

The parties filed a series of motions that covered the majority of the issues in this matter.

A. The DOE's Motion on Robert's Bond

Included with the Robert's RFAH when filed were an executed Procurement Protest Bond and a cashier's check in the amount of \$1,000.00 payable to the Department of Commerce and Consumer Affairs.

On October 9, 2013, the DOE filed a Motion to Dismiss Appeal, asserting that Robert's bond was insufficient. On October 15, 2013, Robert's filed its Reply to the DOE's Motion to Dismiss Appeal.

The DOE's Motion to Dismiss Appeal came on for hearing before the undersigned Hearings Officer on October 17, 2013. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq. Robert's was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq.

At the conclusion of oral argument on the Motion, the Hearings Officer orally ruled that the Motion was denied. A written order denying the Motion was filed October 28, 2013, that more fully sets forth that ruling and stands as the formal order with respect to the DOE's Motion to Dismiss Appeal. A copy of the written order is attached hereto as Exhibit "A," and is incorporated by reference.

B. Robert's Motion on the Automatic Stay

On October 7, 2013, Robert's filed its Motion for Partial Summary Judgment on HRS §103D-709(g) Stay. On October 15, 2013, the DOE filed its Respondents' Memorandum in Opposition to Petitioner Robert's Hawaii School Bus, Inc.'s Motion for Partial Summary Judgment on HRS §103D-709(g).

Robert's Motion for Partial Summary Judgment came on for hearing before the undersigned Hearings Officer on October 17, 2013. Robert's was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq.

At the conclusion of oral argument on the Motion, the Hearings Officer orally ruled that the Motion was denied. A written order denying the Motion was filed October 28, 2013, that more fully sets forth that ruling and stands as the formal order with respect to Robert's Motion. A copy of the written order is attached hereto as Exhibit "B" and is incorporated by reference.

C. Robert's Motion on Addendum No. 1

On October 9, 2013, Robert's filed its Motion for Partial Summary Judgment that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.6(a)(1). On October 15, 2013, the DOE filed Respondents' Memorandum in Opposition to Petitioner Robert's Hawaii School Bus, Inc.'s Motion for Partial Summary Judgment that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.06(a)(1).

Robert's Motion for Partial Summary Judgment came on for hearing before the undersigned Hearings Officer on October 17, 2013. Robert's was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq.

At the conclusion of oral argument on the Motion, the Hearings Officer orally ruled that the Motion was denied. In addition, the Hearings Officer, *sua sponte*, granted summary judgment to the DOE dismissing Robert's claim that RFP Addendum No. 1 Fails to Satisfy

HAR §3-122-16.06(a)(1). A written order denying Robert's Motion and granting summary judgment to the DOE was filed October 28, 2013, and more fully sets forth that ruling and stands as the formal order with respect to the claim that Addendum No. 1 fails to satisfy HAR §3-122-16.06(a)(1). A copy of the written order is attached hereto as Exhibit "C" and is incorporated by reference.

D. Dismissal of the Issue About Use of the RFP Method of Procurement Because it was Untimely Raised

At the prehearing conference on October 9, 2013, the Hearings Officer raised the question of whether a portion of the RFAH was timely filed. In particular, the Hearings Officer was concerned with Robert's claim that "the DOE has not justified issuing an RFP rather than an IFB" that can be found at pages 9-11 of the RFAH. The Hearings Officer established a schedule for briefing the issue of the timeliness of this claim.

In accord with this schedule, both Robert's and the DOE filed supplemental briefs on October 11, 2013. Also in accord with this schedule, on October 16, 2013, the DOE filed a response to Robert's supplemental brief. Robert's chose not to file a response to the DOE's supplemental brief.

In its supplemental brief, at page 3, the DOE also asserted that Robert's did not timely raise the issue that the RFP's evaluation criteria failed to consider findings in a November 2012 Student Bus Transportation Study Final Report prepared by Management Partnership Services, Inc. ("MPS Audit Report"). Robert's claim regarding the MPS Audit Report is raised on page 9 of its RFAH.

