*** * * FOR PUBLICATION * * ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

NIHI LEWA, INC., Petitioner-Appellant,

vs.

DEPARTMENT OF BUDGET AND FISCAL SERVICES,
CITY AND COUNTY OF HONOLULU, Respondent-Appellee.

NO. 23047

ORIGINAL PROCEEDING
(PCH-99-13)

DECEMBER 12, 2003

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ., AND
CIRCUIT JUDGE BLONDIN, ASSIGNED BY REASON OF
VACANCY; ACOBA, J., DISSENTING

OPINION OF THE COURT BY MOON, C.J.

Petitioner-appellant Nihi Lewa, Inc. (Nihi Lewa) seeks judicial review of the December 17, 1999 dismissal order of the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, which denied Nihi Lewa's request for administrative review. Nihi Lewa contends that the hearings officer erred in (1) dismissing its request for review as untimely under Hawai'i Revised Statutes (HRS) § 103D-712(a) (Supp. 1999)[1] and (2) finding that it lacked jurisdiction over the matter because Nihi Lewa had failed to file its request

[1] Quoted infra. See Section III. Discussion.

directly with the Office of Administrative Hearings (hearings office). For the reasons discussed below, we affirm the order of dismissal.

I. BACKGROUND

Respondent-appellee Department of Budget and Fiscal Services, City and County of Honolulu (the purchasing agency) apparently advertised job number 11-99, contract number F-96730, Waipahu Wastewater Pump Station Modifications (the contract) for public bid. On October 28, 1999, the sealed bids submitted for the contract were opened. RCI Environmental, Inc. (RCI) submitted the lowest "basic bid" at $5,027,645.50. Nihi Lewa submitted the second lowest "basic bid" at $5,364,835.00.

On November 2, 1999, Nihi Lewa filed a protest with Roy K. Amemiya, Jr., the director of the purchasing agency (director). Therein, Nihi Lewa complained that the value of RCI's plumbing work was greater than one percent of its total bid and that, therefore, RCI was required to list a "C-37 licensed plumber." Because RCI failed to list such a plumber, Nihi Lewa asserted that RCI's bid should have been rejected. Cf. Okada Trucking Co., Ltd. v. Board of Water Supply, 97 Hawai'i 450, 460-62, 40 P.3d 73, 83-85 (2002) (explaining that, pursuant to HRS § 444-9 (1993), a general contractor may not perform specialty plumbing work without a proper license).

In a letter, dated November 23, 1999, the director denied Nihi Lewa's protest. The letter was sent via certified

mail, return receipt requested, and the envelope was postmarked November 29, 1999. Nihi Lewa's president signed for and received the denial letter on December 2, 1999.

On December 3, 1999, Nihi Lewa hand-delivered a request for an administrative hearing (the request) to the purchasing agency's director. By letter dated December 6, 1999, the purchasing agency transmitted the request to the hearings office, which was received on December 8, 1999. A pre-hearing conference was scheduled for December 17, 1999, and the hearing was scheduled for December 21, 1999.

Approximately forty-five minutes before the pre-hearing conference was scheduled to commence, the hearings officer dismissed Nihi Lewa's request for administrative review on two grounds. First, the hearings officer determined that the request had been sent to the incorrect office:

> [The] mandatory language in the statute is clear as to the time, place, and manner of filing requests for administrative review - such as that attempted by [Nihi Lewa]. The record, however, is equally clear that [Nihi Lewa] has not complied with the requirement that such requests "shall be made directly to the office of administrative hearings[.]"

(Emphasis in original.) Second, he concluded that the appeal was untimely:

> [T]he request was not made within the seven calendar days required by that statute [(HRS § 103D-712(a))]. The record reflects that the [purchasing agency] issued its decision denying [Nihi Lewa's] protest on November 23, 1999, and yet the . . . **request was not made until 10 days later** on December 3, 1999. Once again, the statute is clear in requiring that such requests be made "within seven calendar days of the issuance of a written determination" rather than specifying either the date of mailing or date of receipt to be the time from which the seven calendar days begins to run.

(Underscored emphasis in original.) (Bold emphasis added.) (Citations omitted.)

On December 21, 1999, Nihi Lewa filed a motion to set aside the dismissal and requested a new hearing. By letter dated December 23, 1999, the hearings officer denied the motion on the ground that the hearings office lacked jurisdiction over the matter, stating: "it is questionable whether this forum now has jurisdiction to hear your current motion in a case that has already been dismissed." (Emphasis in original.) On December 23, 1999, Nihi Lewa filed an application for judicial review with this court.

It is undisputed that the contract was eventually awarded to RCI.

II. STANDARD OF REVIEW

When reviewing decisions of an administrative hearings officer based upon Hawaii's Public Procurement Code, the appellate standard of review is governed by HRS § 103D-710(e) (1993). HRS § 103D-710(e) provides:

> Upon review of the record the court may affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> Furthermore, conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and the Hearings Officer's exercise of discretion under subsection (6). Accordingly, a reviewing court will reverse a Hearings Officer's finding of fact if it concludes that such...finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. On the other hand, the Hearings Officer's conclusions of law are freely reviewable.

