

eFiled 2022 Jun 06 a 11:00

HEARINGS OFFICE

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

In the Matter of

SODERHOLM SALES AND LEASING,
INC,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION
SERVICES, CITY AND COUNTY OF
HONOLULU

Respondent.

PDH-2022-002

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
FINAL ORDER GRANTING
RESPONDENT DEPARTMENT OF
TRANSPORTATION SERVICES, CITY
AND COUNTY OF HONOLULU'S
MOTION TO DISMISS OR IN THE
ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT

Senior Hearings Officer:
Denise P. Balanay

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
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TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU'S
MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

On April 18, 2022, Petitioner SODERHOLM SALES AND LEASING, INC. ("Petitioner"), filed a Request for Administrative Review to contest Respondent Department of Transportation Services, City and County of Honolulu's, ("Respondent") April 18, 2022 denial of its protest in connection with RFP-DTS-1571321 ("Solicitation" or "RFP") ("Request"). Petitioner's Request was made pursuant to Hawaii Revised Statutes ("HRS") § 103D-709 and Hawaii Administrative Rules ("HAR") §§ 3-126-42 and 3-126-59.

On April 26, 2022, the Office of Administrative Hearings issued a Notice of Hearing and Prehearing Conference which was duly served upon the parties. A prehearing conference was scheduled for May 2, 2022 and the hearing was scheduled for May 9, 2022. Respondent filed Respondent's Response to Petitioner's Request for Administrative Hearing on April 29, 2022.

A prehearing conference was conducted by telephone in this matter on May 2, 2022 before the undersigned Hearings Officer. Jeffrey P. Miller, Esquire, appeared on behalf of Petitioner. Ryan H. Ota, Esquire, and Moana A. Yost, Esquire, appeared on behalf of Respondent. At the prehearing conference, Respondent raised jurisdictional challenges to the timeliness of the protest as well as Petitioner's failure to pay a filing fee. Respondent indicated its intent to file a motion to dismiss and/or for summary judgment on procedural and substantive issues. The parties were ordered to file any motions by May 4, 2022. The hearing for said motion(s) was scheduled for May 9, 2022. The evidentiary hearing was rescheduled to May 12, 2022.

On May 4, 2022, Respondent filed Respondent's Motion to Dismiss or in the Alternative for Summary Judgment ("Motion"). On May 5, 2022, Petitioner filed Petitioner's Memorandum in Opposition to Respondent's Motion. Respondent filed Respondent's Reply Memorandum on May 6, 2022. The hearing on the Motion was conducted by telephone by the undersigned Hearings Officer on May 9, 2022. Mr. Miller appeared at the hearing on behalf of Petitioner, and Mr. Ota and Ms. Yost appeared on behalf of Respondent.

On May 10, 2022, the Hearings Officer notified the parties that Respondent's Motion to Dismiss was granted. The hearing scheduled for May 12, 2022 was vacated.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following Findings of Fact, Conclusions of Law and Final Order Granting Respondent's Motion to Dismiss.

II. FINDINGS OF FACT

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

1. Respondent issued RFP-DTS-1571321 on February 17, 2022. The Solicitation was for the provision and delivery of forty (40) foot, heavy-duty, low-floor, clean diesel buses for a three (3) year period. The Solicitation provided for an estimated quantity of buses to be ordered each year during the term of the contract as follows: 8 buses for year 1, 15 buses for year 2, and 15 buses for year 3.

2. The Solicitation, under Notice to Offerors – Special Instructions to Offerors, originally stated,

VII. Licensing

All State licensing requirement are not applicable to this Federally Funded Procurement.

3. On March 9, 2022, Respondent issued Addendum No. 3 to the Solicitation. Addendum No. 3 stated, in pertinent part,

Delete Notice to Offerors – Special Instructions to Offerors, Section VII. Licensing, in its entirety and replace with the following:

“VII. Licensing.

Some State licensing requirements may apply to this federal funded procurement. The City reserves the right to validate licensing prior to award.”

4. Respondent issued Addendum No. 4 to the Solicitation on March 11, 2022 which responded to additional requests for clarification.