The two timeliness issues came on for hearing before the undersigned Hearings Officer on October 17, 2013. Robert's was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq.

At the conclusion of oral argument on the timeliness issues, the Hearings Officer orally ruled that Robert's claims regarding the use of the RFP method of procurement and regarding the lack of consideration of the MPS Audit Report were not timely filed and should therefore be dismissed. A written order dismissing the two claims as untimely was filed October 28, 2013, and more fully sets forth that ruling and stands as the formal order with respect to the dismissal of those two claims. A copy of the written order is attached hereto as Exhibit "D" and is incorporated by reference.

E. Disposition of All Other Issues

The motions referred to above did not result in the dismissal of all issues raised by the RFAH. On October 17, 2013, the parties stipulated that the first issue on page 4 of the RFAH involving the lack of a summary of a mandatory conference was moot given the ruling on Robert's motion regarding the HRS §103D-709(g) stay.

On October 15, 2013, the Hearings Officer also concluded that issue 3(d) on page 8 of the RFAH had already been decided adversely to Robert's.

An evidentiary hearing was set for October 18, 2013, on all remaining issues in the RFAH. At the beginning of the evidentiary hearing on October 18, 2013, Robert's withdrew all remaining issues in its RFAH that had not been decided in the motions heard October 17, 2013.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

The Findings of Fact contained in Exhibits "A" through "D" attached hereto are incorporated herein and adopted by reference.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

The Conclusions of Law contained in Exhibits “A” through “D” attached hereto are incorporated herein and adopted by reference.

IV. ORDER


Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. The DOE’s Motion to Dismiss Appeal is denied.
- b. Robert’s Motion for Partial Summary Judgment on HRS §103D-709(g) Stay is denied.
- c. Robert’s Motion for Partial Summary Judgment that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.06(a)(1) is denied.
- d. Partial Summary Judgment is granted to the DOE dismissing Robert’s claim that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.06(a).
- e. Robert’s claims that (1) the DOE has not justified issuing an RFP rather than an IFB and (2) the RFP evaluation criteria fail to consider the Findings of the MPS Audit Report are dismissed for lack of jurisdiction because they were untimely filed.
- f. All other issues in Robert’s Request for Administrative Hearing have either been decided adversely to Robert’s or have been withdrawn by Robert’s. See Section I (E) above.
- g. Robert’s Request for Administrative Hearing herein is dismissed with prejudice.

h. Because a bond was not necessary in this case, Robert's \$1,000.00 bond shall be returned to Robert's upon the filing of a declaration by Robert's or its counsel attesting that the time to appeal has lapsed and that no appeal on the issue of a lack of a sufficient bond has been timely filed. In the event of a timely application for judicial review of the decision herein that raises the issue of the lack of a sufficient bond, the disposition of the bond shall be subject to determination by the court.

i. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, October 29, 2013.


DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs



DEPT. OF COMMERCE
TO CONSUMER AFFAIRS

2013 OCT 28 A 9 01

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

In the Matter of	)	PDH-2013-009
)	
ROBERT'S HAWAII SCHOOL BUS, INC.,	)	ORDER DENYING KATHRYN S.
	)	MATAYOSHI'S, in her capacity as
Petitioner,	)	SUPERINTENDENT OF THE
	)	DEPARTMENT OF EDUCATION,
vs.	)	MOTION TO DISMISS APPEAL
)	
KATHRYN S. MATAYOSHI, in her capacity	)	Senior Hearings Officer:
as SUPERINTENDENT OF THE	)	David H. Karlen
DEPARTMENT OF EDUCATION, STATE)	
OF HAWAII; JOHN DOES 1-5; JANE DOES)	
1-5; DOE PARTNERSHIPS 1-5; DOE)	
CORPORATIONS 1-5; DOE)	
ASSOCIATIONS 1-5; DOE)	
GOVERNMENTAL UNITS 1-5; DOE)	
TRUSTS 1-5; AND DOE ENTITIES 1-5,)	
)	
Respondent.)	