Southern Foods Group, L.P. v. State, 89 Hawai'i 443, 452, 974 P.2d 1033, 1042 (1999) (brackets and citations omitted).

III. DISCUSSION

HRS § 103D-712(a) provides that "[r]equests 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." (Emphases added.) Nihi Lewa contends that "the 'issuance' date of the agency's decision intended by the Legislature [is] the date of receipt." (Emphasis added.) The purchasing agency asserts that the date of "issuance" should be construed as meaning, at the latest, the

date on which the decision was mailed.[2] We agree with the purchasing agency.

Generally, this court is required to construe the words of a statute according to "their most known and usual signification[.]" HRS § 1-14 (1993). A standard dictionary definition of the term "issuance" notes that the term refers to "the act of issuing." The Random House College Dictionary 710 (rev'd ed. 1975). In turn, the primary definition of "issue" is "the act of sending out or putting forth; promulgation; distribution." Id. This general definition of the relevant term also comports with the meaning of the term as it is technically used in the law. See Black's Law Dictionary 830 (6th ed. 1990) (Giving as its first definition: "To send forth; to emit; to promulgate; as, an officer issues orders, process issues from a court.").

HRS § 103D-712(a) establishes the "date of issuance" as the triggering mechanism that starts the clock running on the time for filing a request for administrative review. However, in the absence of a precise definition, it is unclear as to when the written determination should be considered to have been "sent forth, promulgated or distributed." The date of issuance could

---

[2] Specifically, the purchasing agency argues:

> The decision was "issued" when it was made final and signed or at latest, the decision was "issued" when it was sent out. Certainly, at that point in time, the decision was finally made. The record indicates that the decision was postmarked on November 29, 1999. Therefore, at latest, the decision was "issued" on that day.

reasonably be understood to mean the date on which the written determination is finalized and adopted, the date on which it is rendered public, or the date on which it is mailed to the affected parties. Given this ambiguity, it is appropriate to resort to extrinsic aids in order to ascertain and give effect to the intention of the Legislature. This does not mean, however, that, in construing a disputed term, we should lightly disregard the ordinary meaning that attaches to it. See Keliipuleole v. Wilson, 85 Hawai‘i 217, 221, 941 P.2d 300, 304 (1997) ("Words are given their common meaning unless some wording in the statute 'requires a different interpretation.'" (quoting Saranillio v. Silva, 78 Hawai‘i 1, 10, 889 P.2d 685, 694 (1995) (citing Ross v. Stouffer Hotel Co. (Hawaii), Ltd., 76 Hawai‘i 454, 461, 879 P.2d 1037, 1044-45 (1994)) (emphasis added)). Nor can we, under the guise of applying standard rules of statutory construction, thwart the intent of the Legislature.

It is well-settled that, when faced with the task of interpreting ambiguous statutory language, this court should "accord persuasive weight to the construction given words of broad and indefinite meaning by the agency charged with the responsibility of carrying out the mandate of the statute in question, unless the construction is palpably erroneous." Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 733 (1983) (citing Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 424, 653 P.2d 420, 426 (1982)); see also In re Water Use Permit Applications,

94 Hawai'i, 144-45 & n.44, 9 P.3d 409, 456-57 & n.44 (2002). The United States Supreme Court acknowledged as much in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), when it recognized that "the Commission has considerable administrative discretion to decide when an order may fairly be deemed to have issued."[3] Skelly Oil Co., 339 U.S. at 676.

In the instant case, the hearings officer utilized November 23, 1999 -- the date of the denial letter -- as the triggering date for calculating the prescribed period. In our view, construing "issuance" to mean the date of the denial letter is palpably erroneous inasmuch as the prescribed period could conceivably expire before a written determination is made public. More to the point, however, is that such a construction would be, pursuant to the reasoning in Skelly Oil Co., unconstitutional. Thus, as a matter of law, the date of issuance cannot be interpreted as meaning the date on which a written determination is signed by the director.

On appeal, Nihi Lewa maintains that "issuance" is merely a synonym for "receipt." We disagree. The two concepts designated by these terms (i.e., to send and to receive) are distinct, denoting the beginning and end points of the delivery process. We are, instead, persuaded by the purchasing agency's

[3] We note that the Commission's own Rules of Practice and Procedure provided that: "In computing any period of time involving the date of issuance of an order by the Commission, the day of issuance of an order shall be the day the Office of the Secretary mails or delivers copies of the order (full text) to the parties or their attorneys of record, or makes such copies public, whichever be the earlier." Skelly Oil Co., 339 U.S. at 676 n.1.