5. On March 12, 2022, Petitioner emailed Respondent, objecting to Addendum No. 3, stating,

This is vague, ambiguous, incomplete and unresponsive. We ask for a complete answer in another addendum stating clearly that all Offers must contain on the date of the submission that they are in compliance with HRS 437B-7 for their Repair Dealer and Hawaii Administrative Rules 16-87-25 for their mechanics. Proof of compliance must be included in the Proposal. Anything less in a Proposal would be fraud and must be rejected. This can't be fixed after the RFP due date. The City can't negotiate with an Offeror after Offer submission.

We request a revised Addendum by the close of business Tuesday 3/16/22 or we will protest to the full extent. We are available on Monday or Tuesday with a meeting with you and the City Corporation Counsel. We are sure that Corporation Counsel with [sic] understand that the City must follow State law. We have been discussing the same issues with the City for years.

6. On March 14, 2022, Respondent replied to Petitioner's email by stating, “Confirmed.”

7. On March 14, 2022, Petitioner responded to Respondent's email of March 14, 2022, stating,

When will we get answers? The City put out Addendum No. 3 on 3/9/22, and said last date for addendum was 3/9/22? Now the latest Addendum No. 4 came out on 3/11/22, and says latest addendums now 3/11/22?

8. By letter dated March 21, 2022, Petitioner submitted a protest to Respondent in connection with the Solicitation. The protest stated, in pertinent part,

Addendum No. 3 is Vague and Ambiguous As Currently Written

H.R.S. §103D-302(b) provides "[a]n invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement." H.R.S. §103D-303 likewise requires that requests for proposals provide a description of all contractual terms and conditions.

On March 9, 2022, the City issued Addendum No. 3 which changed the state licensing requirements to state that "Some State licensing may apply to this federally funded procurement. The City reserves the right to validate licensing prior to award." Addendum No. 3 revised the RFP licensing requirements to state that "some" State licensing "may" apply without identifying which licensing requirements may or may not apply.

The RFP, as amended by Addendum No. 3, is vague and ambiguous. The language of Addendum No. 3 does not advise prospective bidders which state licensing laws apply to the RFP. Instead, it states that "some" state licensing requirements "may" apply without identifying any licensing requirements and which one's apply to the RFP. Prospective bidders are left to guess which state licensing requirements they must comply with.

9. The protest requested that Respondent suspend the March 23, 2022 bid deadline, issue an addendum to the RFP requiring offerors to submit repair dealer licensing in compliance with HRS §437B-7.

10. By letter dated April 18, 2022, Respondent denied the protest. The denial letter stated, in pertinent part,

As previously stated, Addendum No. 3 was issued on March 9, 2022 and offerors have 5 working days to protest the issues of concern. The protest of this issue is untimely and DENIED as such. However, notwithstanding the untimeliness of protesting this issue,

the Solicitation states that offerors are solely responsible for being aware of any and all requirements that may affect the work specified in the Solicitation.

Without waiving any previous determinations, the City would amend and clarify the Solicitation to be consistent with the determinations in this letter in a future addendum one the stay resulting from this Protest is lifted.

11. Petitioner filed its Request for Administrative Review with the Office of Administrative Hearings on April 18, 2022.

12. Petitioner did not inform Paula Youngling, Purchasing Administrator for the Department of Budget and Fiscal Services for the City and County of Honolulu, of Petitioner's Request for Administrative Review within seven calendar days after the final decision.

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. Standard for Motion to Dismiss and/or for Summary Judgment

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. *See Brewer Environmental Industries v. County of Kauai*, PDH 96-9 (November 20, 1996), *A's Mechanical & Builders v. Department of Accounting and General Services, State of Hawaii*, PDH 2013-004 (May 7, 2013).

b. Discussion

The issue for determination is whether the Hearings Officer has jurisdiction to consider Petitioner's Request for Administrative Review. Respondent's Motion to Dismiss raises three bases to dismiss the Request: 1) Petitioner failed to pay a filing fee when it filed its Request for Administrative Review; 2) Petitioner failed to inform the head of the purchasing agency of its Request for Administrative Review of its protest within seven calendar days after the final decision; and 3) Petitioner failed to submit its protest within the time required by HRS §103D-701(a). For the reasons set forth herein, the Hearings Officer grants Respondent's Motion to Dismiss.

1. A filing fee is not required in this matter.

HRS §103D-709(f) states,

In addition to the bond required in subsection (e), the initiating party shall pay to the department of commerce and consumer affairs a non-refundable

filing fee of:

- (1) \$200 for a contract with an estimated value of \$500,00 or more, but not less than \$1,000,000; or
- (2) \$1,000 for a contract with an estimated value of \$1,000,000 or more.