**ORDER DENYING KATHRYN S. MATAYOSHI'S, in her capacity as
SUPERINTENDENT OF THE DEPARTMENT OF EDUCATION,
MOTION TO DISMISS APPEAL**

I. INTRODUCTION

Petitioner Robert's Hawaii School Bus, Inc. ("Robert's" or "Petitioner") filed a Request for Administrative Hearing ("RFAH") in this matter on September 25, 2013. Included with this Request when filed were an executed Procurement Protest Bond and a cashier's check in the amount of \$1,000.00 payable to the Department of Commerce and Consumer Affairs.

EXHIBIT "A"

On October 9, 2013, Respondent Kathryn S. Matayoshi, in her capacity as Superintendent of the Department of Education (“DOE” or “Respondent”) filed a Motion to Dismiss Appeal. On October 15, 2013, Robert’s filed its Reply to the DOE’s Motion to Dismiss Appeal.

The DOE’s Motion to Dismiss Appeal came on for hearing before the undersigned Hearings Officer on October 17, 2013. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq. Robert’s was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq.

At the conclusion of oral argument on the Motion, the Hearings Officer orally ruled that the Motion was denied. This Order, based on the record as of the conclusion of oral argument on October 17, 2013, more fully sets forth that ruling and stands as the formal order with respect to the DOE’s Motion to Dismiss Appeal.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On July 19, 2013, the DOE issued its Request for Proposals RFP D13-010 for Student Transportation Services (“RFP”). Proposals were to be submitted by 2:00 p.m. on October 4, 2013.

2. On August 19, 2013, the DOE issued Addendum 1 to the RFP. Addendum 1 did not change the date by which proposals were to be submitted.

3. By letter dated August 26, 2013, Robert’s submitted to the DOE its Protest of the RFP.

4. By letter dated September 18, 2013, the DOE denied Robert’s Protest of the RFP.

DOE

5. On September 25, 2013, Robert's filed its RFAH herein appealing the denial of its Protest of the RFP. At the same time, Robert's filed a Procurement Protest Bond and submitted a cashier's check in the amount of \$1,000.00 (One Thousand and No/100 Dollars) payable to the Department of Commerce and Consumer Affairs.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

The DOE's Motion to Dismiss Appeal is based on HRS §103D-709, the DOE alleging that Robert's bond of \$1,000.00 was insufficient. The DOE asserts that a bond in the amount of \$10,000.00 was required.

Robert's RFAH contained a section devoted to an attempt to justify the amount of its bond. In its Reply to the DOE's Motion, however, Robert's took the position that no bond was required because its protest concerned the terms of the RFP, it had not yet submitted an offer in response to the RFP, and its protest was submitted before the deadline for submitting offers.

The scope of the Department of Commerce and Consumer Affairs' ("DCCA") jurisdiction to hear and decide an administrative review of a procurement decision is set forth in HRS §103D-709(a), which provides that:

- (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.
(Emphasis supplied)

On June 27, 2012, Governor Neil Abercrombie signed into law HB2265 HD2 SD2 CD1, now known as Act 173 of the 2012 Legislature. Act 173 modified subsections (d) and (e) of HRS §103D-709 to read as follows:

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or

(2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

(e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

(1) \$1,000 for a contract with an estimated value of less than \$500,000;

(2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or

(3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

Act 173 also added HRS §103D-709(j) which states as follows:

(j) 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 writing to be the most advantageous under section 103D-303, as applicable.

