of the bell 206 Type Certificate.

b. If Manuiwa Airways had operated Bell 206 helicopters prior to 1992 that would raise questions of recency that should be addressed in the IFB.

In support of its position that Manuiwa did not have the requisite minimum three years' experience in the maintenance of Bell 206 series helicopters, Petitioner argues that it is unclear from Manuiwa's letters and David Okita's resume whether Mr. Okita's experience alone would satisfy the minimum three years' experience in the maintenance of Bell 206 series helicopters. In response, Respondent states that it evaluated Manuiwa's bid and based on the resumes of Tim Anderson and David Okita as FAA Certified mechanics,

Manuiwa met the required minimum three years' experience in the maintenance of Bell 206 helicopters. The record established that David Okita was named as Manuiwa's program administrator for IFB 3985. Manuiwa listed Tim Anderson as its primary mechanic, along with mechanics Aaron Moniz, David Okita and Richard Bridges in its bid. The evidence established that David Okita was employed by Rotor Wing Hawaii, Inc. from 1990-2011 during which time the company held the Pilot and Maintenance contract for the Hawaii Fire Department's two helicopters, the MD 500 and Bell 206L-3. While Rotor Wing Hawaii, Inc. held the contract with the Hawaii County Fire Department, Mr. Okita held the positions of Line Pilot, Director of Operations, Mechanic and Pilot Supervisor. According to his resume, Mr. Okita conducted mechanic duties in the maintenance of the two helicopters. At hearing, Deanna Sako, Director of Finance, County of Hawaii, opined that based on Mr. Okita's resume, Manuiwa satisfies the mechanic experience required in the IFB. In addition, Lowell "Kalani" Ching, Director of Operations for Chopper 2, testified that that he has known Mr. Okita as a mechanic and pilot for over 20 years. Mr. Ching opined that Mr. Okita's experience with the Bell series helicopters exceeds three years. Mr. Ching based his opinion on Mr. Okita's previous roll as Director of Maintenance for Chopper 2.

Pursuant to HRS §103D-310(b), the procurement officer shall determine whether the prospective offeror has the financial ability, resources, capability and business integrity necessary to perform the work. The determination of responsibility or nonresponsibility of an offeror or prospective offeror to perform the work called for in the solicitation shall be made by the procurement officer on the basis of available information. Hawaii Administrative Rules ("HAR") § 3-122-108. Based on the record, the Hearings Officer concludes that Petitioner has failed to prove that Manuiwa is not a responsible bidder by virtue of David Okita's experience in the maintenance of Bell 206 series helicopters.

Petitioner also argues that Tim Anderson, who was designated as Manuiwa's lead mechanic in their bid, has withdrawn from the bid and therefore cannot be counted to fulfill the requirement. Petitioner further argues that Tim Anderson misrepresented his maintenance experience in regard to Bell helicopters in his resume. In support of its position, Petitioner cites Mr. Anderson's resume, which states Mr. Anderson worked for Petitioner from 2016 to 2020. The evidence established that Mr. Anderson worked for Petitioner from

March 3, 2017 to the pay period ending January 4, 2020.⁴ According to the evidence in record, Manuiwa provided supplemental information to its proposal for IFB 3985 by letter dated November 5, 2020. According to the letter, the five-month suspension of the award of the contract affected Tim Anderson's employment status with Manuiwa, and Mr. Anderson pursued alternate employment. Thus, in addition to the original maintenance staff of David Okita, Aaron Moniz and Richard Bridges, Manuiwa replaced Tim Anderson with Luka Dayton-Smith. According to the evidence, Mr. Dayton-Smith is an A&P mechanic and has over three years of experience maintaining Bell series 206 helicopters. Based on the information provided, the Hearings Officer concludes that Mr. Dayton-Smith's experience also satisfies the required maintenance experience and qualifications.

Finally, Petitioner argues that Manuiwa's service agreements with mainland-based contractors Specialty Aviation Services, LLC (Marcus Dunn) and Logic Aviation Services, LLC could not satisfy the minimum three years' experience in the maintenance of Bell 206 series helicopters. Petitioner argues that Respondent admitted at hearing that it did not have copies of the agreements and did not know the terms or conditions of Manuiwa's service agreements with Specialty Aviation Services, LLC and Logic Aviation Services, LLC. On the other hand, Petitioner acknowledges that it did not rely on Manuiwa's subcontractors' experience to meet the minimum three years' experience requirement. In its closing brief, Respondent states that IFB 3985 has specific provisions to allow the subcontractor to use a subcontractor for certain maintenance functions, and that the IFB did not require bidders to submit copies of its contract with listed subcontractors. Having determined that Manuiwa met the maintenance experience requirement through David Okita and also with Luka Dayton-Smith, the Hearings Officer rejects this argument. Based on the foregoing, the Hearings Officer concludes that Petitioner has failed to prove that Manuiwa did not satisfy the required minimum three years' experience in the maintenance of Bell 206 helicopters.

2. The issue of Manuiwa's responsiveness to the Proposal section entitled "Qualified FAA Certified Helicopter Mechanics" was not raised in

⁴ Petitioner's CEO Calvin Dorn testified that Mr. Anderson's last day employed with Petitioner was December 31, 2019. The Hearings Officer credited Mr. Dorn's testimony that Petitioner's Exhibit "16" was Mr. Anderson's final pay statement from Petitioner. The pay statement indicates a pay period of December 22, 2019 to January 4, 2020.

Petitioner's protest letter, therefore OAH lacks jurisdiction to review the matter.