Failure to pay the filing fee shall result in the rejection or dismissal of the request for review. The fee shall be deposited into the compliance resolution fund established pursuant to section 26-9(o) and used to help defray the costs of conducting the administrative proceeding for review.

Petitioner did not submit a filing fee with its Request for Administrative Review. Respondent argues that pursuant to HRS §103D-709(f), Petitioner's failure to pay a filing fee requires a dismissal of Petitioner's Request. For the reasons set forth herein, the Hearings Officer finds that a filing fee is not required in this matter.

HRS §103D-709(k) states,

As used **in this section**, "estimated value of the contract" or "estimated value", with respect to a contract, means the lowest responsible and responsive **bid** under section 103D-302, or the **bid amount** of the responsible offeror whose proposal is determined in the writing to be the most advantageous under section 103D-303, as applicable.

(Emphases added).

This Office previously interpreted the language of HRS §103D-709(k) to exclude "pre-bid" protests from the bonding requirement set forth in HRS §§103D-709(d) and (e). In *Maui County Community Television, Inc. dba Akaku Maui Community Television v. Dept. of Accounting and General Services, State of Hawaii*, PCX-2010-3 (July 9, 2010), this Office stated,

"because the estimated value of the contract cannot be determined for protests over the content of the solicitation, the requirements set forth in HRS §103D-709(d) and (e) are inapplicable to such protests. For these reasons, the Hearings Officer concludes that under HRS §103D-709, as presently written, protests over the contents of a solicitation need not meet the requirements in subsections (d) and (e) as prerequisites to the protestor's ability to pursue a request for an administrative review."

See also Soderholm Sales and Leasing, Inc. v. Dept. of Budget & Fiscal services, City and County of Honolulu, PDH-2012-005 (November 30, 2012).

The rationale in *Maui County Community Television* applies equally in this matter. HRS §103D-709(k) specifically defines "estimated value of contract" or "estimated value" "as used **in this section**", meaning the entirety (all subsections of) HRS §103D-709. Thus, the definition applies to HRS §103D-709(f) as well as subsections (d) and (e).

Respondent argues that the purpose of filing fee is different than the bond requirement. Respondent argues that the bond requirement is jurisdictional in nature and therefore HRS §103D-709 must be strictly construed as to the definition of “estimated value”. On the other hand, Respondent argues that the filing fee is administrative in nature, and therefore the statutory definition of “estimated contract value” should not apply to the filing fee requirement as the fee is used to defray the cost of the administrative proceeding. While Respondent is correct as to the purpose of the filing fee, there is nothing in the legislative history to indicate that the legislature intended to exclude HRS §103D-709(f) from the definition of “estimated contract value” or “estimated value” in HRS §103D-709(k). As such, the Hearings Officer finds the determination of “estimated contract value” in this matter to be just as impossible as in *Maui County Community Television* as the definition relies on the bid, and there is no such bid in this matter.

Respondent argues that the estimated value of the contract can be determined by looking at the estimated cost of the buses sought by the Solicitation. The Hearings Officer rejects this argument as contrary to the plain language of HRS §103D-709(k).

Based upon the language of the statute *as written*, the Hearings Officer concludes that the estimated value of the contract is impossible to determine where no bid has been submitted by the protestor. Consequently, the Hearings Officer finds that no filing fee is required in this matter.

2. Petitioner violated HAR §3-126-7(c) when it failed to notify the head of the purchasing agency of its Request for Administrative Review within seven calendar days after the final decision.

HAR §3-126-7(c) states that a “protestor *shall* inform the head of the purchasing agency within seven calendar days after the final decision if an administrative appeal will be filed” (emphasis added). Paula Youngling, the Central Purchasing and Contracts Administrator for the City and County of Honolulu, stated in her Declaration that she did not receive a copy of Petitioner’s Request for Administrative Review on April 25, 2022, which was seven calendar days after the final decision denying Petitioner’s protest. Although the Request itself indicated that Ms. Youngling had been delivered a copy of the Request, Petitioner now admits that Ms. Youngling did not receive the Request on or by April 25, 2022 due to Petitioner’s “administrative error”.¹ Respondent first became aware of the Request on April 26, 2022, when it received the Notice of Hearing and Pre-hearing Conference from the Office of Administrative Hearings and requested a

¹ Petitioner’s Opposition to Motion to Dismiss, at 9.

copy of the Request from this Office.