In Soderholm Sales and Leasing, Inc. vs. Department of Budget and Fiscal Services, City and County of Honolulu, PDH 2012-005 (November 30, 2012), pages 8-9, the Hearings Officer ruled the a bond was not required to be filed with the protest of an invitation for bids

when the protest concerned the contents of the solicitation and was filed prior to the opening of bids. In summary, the decision stated that since no bids had been opened it was impossible to determine what the “estimated value of the contract” or the “estimated value” is, as those terms were defined by HRS §103D-709(j), and, therefore, no bond amount could be determined. It followed that protests of the language of the solicitation, which were still specifically allowed by the statute, did not require the posting of a cash or protest bond.

The same conclusion holds true where, as here, the protest involves the language of a solicitation for an RFP, and the protest was filed before offers in response to the RFP were opened.

Since the “estimated value” cannot be determined, it also follows that the requirements of HRS §103D-709(d) concerning a minimum amount in controversy also do not apply to protests of the language of solicitation filed before proposals were submitted.

To the same effect is the decision in Maui County Community Television, Inc. dba Akakua Maui Community Television vs. Department of Accounting and General Services, State of Hawaii, PCX-2010-3 (July 9, 2010), pages 11-13, interpreting a statutory predecessor of Act 173 that was worded identically to Act 173. The previous statutory language had “sunsetting” as of June 30, 2011. One year later, the Legislature enacted Act 173 restoring the language in question. The OAH’s bid protest decisions are publicly available online, and the Legislature presumably endorsed the interpretation in Maui County Community Television when it did not change the language in question while enacting Act 173.

The DOE’s Motion alleges that the estimated value of the contract can be determined by a DOE estimate based on the average daily per bus cost under current contracts. Such an

estimate, however, does not fit the definition of estimated value adopted by the Legislature. Further, there is no evidence that an internal DOE estimate based on past contracts and not provided to any potential offeror has any predictive value insofar as what the amount of an actual offer might be. It would indeed be a risky business for State agencies to reveal their internal cost estimates before bids or offers are submitted. Thus, besides being contrary to the language of the statute, the DOE's proposed method of determining estimated value in this case is not practical and would actually be detrimental to State procurements if adopted on a general basis.

While the Hearings Officer does not fault the DOE for requesting that previous OAH rulings on the issue at hand be reconsidered and reversed, the Hearings Officer respectfully declines that request.

When a bond is not required, there is no basis for the Department of Commerce and Consumer Affairs to retain the cash bond filed by Robert's. However, to allow the DOE to preserve its position that the bond should be forfeited, the bond should be returned to Robert's under the same conditions that were imposed upon the return of a bond in the case of Derrick's Well Drilling Pump Services, LLC, v. County of Maui, Department of Finance, PDH-2012-001 (July 26, 2012).

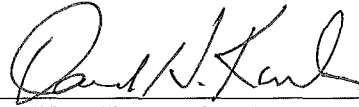
IV. ORDER

For the reasons set forth above, the DOE's Motion to Dismiss Appeal, filed herein on October 9, 2013, is hereby denied.

It is further ordered that Robert's cash bond shall be returned to Robert's upon the filing and service of a declaration by Robert's attesting that the time to appeal in this matter

has lapsed and that no appeal relating to the issues in the DOE's Motion to Dismiss has been timely filed. In the event a timely application for judicial review of this decision is filed, the disposition of the bond shall be subject to any determination by the court.

DATED: Honolulu, Hawaii, October 28, 2013.



DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2013 OCT 28 A 9:01

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

In the Matter of	)	PDH-2013-009
)	
ROBERT'S HAWAII SCHOOL BUS, INC.,	)	ORDER DENYING ROBERT'S HAWAII
	)	SCHOOL BUS, INC.'S MOTION FOR
Petitioner,	)	PARTIAL SUMMARY JUDGMENT ON HRS
	)	§103D-709(g) STAY
vs.)	
)	
KATHRYN S. MATAYOSHI, in her capacity	)	Senior Hearings Officer:
as SUPERINTENDENT OF THE	)	David H. Karlen
DEPARTMENT OF EDUCATION, STATE)	
OF HAWAII; JOHN DOES 1-5; JANE DOES)	
1-5; DOE PARTNERSHIPS 1-5; DOE)	
CORPORATIONS 1-5; DOE)	
ASSOCIATIONS 1-5; DOE)	
GOVERNMENTAL UNITS 1-5; DOE)	
TRUSTS 1-5; AND DOE ENTITIES 1-5,)	
)	
Respondent.)	

