DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of	)	PCH-2004-12
	)	
SUPERIOR PROTECTION, INC.,	)	HEARINGS OFFICER'S FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII,	)	
	)	
Respondent.	)	
	)	

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

I. INTRODUCTION

On July 19, 2004, the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("DCCA") received a facsimile transmission of Superior Protection, Inc.'s ("Petitioner") request for hearing from the Department of Transportation's ("Respondent") Contracts Office, facsimile number (808) 587-2132.

On July 23, 2004, DCCA received Petitioner's original request for hearing by certified mail. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the pre-hearing conference held on August 3, 2004, the parties agreed to take the hearing scheduled for August 12, 2004 off the calendar because it was determined that there were no facts in dispute and that this matter could be resolved by motion. Respondent agreed to file its motion on or before August 4, 2004. Petitioner agreed to file its

response on or before August 9, 2004, and Respondent agreed that it would file a rebuttal on or before August 11, 2004. The Hearings Officer agreed to issue a preliminary ruling on or before August 13, 2004.

Respondent filed its Motion to Dismiss ("Motion") on August 3, 2004. Petitioner submitted its response to the Motion by facsimile transmission on August 5, 2004 and the original document was filed on August 9, 2004. Respondent's reply memorandum was filed on August 10, 2004. By letter dated August 13, 2004, the Hearings Officer notified the parties that an order granting the Motion would be issued.

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 February 24, 2004, Respondent issued Addendum No. 4 for Furnishing Security Services at Hawaii State Airports, Project Nos. EO1649-04, EO4650-04, EO-2651-04, EH1398-04, EH2399-04, EH3400-04, EM1352-04, EM6353-04, EM4354-04, EM2355-04, EK1467-04. Addendum No. 4 amended the bid documents and notified bidders that the receiving of sealed bids scheduled for 2:00 p.m. February 26, 2004 was postponed until 2:00 p.m. June 23, 2004. Bids were to be publicly opened and read at the Contracts Office, Department of Transportation, 869 Punchbowl Street, Honolulu, Hawaii 96813.

2. On June 22, 2004, Petitioner sent its bid from Houston, Texas to Respondent by Federal Express, FedEx First Overnight. FedEx First Overnight is described as "Earliest business morning delivery to select locations." The bid arrived in Hawaii at 8:00 a.m. on June 23, 2004 and was on a Federal Express vehicle for delivery at 9:04 a.m. on June 23, 2004. Federal Express delivered Petitioner's bid to Respondent at 2:32 p.m. on June 23, 2004.

3. By a letter dated June 30, 2004, Petitioner filed a protest with Respondent, alleging that its bid proposal was in Hawaii in sufficient time to be received timely and that it should not be disqualified because of a third party error.

4. By a letter dated July 12, 2004, Respondent determined that Petitioner's bid would not be considered because it was received 34 minutes after the time specified in the bid documents. Respondent returned the bid to Petitioner unopened.

5. The letter dated July 12, 2004 was transmitted to Petitioner by facsimile transmission on July 12, 2004, and sent to Petitioner by certified mail on July 15, 2004.

6. On July 19, 2004, DCCA received a facsimile transmission from Respondent's Contracts Office at (808) 587-2132, which consisted of a request for hearing from Petitioner.

7. DCCA did not receive a facsimile transmission from Petitioner on July 19, 2004.

8. DCCA received Petitioner's original request for hearing on July 23, 2004. It was sent by certified mail and postmarked on July 19, 2004.

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's bid submission was not timely.

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 July 15, 2004. Thus, Petitioner's request for hearing was due no later than July 22, 2004.

Petitioner argues that it filed a timely request for hearing because DCCA received a facsimile transmission of its request for hearing on July 19, 2004. However, Petitioner did not transmit this request for hearing directly to the DCCA as required by HRS § 103D-712, but instead, transmitted it to Respondent, who then transmitted it to the DCCA. Accordingly, the Hearings Officer finds that the documents that DCCA received on July 19, 2004 did not meet the requirements of HRS § 103D-712, and did not confer jurisdiction on DCCA. Even if Petitioner had transmitted its request for hearing directly to the DCCA by facsimile transmission on or before July 22, 2004, the result is the same because there is no authority to support Petitioner's contention that filing a request for hearing by facsimile transmission is acceptable.[1]

Petitioner's original request for hearing was filed with the DCCA on July 23, 2004, eight calendar days after Respondent's written determination was issued and accordingly, the Hearings Officer concludes that Petitioner's request for hearing was untimely.

Timeliness of Bid Submission

Petitioner contends that its bid should have been deemed timely received pursuant to the "mail box rule", which provides that acceptance is effective upon a timely and proper mailing. The Hearings Officer concludes that the "mail box rule" is not applicable in this case because it is clear that Respondent required that the bids be received by 2:00 p.m. on June 23, 2004.

It is not disputed that Petitioner's bid arrived 32 minutes after the bid deadline. Hawaii Administrative Rules § 3-122-16.08(b) states:

[1] Requests for hearing received by facsimile transmission are considered to be courtesy copies and no action is taken by DCCA unless and until an original is received.

> § 3-122-16.08 Late bid or proposal, late withdrawal, and late modification.
>
> . . .
>
> (b) A late bid or proposal or late modification will not be considered for award and shall be returned to the offeror unopened as soon as practicable, accompanied by a letter from the procurement activity stating the reason for its return[.]

Petitioner contends that its bid should be considered because it did everything possible to ensure that the bid was delivered by 2:00 p.m. on June 23, 2004. However, Petitioner has not cited any statute, rule or legal authority which would give Respondent the discretion to consider late bids, even assuming there would be no prejudice to the other bidders. Accordingly, the Hearings Officer concludes that Respondent acted properly by not considering Petitioner's bid.

IV. FINAL ORDER

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

IT IS HEREBY ORDERED that the above-entitled matter is dismissed.

DATED: Honolulu, Hawaii, AUG 18 2004.

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