Respondent argues that Petitioner's failure to inform the head of the purchasing agency of its April 25, 2022 Request for Administrative Review is fatal to Petitioner perfecting a timely appeal in this matter and thus constitutes grounds for dismissal of the Request.

Petitioner argues that Respondent was not prejudiced by Petitioner's failure to inform the head of the purchasing agency of the Request for Administrative Review as Respondent was able to file a response to the Request on April 29, 2022, prior to the May 2, 2022 prehearing conference. Petitioner further cites this Office's decision in *InformedRx, Inc. v. State of Hawaii Dept. of Budget & Finance Employer-Union Health Benefits Trust Fund*, PCY-2012-4 (March 9, 2012) where the Hearings Officer stated that the purpose of HAR §3-126-7(c) is "to make sure the purchasing agency is aware of an appeal being filed so that the agency, and its attorney, can adequately respond to the appeal whether that be in area of a stay of the procurement, a response to the OAH, or otherwise". Respondent argues that any amount of time lost due to a delay in notice of an appeal negatively affects an agency's ability to respond to the appeal. Given the expedited nature of procurement proceedings, the Hearings Officer agrees that even a one-day delay, as in this matter, can negatively affect the agency's ability to adequately respond to the appeal.

This Office has consistently upheld strict enforcement of the deadlines and requirements in procurement matters to effectuate the purpose of the procurement code, which is the expedient resolution of procurement disputes. See, *GTE Hawaiian Telephone Co., Inc., supra*; *Clinical Laboratories of Hawaii, Inc. v. City and County of Honolulu, Dept. of Budget & Fiscal Services*, PCH-200-8 (October 17, 2000); *CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. DOE, et al.*, PCH-2007-007 (December 12, 2007); *Paradigm Construction LLC v. Dept of Hawaiian Home Lands, et al.*, PCH-2009-16 (October 7, 2009); *Diversified Plumbing & Air Conditioning v. Hawaii Housing Finance and Development Corp.*, PCH-2009-11 (June 30, 2009); *Maui County Community Television, Inc. dba Akaku Maui Community Television v. Dept. of Accounting and General Services*, PCX-2010-3 (July 9, 2010). See also, *Robert's Hawaii School Bus, Inc. v. DOE*; PCH-2004-17 (December 9, 2004) (*excusable neglect not a basis to extend time to file appeal*).

Respondent further argues that the language of HAR §3-126-7(c) definitively states that the Petitioner *shall* notify the head of the purchasing agency, and any prejudice the Respondent may or may not suffer is not a factor in compliance with the rule. The Hearings Officer agrees with Respondent.

In this matter, Respondent obtained a copy of the Request on April 26, 2022 because the Office of Administrative Hearings issued the Notice of Hearing on that date. If this Office did not issue a Notice of Hearing within 24 hours of the filing of the Request, Respondent would have had less time to prepare its Response to the Request. Respondent's ability to adequately prepare its case should not be dependent upon when it receives a Notice from the Hearings Officer, and the procurement code does not place that burden on this Office. Instead, HAR §3-126-7(c) places the duty to inform the purchasing agency on the Petitioner.

Additionally, as pointed out in *InformedRx*, HAR §3-126-7(c) does not require *service* of the Request for Administrative Review on the head of the purchasing agency, but rather requires the protestor to **inform** the purchasing agency of the Request for Administrative Review. The Hearings Officer in *InformedRx* concluded that HAR §3-126-7(c) "requires only that the head of the purchasing agency be **notified in a reasonable manner** than an administrative appeal will be filed. Furthermore, ...the rule does not preclude informing a representative of the head of the purchasing agency, such as an attorney representing that agency, rather than directly informing the head of the purchasing agency." As such, Petitioner's burden was very low, and Petitioner could easily have emailed a copy of the Request for Hearing to the Department of the Corporation Counsel or emailed Ms. Youngling directly.