**ORDER DENYING ROBERT'S HAWAII SCHOOL BUS, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON HRS §103D-709(g) STAY**

I. INTRODUCTION

Petitioner Robert's Hawaii School Bus, Inc. ("Robert's" or "Petitioner") filed a Request for Administrative Hearing in this matter on September 25, 2013. By Notice of Hearing and Pre-Hearing Conference filed September 26, 2013, a pre-hearing conference was set for October 9, 2013.

On October 7, 2013, Robert's filed it Motion for Partial Summary Judgment on HRS §103D-709(g) Stay. Attached to this Motion were five exhibits.

EXHIBIT "B"

At the pre-hearing conference on October 9, 2013, the Hearings Officer informed Robert's that it had attached an incorrect document as Exhibit 5 to its Motion. The attached document did not correspond to the document described as Exhibit 5 in the text of Robert's Motion. At this pre-hearing conference, Robert's was given an opportunity to file and serve a copy of the correct Exhibit 5. Later that day, Robert's provided a copy of the correct document identified as Exhibit 5.

On October 15, 2013. Respondent Kathryn S. Matayoshi, in her capacity as Superintendent of the Department of Education ("DOE" or "Respondent") filed Respondents' Memorandum in Opposition to Petitioner Robert's Hawaii School Bus, Inc.'s Motion for Partial Summary Judgment on HRS §103D-709(g).

Robert's Motion for Partial Summary Judgment came on for hearing before the undersigned Hearings Officer on October 17, 2013. Robert's was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq.

At the conclusion of oral argument on the Motion, the Hearings Officer orally ruled that the Motion was denied. This Order, based on the record as of the conclusion of oral argument on October 17, 2013, more fully sets forth that ruling and stands as the formal order with respect to the DOE's Motion to Dismiss Appeal.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On July 19, 2013, the DOE issued its Request for Proposals RFP D13-010 for Student Transportation Services ("RFP"). Proposals were to be submitted by 2:00 p.m. on October 4, 2013.

2. On August 19, 2013, the DOE issued Addendum 1 to the RFP. Addendum 1 did not change the date by which proposals were to be submitted.
3. By letter dated August 26, 2013, Robert's submitted its Protest of the RFP to the DOE.
4. By letter dated September 18, 2013, the DOE denied Robert's Protest of the RFP.
5. On September 25, 2013, Robert's filed its Request for Administrative Hearing ("RFAH") with the Office of Administrative Hearings appealing the denial of its Protest of the RFP.
6. On September 30, 2013, Superintendent Kathryn S. Matayoshi approved a Determination of Substantial State Interest in Contracting Activity Relating to Request for Proposals RFP D13-010 for School Bus Services ("Determination of Substantial State Interest").
7. On October 1, 2013, the DOE issued Addendum 2 to the RFP.
8. On October 2, 2013, the DOE issued Addendum 3 to the RFP.
9. By letter dated October 2, 2013, and addressed to Superintendent Kathryn Matayoshi, Robert's demanded that the DOE retract Addenda Nos. 2 and 3 and cease taking any further procurement actions until its appeal to the Office of Administrative Hearings was resolved.
10. At the time Robert's prepared and delivered its letter of October 2, 2013, Robert's was unaware that Superintendent Matayoshi had approved the Determination of Substantial State Interest. The letter specifically, but mistakenly, asserts that "[t]he DOE has never issued a written determination stating that the contract should be awarded without delay or finding that there is any substantial interest of the State which prohibits delay."

11. The complaint in Robert's October 2, 2013 letter was about the issuance of Addenda Nos. 2 and 3. The complaint in the October 2, 2013 letter was not about approval or issuance of the Determination of Substantial State Interest.