interpretation that "issuance" means the date of mailing, as evidenced by the postmark date. Such interpretation is consistent with the ordinary meaning of the term and more accurately reflects the Legislature's intent. The legislative history supports the conclusion that the Legislature intended the time for filing to start at the beginning, rather than the end, of the delivery process because it expressly utilized the term "issuance" rather than the term "receipt." The applicable provision of the American Bar Association's Model Procurement Code for State and Local Governments (Model Code) (February 1979) specifically suggests that the relevant time period be measured from the date of "receipt." Model Code § 9-506(2)(b) ("the aggrieved person shall file an appeal within [seven] days of receipt of a decision") (brackets in original) (emphasis added). The Hawai'i Public Procurement Code is based, in part, on the Model Code. See Stand. Comm. Rep. S8-93, in 1993 Senate Journal, at 39. However, instead of merely replicating the language from the Model Code, as it had done elsewhere, the Legislature drafted a substantively different statute that makes the date of issuance the operative date. Based upon the differences between the Model Code and HRS § 103D-712, one may reasonably infer that the Legislature considered establishing the date of receipt as an appropriate triggering mechanism, but ultimately rejected this alternative in favor of the date of issuance.

It was within the prerogative of the Legislature to decide that the time for filing a request for administrative review should begin running sooner rather than later. The overall framework of the Hawai‘i Public Procurement Code indicates that the Legislature intended to create an expeditious process for resolving disputes over the awarding of contracts. See Carl Corp. v. State, 85 Hawai‘i 431, 453, 946 P.2d 1, 24 (1997) ("the [Procurement] Code both shortens deadlines for filing protests and applications for review and expedites the administrative hearings process"). Under most circumstances, public projects cannot proceed while a protest is pending. See HRS § 103D-709(e) (1993) ("No action shall be taken on . . . an award of a contract while a proceeding is pending[.]"). Given that disputes over the award of contracts will necessarily result in delays that will affect public works and, given that the Legislature expressed a clear intent to expedite the process by which such disputes are resolved, "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it," HRS § 1-15 (1993), support the purchasing agency's construction of the term "issuance" to mean the date on which a written determination is mailed, as evidenced by the postmark. Using the date of mailing as the triggering mechanism (1) creates an easily verifiable way of establishing the filing deadline (i.e., counting from the date of postmark), (2) reduces the potential for delay that might arise if the party authorized to receive the

written determination is unavailable when actual delivery is made, and (3) is in harmony with other provisions of the legislative scheme. See, e.g., Hawai‘i Administrative Rules § 3-126-74 (providing that service of a hearings officer's decision "shall be deemed complete upon its mailing to the party's last known address").

Moreover, it is well-settled that "[s]tatutory construction dictates that an interpreting court should not fashion a construction of statutory text that . . . creates an absurd or unjust result." Dines v. Pacific Ins. Co., Ltd., 78 Hawai‘i 325, 337, 893 P.2d 176, 188 (1995) (citation omitted). The facts of this case do not indicate that construing the term "issuance" to mean the date of mailing, as evidenced by the postmark, leads to an absurd or unjust result.

The record in this case clearly reflects that the letter denying Nihi Lewa's protest was dated November 23, 1999 and mailed on November 29, 1999, as evidenced by the postmark. Thus, Nihi Lewa's request for an administrative hearing was required to be filed with the hearings office no later than December 6, 1999. The record also indicates that Nihi Lewa received a copy of the denial letter on December 2, 1999 -- four days before the request for review would have been due. Although Nihi Lewa's written request was hand-delivered on December 3, 1999, it was presented to the purchasing agency rather than the hearings office, in direct contravention of HRS § 103D-712(a).

In turn, the hearings office did not receive the request until December 8, 1999. Thus, it appears that the untimeliness of Nihi Lewa's request has less to do with the date on which Nihi Lewa received the denial letter and more to do with Nihi Lewa's failure to comply with the filing mandate of the statute. Clearly, had the December 3, 1999 request been filed directly with the hearings office instead of the purchasing agency, it would have been timely. In our view, construing "issuance" to mean "date of mailing" does not lead to an absurd or unfair result merely because such an interpretation reduced the amount of time in which it was possible to correct an oversight that could easily have been avoided.

Based on the foregoing, we hold that the term "issuance" as used in HRS § 103D-712(a) means the date of mailing, as evidenced by the postmark. Because Nihi Lewa's request was not received by the proper office until two days after the December 6 deadline, the request was untimely. Consequently, we need not address Nihi Lewa's second contention on appeal.

IV. CONCLUSION

In light of the above, we affirm the hearings officer's December 17, 1999 order of dismissal. See Agsalud v. Lee, 66 Haw. 425, 430, 664 P.2d 734, 738 (1983) ("'Where the decision below is correct it must be affirmed by the appellate court

though the lower tribunal gave a wrong reason for its action.'"

(Citations and internal brackets omitted.)).

On the briefs:

David F. E. Banks and
Marc E. Rousseau (of
Cades Schutte Fleming &
Wright), for petitioner-
appellant

Cynthia M. Nojima,
Deputy Corporation Counsel,
for respondent-appellee