In its Reply Memorandum, Respondent argues that Petitioner also violated HAR §3-126-61(a) for failing to serve the head of the purchasing agency with its Request for Administrative Review. This Office has previously held that a challenge for failure to effect service pursuant to HAR §3-126-61(a) is "akin to a claim of lack of personal jurisdiction". *InformedRx, supra*. The defense is personal to Respondent in this matter and can be waived. *Id. citing, Rearden Family Trust v. Wisenbacker*, 101 Haw. 237, 65 P.3d 1029 (2003). As Respondent did not raise this defense in its Response to the Request or in its initial Motion, the defense is hereby waived.

Based on the foregoing considerations, the Hearings Officer finds that Petitioner's failure to comply with HAR §3-126-7(c) constitutes a failure to perfect its appeal of the denial of its protest and therefore requires the dismissal of Petitioner's Request for Administrative Review.

3. The protest was untimely.

Even if Petitioner's failure to notify the head of the purchasing agency in violation of HAR §3-126-7(c) did *not* affect its ability to perfect a timely appeal, the Hearings Officer does not have jurisdiction to hear Petitioner's Request for Administrative Review because the protest was untimely.

HRS §103D-701 (a) states:

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 a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, a 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**; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

(Emphasis added).

The protest in this matter related to Petitioner's perceived ambiguity and/or confusion regarding the licensing provision in Addendum No. 3. The Solicitation stated that "All State licensing requirements are not applicable to this Federally Funded Procurement." Addendum No. 3, issued on March 9, 2022, replaced the aforementioned language with the following, "Some State licensing may apply to this federally funded procurement. The City reserves the right to validate licensing prior to award." Respondent issued Addendum No. 4 on March 11, 2022, which did not address licensing requirements.

Petitioner emailed Respondent on March 12, 2022, objecting to Addendum No. 3 as being "vague, ambiguous, incomplete and unresponsive" and demanding that Respondent issue another addendum, "stating clearly that all Offers must contain on the date of the submission that they are in compliance with HRS (sic) 437B-7 for their Repair Dealer and Hawaii Administrative (sic) Rules 16-87-25 for their mechanics. ...". Petitioner further requested the addendum be issued by March 16, 2022, or Petitioner intended to "protest to the full extent."

Petitioner argues that when Respondent failed to respond to Petitioner's March 12, 2022 email by March 14, 2022, Petitioner "reasonably concluded" that Respondent was not going to issue the requested addendum. Petitioner therefore argues that March 14, 2022 is the date it knew or should have known of the facts giving rise to its protest. Petitioner accordingly submitted its protest on March 21, 2022.

Respondent argues that Petitioner should have filed its protest within five working days of the issuance of Addendum No. 3 on March 9, 2022, or by March 16, 2022. The Hearings Officer agrees with Respondent. The subject of the protest is Petitioner's objection to the licensing provision in Addendum No. 3, which stated that *some* licensing *may* apply to this federally funded

solicitation. Petitioner's protest relates to the content of Addendum No. 3, *not* Respondent's alleged refusal to comply with Petitioner's demand for an additional addendum. Petitioner clearly knew or should have known of the facts giving rise to its protest of Addendum No. 3 when the addendum was issued, on March 9, 2022. The Hearings Officer finds that Petitioner had five working days from March 9, 2022 to protest the content of the Solicitation or Addendum No. 3. Having submitted its protest on March 21, 2022, the protest was untimely. Consequently, the Hearings Officer lacks jurisdiction to hear Petitioner's Request for Administrative Review.

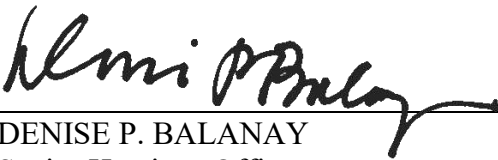
4. Respondent's Motion for Summary Judgment is denied as moot.

Having found that Petitioner failed to perfect a timely appeal of the denial of its protest and the Hearings Officer lacks jurisdiction to hear Petitioner's Request for Administrative Review of its untimely protest, Respondent's Motion to Dismiss is granted. Accordingly, Respondent's alternative Motion for Summary Judgment is denied as moot.

Based on the foregoing considerations, Respondent's Motion to Dismiss is GRANTED. Respondent's alternative Motion for Summary Judgment is denied as moot. Petitioner's Request for Administrative Review is hereby DISMISSED.

Each party shall bear its own attorney's fees and costs incurred in this matter.

DATED: Honolulu, Hawai'i, June 6, 2022.



DENISE P. BALANAY
Senior Hearings Officer
Department of Commerce
and Consumer Affairs