12. By letter dated October 3, 2013, the Attorney General's office informed Robert's that all further communications regarding the protest should be directed to the Attorney General's office and that a response to the substance of Robert's October 2, 2013 letter would be forthcoming.

13. By letter dated October 4, 2013, the DOE, through the Attorney General's office, declined Robert's demand that it withdraw Addenda Nos. 2 and 3. Based on the Determination of Substantial State Interest, the DOE concluded that it could continue with procurement actions with respect to the RFP.

14. Robert's filed the instant Motion on October 7, 2013.

15. The basis of Robert's Motion is that the Determination of Substantial State Interest could not be made after Robert's timely appealed to the Office of Administrative Hearings by filing its RFAH:

After the stay goes into effect and the matter is appealed to the DCCA, neither HRS §103D-709 nor §701 allows a state agency to retroactively issue a written determination permitting the procurement to proceed. Rather, HRS §103D-709(g) is clear that once the matter is stayed, and once the matter is timely appealed to the DCCA, it must remain stayed during the pendency of the agency appeal.

Robert's Motion, filed October 7, 2013, at page 2.

III. CONCLUSIONS OF LAW

A. General Considerations

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. Reed v. City & County of Honolulu, 76 Haw. 219, 225, 873 P.2d 98, 104 (1994).

B. Lack of Jurisdiction

The essence of Robert's Motion is that HRS §103D-709(g) prohibits the DOE from issuing a Determination of Substantial State Interest (thus lifting the stay imposed by HRS §103D-701(f)) after Robert's filed its RFAH with the Office of Administrative Hearings. The DOE's first ground for opposing this motion asserts that Robert's failed to file a protest with the DOE concerning the alleged violation of HRS §103D-709(g).

The Hearings Officer's jurisdiction is limited by HRS §103D-709(h), which provides:

The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no

room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer.

The issue of the alleged violation of HRS §103D-709(g) was not first presented to the DOE's chief procurement officer or the designee of the DOE's chief procurement officer. Accordingly, the Hearings Officer has no jurisdiction to consider that issue.

The DOE's second ground of opposition to Robert's Motion is that Robert's is precluded from raising the issue of an alleged violation of HRS §103D-709(g) for the first time on appeal. This is another way of phrasing the DOE's first asserted ground of opposition to the Motion, and no separate discussion of this second ground is necessary.

C. Robert's Has No Basis for a Claimed Violation of HRS §103D-709(g)

Assuming solely for the sake of argument that the Hearings Officer does have jurisdiction to consider Robert's claim, Robert's cannot prevail on the merits of its claim.

Under the terms HRS §103D-709(f), all procurement activity for the RFP in question was to cease once the DOE received Robert's protest. That is what occurred in this case—there is no dispute on that point.

This statutory stay on procurement, however, is not absolute. Procurement activity is stayed “until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the State.” The Superintendent of the DOE is the DOE's chief procurement officer. HRS §103D-203(a)(6). The Superintendent made a “written determination that the award of the contract without delay is necessary to protect the substantial interests of the State.” There is no dispute on that point.

Looking just at HRS §103D-701, it would appear that, absent the “written determination,” the stay of procurement activity would remain in effect until the procurement officer denied the protest pursuant to HRS §103D-7(c). There is nothing in the statute providing for a stay during the pendency of an appeal to the Department of Commerce and Consumer Affairs.

The question of whether there is a stay during an administrative appeal is resolved by HRS §103D-709(g) which continues the stay initially imposed by HRS §103D-701(f) pending resolution of an appeal to the Department of Commerce and Consumer Affairs. Nothing in that statute, however, precludes lifting the stay upon a “written determination” as was made in this case.

Robert’s argues that the short time for an appeal means there is no prejudice to the State’s interest if a “written determination” cannot be made during the pendency of an appeal. In support of its argument, Robert’s asserts that appeal period only lasts 21 days. Robert’s Motion at page 3. Robert’s is mistaken on that point. The appeal hearing “shall commence” within 21 days after the appeal is filed (see the first sentence of HRS §103D-709(b)). However, the time period for concluding the entire appeal process is 45 days after the appeal is filed (see the second sentence of HRS §103D-709(b)).

The DOE’s written determination sets forth the prejudice to the DOE if there is any further delay in the procurement process because of the time table necessary for putting any new contract in place before the beginning of the next school year. Robert’s has not challenged the substance of that written determination. It would be a strained, and unacceptable, interpretation of HRS §103D-709(g) if the State’s hands were completely tied

for 45 days -- over six (6) weeks -- even when a justifiable state of emergency exists with respect to the procurement in question. The Hearings Officer does not believe that the Legislature intended such an interpretation.

If should also be remembered that HRS §103D-709(g) was enacted in its present form before the 45 day limit was imposed on appeal proceedings by the 2012 Legislature (and even before it was temporarily imposed from July 1, 2009 through June 30, 2011 by the 2009 Legislature). Before the 45 day limit was established by statute, there was no absolute time limit on appeal proceedings. It is highly unlikely that the Legislature intended HRS §to indefinitely handcuff the procurement process despite the possibility of a lengthy appeal period for complicated and/or controversial cases.

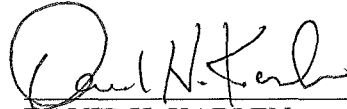
D. Further Considerations

During oral argument on Robert's Motion, the Hearings Officer discussed the possibility that equitable considerations could have a place in determining the length of the stay imposed by HRS §103D-701(f). This possibility might have a particular application when a protest is filed before bids or offers are submitted and the issue is the solicitation's alleged lack of sufficient information or clarity so that a bidder or offeror could not make a reasoned submission. However, this possibility was not specifically raised or briefed by the parties. The question of possible equitable factors as a separate ground for analyzing the issue herein will not be considered by the Hearings Officer and will play no role in the final decision on Robert's Motion.

IV. ORDER

For the reasons set forth above, Robert's Motion for Partial Summary Judgment on HRS §103D-709(g) Stay, filed herein on October 7, 2013, is hereby denied.

DATED: Honolulu, Hawaii, October 28, 2013.



DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2013 OCT 28 A 9 01

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

In the Matter of	)	PDH-2013-009
)	
ROBERT'S HAWAII SCHOOL BUS, INC.,	)	ORDER: (1) DENYING ROBERT'S HAWAII
	)	SCHOOL BUS, INC.'S MOTION FOR
Petitioner,	)	PARTIAL SUMMARY JUDGMENT THAT
	)	RFP ADDENDUM NO.1 FAILS TO
vs.	)	SATISFY HAR §3-122-16.06(a)(1), AND
	)	(2) GRANTING SUMMARY JUDGMENT
KATHRYN S. MATAYOSHI, in her capacity	)	DISMISSING ROBERT'S HAWAII SCHOOL
as SUPERINTENDENT OF THE	)	BUS, INC.'S CLAIM THAT RFP
DEPARTMENT OF EDUCATION, STATE	)	ADDENDUM NO. 1 FAILS TO SATISFY
OF HAWAII; JOHN DOES 1-5; JANE DOES	)	HAR §3-122-16.06(a)(1)
1-5; DOE PARTNERSHIPS 1-5; DOE)	
CORPORATIONS 1-5; DOE)	
ASSOCIATIONS 1-5; DOE	)	Senior Hearings Officer:
GOVERNMENTAL UNITS 1-5; DOE	)	David H. Karlen
TRUSTS 1-5; AND DOE ENTITIES 1-5,)	
)	
Respondent.)	

ORDER: (1) DENYING ROBERT'S HAWAII SCHOOL BUS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT THAT RFP ADDENDUM NO. 1 FAILS TO SATISFY HAR §3-122-16.06(a)(1), AND (2) GRANTING SUMMARY JUDGMENT DISMISSING ROBERT'S HAWAII SCHOOL BUS, INC.'S CLAIM THAT RFP ADDENDUM NO. 1 FAILS TO SATISFY HAR §3-122-16.06(a)(1)

I. INTRODUCTION

Petitioner Robert's Hawaii School Bus, Inc. ("Robert's" or "Petitioner") filed a Request for Administrative Hearing ("RFAH") in this matter on September 25, 2013. By Notice of Hearing and Pre-Hearing Conference filed September 26, 2013, a pre-hearing conference was set for October 9, 2013.

EXHIBIT "c"

On October 9, 2013, Robert's filed its Motion for Partial Summary Judgment that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.6(a)(1).

On October 15, 2013. Respondent Kathryn S. Matayoshi, in her capacity as Superintendent of the Department of Education ("DOE" or "Respondent") filed Respondents' Memorandum in Opposition to Petitioner Robert's Hawaii School Bus, Inc.'s Motion for Partial Summary Judgment that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.06(a)(1).

Robert's Motion for Partial Summary Judgment came on for hearing before the undersigned Hearings Officer on October 17, 2013. Robert's was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq.

At the conclusion of oral argument on the Motion, the Hearings Officer orally ruled that the Motion was denied. In addition, the Hearings Officer, *sua sponte*, granted summary judgment to the DOE dismissing Robert's claim that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.06(a)(1). This Order, based on the record as of the conclusion of oral argument on October 17, 2013, more fully sets forth those rulings and stands as the formal order with respect to Robert's Motion for Partial Summary Judgment and the summary judgment granted to the DOE.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On July 19, 2013, the DOE issued its Request for Proposals RFP D13-010 for Student Transportation Services ("RFP"). Proposals were to be submitted by 2:00 p.m. on October 4, 2013.

2. On or about August 9, 2013, Robert's submitted a series of questions to the DOE regarding the RFP.

3. The following questions submitted by Robert's, and initially denominated Questions 1, 2, and 3 are directly relevant to this Motion:

1. Does the amount of routes offered under this RFP include 100% of all DOE routes that were active during the 2012-13 School Year on the island of Oahu? If it does not include all of the routes which ones are not included.

2. Are any of the routes offered under this RFP currently under an existing contract with a term expiring subsequent to June 30, 2014? If so, please breakdown[sic] the number of routes that are under contracts expiring at June 30, 2014 or prior and those routes under contract that are expiring subsequent to June 30, 2014 for each service cluster and include detail by identifying if Regular Ed. or Special Education. [Illustrations in text omitted]

3. Is it your intent to cancel the contracts with expiration dates subsequent to June 30, 2014?

See page 1 of Exhibit "B" to Exhibit "1" to Robert's RFAH.

4. On August 19, 2013, the DOE issued Addendum 1 to the RFP.

5. Addendum No.1 relabeled Robert's three questions, set forth above, as Question Nos. 73, 74, and 75. Addendum 1 answered all three of Robert's questions as follows: "The question is not relevant to the development of a response to this RFP."

6. By letter dated August 26, 2013, Robert's submitted its Protest of the RFP to the DOE.

7. By letter dated September 18, 2013, the DOE denied Robert's Protest of the RFP.

8. On September 25, 2013, Robert's filed its Request for Administrative Hearing ("RFAH") with the Office of Administrative Hearings appealing the denial of its Protest of the RFP.

9. On October 1, 2013, the DOE issued Addendum No. 2 to the RFP.

10. On October 2, 2013, the DOE issued Addendum No. 3 to the RFP.

11. In Addendum No. 3, the DOE provided all potential offerors with the following information: (a) specific number of buses required; (b) routes by region code; and (c) current curb-to-curb bus routes by location. See Exhibit "E" to the DOE's Memorandum in Opposition to Robert's Motion at pages 00593-631.

12. The information provided in Addendum No. 3 effectively answers Robert's Question No. 73. In addition, