



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

In the Matter of	)	PCH-2008-12
	)	
CHING'S NURSERY, INC. dba	)	HEARINGS OFFICER'S FINAL ORDER
SERVICE CONTRACTING,	)	GRANTING RESPONDENT'S MOTION
	)	TO DISMISS FOR LACK OF
Petitioner,	)	JURISDICTION
	)	
vs.	)	
	)	
UNIVERSITY OF HAWAII,	)	
	)	
Respondent.	)	
_____		)

HEARINGS OFFICER'S FINAL ORDER GRANTING  
RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

I. INTRODUCTION

On September 5, 2008, Ching's Nursery, Inc., dba Service Contracting ("Petitioner") filed a request for hearing to contest the University of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for a pre-hearing conference on September 9, 2008 and a hearing on September 26, 2008. The Notice of Hearing and Pre-Hearing Conference ("Notice") was transmitted to the parties by facsimile transmission and by certified mail, return receipt requested.

At the pre-hearing conference held on September 9, 2008, Respondent was represented by William C. McCorriston, Esq. Petitioner failed to enter an appearance. Respondent indicated that it would be filing a Motion to Dismiss ("Motion") and a hearing on the Motion was set for September 18, 2008 at 2:00 p.m. A Pre-Hearing order was issued on September 10, 2008.

On September 10, 2008, the Hearings Officer received a telephone call from Petitioner's representative Gifford Chang, who stated that he did not attend the pre-hearing conference on September 9, 2008 because he did not receive the facsimile transmission and had only received the Notice that day. Pursuant to his request, Mr. Chang was sent the Pre-Hearing Order by facsimile transmission, and Mr. Chang was informed that a second pre-hearing conference could be scheduled if requested.

Respondent filed its Motion on September 11, 2008. Petitioner did not file a response. The hearing on the Motion was held on September 18, 2008. Petitioner was represented by Mr. Chang and Respondent was represented by Mr. McCorriston. The matter was taken under advisement, and Respondent was requested to supplement its Motion with a Declaration to support the arguments made in its Motion. The Declaration of Duff Zwald, with Exhibits "1" to "3" was filed on September 19, 2008. Petitioner was requested to submit a copy of its protest and the response received from Respondent.

By facsimile transmission on September 19, 2008, Petitioner filed a response to Respondent's Motion, as well as the documents requested by the Hearings Officer at the hearing on the Motion. As Petitioner's transmission was after close of business on September 19, 2008, the documents were file-stamped on September 22, 2008.

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. On August 6, 2008, the Notice of Award for Invitation for Bids No. 08-145, Cooke Field Replace Turf, University of Hawai'i at Manoa, Honolulu, Hawai'i, Project No. UHM 07-541-602, was posted at the Office of Procurement and Real Property Management ("OPRPM").

2. The Notice of Award document was posted in a wall mounted locked glass display case that contains a cork surface and is approximately five (5) feet wide and three (3) feet high. The display case contains a banner which identifies the case to contain "PROCUREMENT NOTICES." The general public may view the contents of the display

case between the hours of 7:45 a.m. and 4:30 p.m. Monday through Friday, excluding State recognized holidays.

3. On August 19, 2008, a protest letter from Petitioner was hand-delivered to the OPRPM.

4. By a letter dated August 26, 2008, Respondent denied Petitioner's protest. The denial letter was mailed to Petitioner on August 26, 2008 by certified mail, return receipt requested, and Petitioner received this letter on August 27, 2008.

5. Petitioner's request for hearing to the Department of Commerce and Consumer Affairs ("DCCA") is dated August 29, 2008 but the envelope is postmarked September 3, 2008. The Office of Administrative Hearings ("OAH"), DCCA, received Petitioner's request for hearing on September 5, 2008.

### 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 Petitioner did not file its request for administrative hearing with DCCA within seven calendar days of the issuance of the denial of the protest. Respondent also asserts that its denial of Petitioner's protest should be upheld because Petitioner did not submit its protest within five working days of the posting of the award.

#### Timeliness of Request for Administrative Review

Hawaii Revised Statutes ("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.

In *Nehi Lewa, Inc. v. Department of Budget and Fiscal Services*, 103 Haw. 163, 80 P3d. 984 (2003) the Hawaii Supreme Court determined that the term "issuance" as used in HRS §

103D-712(a) means the date of mailing as evidenced by the postmark. In this case, Respondent issued its written determination on August 26, 2008. Thus, Petitioner's request for hearing was due no later than September 2, 2008. Petitioner argued that it mailed the letter to DCCA on August 29, 2008 and "thinks" DCCA received the letter within seven calendar days. However, the evidence established that Petitioner's letter was postmarked September 3, 2008 and that OAH did not receive the letter until September 5, 2008, ten calendar days after Respondent's written determination was issued. Accordingly, the Hearings Officer concludes that Petitioner's request for hearing was untimely.

Timeliness of Protest

Pursuant to Hawai'i Revised Statutes § 103D-701(a), a protest of an award shall be submitted in writing within five working days after the posting of an award of the contract. It is not disputed that the award was posted on August 6, 2008, so any protest was due by August 13, 2008. Respondent received Petitioner's protest on August 19, 2008. Petitioner argued that its protest should be deemed timely because Respondent should have notified all bidders that the award had been posted, and notification and the posting itself should have been done electronically, by facsimile or by telephone call. Petitioner has not cited any statute or legal authority in support of its argument that Respondent's method of posting the award was not in compliance with the procurement statute or rules. Accordingly, the Hearings Officer concludes that Petitioner's protest was untimely.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss for Lack of Jurisdiction 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.

DATED: Honolulu, Hawaii, SEP 23 2008\_\_\_\_\_.

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