For the first time in its post-hearing brief, Petitioner argues that Manuiwa was neither a responsible nor responsive bidder and that "Manuiwa did not satisfy the requirement to have two FAA certified licensed mechanics with two continuous years of service preceding the June 2020 bid opening date." In its closing brief Petitioner argues that Manuiwa was neither responsible nor responsive bidder under the provision "Qualified FAA Certified Helicopter Mechanics" under the PROPOSAL section of IFB. The provision states, "The Contractor shall have a minimum of two (2) years of continuous service preceding the bid opening date."

At a minimum, a protest must place the procuring agency on notice of filing of a protest. Such notice is obviously necessary before the agency can take steps to resolve the protest or issue a decision upholding or denying the protest. *Frank Coluccio Construction Company v. City & County of Honolulu, et al. PCH-2002-12 (October 18, 2002), HAR §3-136-3(c)*. In this case, Petitioner's protest letter did not include notice of this protest item, therefore precluding Respondent from resolving the protest item or issue a decision denying the protest. This office has recognized the requirement that a protestor raise *all* of its claims in a timely and efficient manner. *See Marsh USA Inc., v. RIX Maurer, III, Department of Budget and Fiscal Services, City and County of Honolulu, PCX-2010-1 (February 11, 2010)*. In this case, Petitioner claims for the first time in its closing brief that Manuiwa was a nonresponsive bidder, alleging Manuiwa did not satisfy the requirement to have two FAA certified licensed mechanics with two continuous years of service preceding the June 2020 bid opening date. Because Petitioner raises this claim for the first time in its closing brief, the claim cannot be considered part of Petitioner's protest. Accordingly, the Hearings Officer concludes that OAH lacks jurisdiction to review the matter.

D. Respondent did not provide any evidence in support of its protest items 2 and 3 and thus has failed to meet its burden of proving Respondent's denial for those two items was improper.

Petitioner did not provide any evidence or argument regarding protest items 2 and 3 of its protest letter. Nonetheless, the Hearings Officer will address remaining items of protest in Petitioner's June 23, 2020 protest letter. In Petitioner's second item of protest,

Petitioner protests Respondent's determination that Manuiwa satisfied pilot qualification and experience requirements. Item 2 of Petitioner's protest states:

Protest Item 2. IFB 3985 SPECIFICATIONS Paragraph 10. PILOTS subparagraph 5). On Page 7 of 12 states: "The contractor must submit pilot resumes that verify relevant experience to be considered for this bid..." Subparagraph 6) states that: "Pilot(s) proposed for this contract must pass a competency check administered by the Department..."

a. K&S Helicopters, Inc. currently employs the Chopper 2 pilots and the pilots have passed the competency checks required annually.

b. To my knowledge no competency checks were conducted for potential pilots and only the current pilots would be acceptable for the contract.

In its protest denial letter, Respondent states "Manuiwa submitted the resumes of pilots that will fly the Bell 206 helicopters. The County reviewed the resumes of the pilots submitted by Manuiwa and found that they meet the qualifications and experience required by IFB 3985 as they are currently flying Chopper 2." In its closing brief, Respondent also states that pursuant to the IFB, the Respondent will administer a competency check for any additional pilots needed prior to operations. Petitioner provided no evidence or argument in support of its contention that Manuiwa was not a responsible bidder in regard to its pilots' qualification and experience.

In its third item of protest, Petitioner protests Manuiwa's bid submission that purportedly does not list price increases for option years. Protest item 3 of Petitioner's protest letter states:

Protest Item 3. IFB 3985 SPECIFICATIONS paragraph 15. CONTRACT PRICE AND ADJUSTMENTS subparagraph f. on Page 11 of 12 states that the bid price for item 1 will be fixed for the first year of the Contract and subject to negotiation during the following four option years, based on price index data and other information provided by the bidder "WITH THE BID."

a. The bid proposed by Manuiwa Airways did not appear to have a price increase in subsequent years. Subparagraph f.

further states that “FAILURE TO PROVIDE SUCH INFORMATION WILL RESULT IN THE PRICES LISTED BEING CONSIDERED THE MAXIMUM TO BE PAID IF THE COUNTY ACCEPTS ANY GIVEN OPTION YEAR.”

b. It is the opinion of K&S Helicopters Inc. that bidding with no price increase while knowing that required wage increases are inevitable can cause a skewed overall bid evaluation and not adequately address the four option years. It is assumed that Manuiwa Airways would not be afforded the ability to negotiate a price increase since none was indicated in the four option years in the bid process. Any presentation of documentation of a price index data or other rate increase information should have been reflected in the bid process for the four option years.

At hearing, Petitioner’s CEO Calvin Dorn opined that bidding without a price increase can cause a skewed overall bid evaluation. In its letter denying Petitioner’s third item of protest, Respondent states, “The fact that Manuiwa did not increase their bid for option years is their business decision.” Petitioner fails to provide any evidence or argument in support of this protest issue. Based on the foregoing, the Hearings Officer concludes that Petitioner has not met its burden of proving Manuiwa was not a responsible bidder in regard to its pilots’ qualification and experience or that Manuiwa’s alleged failure to include price increases in its bid rendered its bid improper.

IV. DECISION

Based upon the foregoing considerations, Respondent’s motion to dismiss is granted and the matter is hereby dismissed. The parties shall bear their own attorney’s fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, December 16, 2020.



DESIRÉE L. HIKIDA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

*Hearings Officer's Findings of Fact, Conclusions of Law, and Order Granting Respondent's Motion to Dismiss:
K & S Helicopters, Inc. dba Paradise Helicopters v. Dept. of Finance, County of Hawaii, PDH-2020-005.*