DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2005 OCT -6 P 1:36

HEARINGS OFFICE

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

In the Matter of	)	PCH-2005-4
	)	
CULTURAL SURVEYS HAWAII, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND ORDER GRANTING
vs.	)	RESPONDENT'S MOTION
	)	TO DISMISS REQUEST
DEPARTMENT OF LAND AND	)	FOR HEARING
NATURAL RESOURCES,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	
	)	

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

I. INTRODUCTION

On June 28, 2005, Cultural Surveys Hawaii, Inc. ("Petitioner"), filed a request for administrative review of the Department of Land and Natural Resources, State of Hawaii's ("Respondent") June 21, 2005 decision to deny Petitioner's December 13, 2004 protest in connection with a project designated as RFP-AK04-01, "Services to Develop a Cultural Resource Management Plan for Ahihi-Kinau Natural Area Reserve and Keoneoio." Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On August 22, 2005, Respondent filed the instant motion to dismiss Petitioner's request for hearing. On August 31, 2005, the motion came before the undersigned Hearings Officer; Pamela K. Matsukawa, Esq. appearing for Respondent and Marshall D. Chinen, Esq. appearing for Petitioner.

Having reviewed and considered the motion, memoranda, declarations and exhibits attached thereto along with the argument of counsel, the Hearings Officer hereby renders the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. On September 7, 2004, Respondent issued a request for proposals ("RFP") in connection with a project designated as RFP-AK04-01, "Services to Develop a Cultural Resource Management Plan for Ahihi-Kinau Natural Area Reserve and Keoneoio." ("Project").

2. The RFP provided that sealed offers would be received up to 2:00 p.m. on October 15, 2004, at the Division of Forestry and Wildlife, Maui Branch Office, 54 South High Street, Wailuku, Hawaii 96793.

3. On the morning of October 15, 2004, a representative of Petitioner telephoned Matt Ramsey ("Ramsey"). Ramsey is a Natural Area Reserve Specialist III for Respondent's Division of Forestry and Wildlife.

4. Petitioner's representative requested an extension of time to Monday, October 18, 2004, to submit it proposal.

5. Ramsey informed Petitioner's representative that if Petitioner delivered a letter of intent to submit a proposal on October 15, 2004, Petitioner could submit its proposal on October 18, 2004.

6. Petitioner submitted its letter of intent to Respondent on October 15, 2004 as directed by Ramsey.

7. A total of six proposals were submitted to Respondent in response to the RFP by October 15, 2004.

8. Petitioner submitted its proposal on October 18, 2004.

9. No addendum was issued by Respondent changing the deadline for the submission of proposals from October 15, 2004 to October 18, 2004. Nor were the other offerors otherwise notified of an extension of the submission deadline to October 18, 2004.

10. On November 15, 2004, Ramsey notified Petitioner of Respondent's intent to award the contract for the Project to Petitioner as the first-ranked offeror. However, on December 6, 2004, another offeror objected to Respondent's intent to award the contract to Petitioner on the basis that Petitioner's proposal had been submitted late.

11. On December 6, 2004, Ramsey cancelled the intent to award the contract to Petitioner and resolicited the RFP. On December 13, 2004, Ramsey withdrew the resolicitation in order to award the contract to the second-ranked offeror.

12. On December 13, 2004, Petitioner protested Respondent's decision to award the contract to the second-ranked offeror.

13. On June 21, 2005, Respondent denied the protest.

14. On June 28, 2005, Petitioner filed the instant request for administrative review.

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.

The salient facts are not in dispute. In September 2004, Respondent issued the RFP. The RFP required that proposals be submitted by October 15, 2004. On October 15, 2004, a representative of Petitioner telephoned Ramsey and requested an extension to October 18, 2004 to submit its proposal. Ramsey agreed to the request and on October 18, 2004, Petitioner submitted its proposal. No addendum was issued by Respondent changing the deadline for the submission of proposals to October 18, 2004.

Petitioner does not dispute that Ramsey lacked the actual authority to grant the extension. Instead, Petitioner contends that its proposal would have been timely but for Ramsey's "mishandling" of the request by agreeing to the extension and failing to properly amend the RFP to reflect the extension. Therefore, according to Petitioner, its proposal

cannot be deemed late. Petitioner's argument is based on the lateness exception set forth in Hawaii Administrative Rules ("HAR") §3-122-16.08(a) which states:

> Late bid or proposal, late withdrawal, and late modification.
> (a) Any notice of withdrawal, notice of modification of a bid or proposal with the actual modifications, or any bid or proposal is late when received at the place designated for receipt and opening of an offer after the established due date, additionally defined in section 3-122-16.06(a), *except when received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity*

(Emphasis added).

Respondent, on the other hand, argues that the exception is not applicable where the action of personnel within the procurement activity would otherwise violate the provisions of and safeguards provided by HRS Chapter 103D and its implementing rules. Respondent correctly points out that the granting of the extension by Ramsey violated HAR §3-122-16.06 which, among other things, requires that an addendum be issued to the other offerors for amendments involving material changes to the solicitation.[1]

In construing HRS Chapter 103D and its implementing rules, the foremost obligation is to ascertain and give effect to the intention of the Legislature which is to be construed primarily from the language of the statute itself. The language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose. *Hawaii Newspaper Agency, et. al v. State Dept. of Accounting & General Services, PCH 99-2; Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-3 (April 16, 1999)(Consolidated).* Clearly, the application of the lateness exception here would circumvent the safeguards put in place by HAR §3-122-16.06[2] and provide Petitioner with an unfair advantage over the other offerors - three additional days to prepare its proposal. Such a result could not have been intended by the Procurement Policy Board in promulgating HAR

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[1] Petitioner does not dispute that HAR §3-122-16.06 required Respondent to issue an addendum to the RFP in order to properly grant the requested extension.

[2] HAR §3-122-16.06(b)(2) requires the issuance of an addendum to the solicitation prior to the submission of offers in order to "[f]urnish to other offerors information given to one offeror if the information will assist the other offerors in submitting offers or if the lack of the information would prejudice the other offerors."

§3-122-16.08. On the contrary, the purpose of the exception[3] is to insure for the government the benefits of the maximum of *legitimate* competition, not to give one offeror a wholly unmerited advantage over another by an over-technical application of the rule. Accordingly, the Hearings Officer concludes that the lateness exception set forth in HAR §3-122-16.08(a) is inapplicable where, as here, the action of personnel within the procurement activity would otherwise violate the provisions of HRS Chapter 103D or its implementing rules.[4]

Alternatively, Petitioner contends that Respondent should be equitably estopped from claiming that Petitioner's proposal was late. While it is generally true that equitable estoppel may be applied to prevent manifest injustice, the supreme court has held that the application of equitable estoppel against the government is not favored and that estoppel cannot be applied to actions for which the agency or agent of the government has no authority. *Turner v. Chandler, 87 Hawaii 330 (1998); Filipo v. Chang, 62 Hawaii 626 (1980)*. Petitioner contends, however, that Respondent's failure to amend the solicitation to properly provide for the extension is an act "improper for some reason in their execution" rather than an ultra vires act. The former refers to the irregular use of *granted power* (which may be estopped) while the latter refers to the lack of power (which is ultra vires and cannot be estopped). Here, the undisputed facts make clear that Ramsey did not have the authority

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[3] HAR §3-120-1 provides that, "the purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods and services, and the construction of public works for the State and counties, by:

* * * *

> (4) Ensuring the fair and equitable treatment of all persons who deal with the procurement of the State and counties;
>
> * * * *
>
> (6) Fostering effective broad-based competition within the free enterprise system;
>
> (7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and
>
> (8) Increasing public confidence in the procedures followed in the public procurement.

[4] It seems more reasonable that an individual should occasionally suffer from the mistakes of public agents or officials than to adopt a rule which might allow a party to circumvent the safeguards provided in HRS Chapter 103D and its implementing rules to protect the integrity of the procurement system.

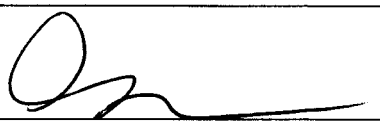
to grant the extension, by amendment or otherwise. Thus, Ramsey's action can only be construed as ultra vires and as such, cannot be the basis for equitable estoppel.

Finally, Petitioner alleges that Ramsey had the apparent authority to grant Petitioner's extension request. Apparent authority arises when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have. The critical focus is not on the principal and agent's intention to enter into an agency relationship, but on whether a third party relies on the *principal's conduct* based on a reasonable belief in the existence of such a relationship. *State Farm Fire and Cas. Co. v. Pacific Rent-All, Inc., 90 Hawai'i 315, 978 P.2d 753 (1999); Cho Mark Oriental Food v. K & K Int'l, 73 Hawaii 509 (1992).* The only evidence offered by Petitioner to establish that Respondent had clothed Ramsey with the authority to grant the extension is the allegation that Petitioner "was specifically directed to contact Ramsey." Even if true, however, that assertion alone cannot constitute a sufficient showing that *Respondent's conduct reasonably* led Petitioner to believe that Ramsey had the authority to grant the extension.[5] Therefore, the Hearings Officer can only conclude that if this matter went to hearing, there would be no competent evidence to support a decision for Petitioner. *Hall v. State, 756 P.2d 1048 (1988)(moving party is entitled to judgment as a matter of law because the nonmoving party failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof).*

IV. ORDER

Based on the foregoing findings and conclusions, Respondent's motion to dismiss Petitioner's request for hearing is granted and this matter is hereby dismissed.

Dated at Honolulu, Hawaii: OCT - 6 2005



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

[5] This conclusion is buttressed by the principle that when dealing with agents of the state, one is presumed to have knowledge of the agent's power and authority, and when one deals with them in a manner not in compliance with the law one does so at one's peril. *Barendregt v. Walla Walla School District, No. 140, 611 P.2d 1385 (1980).*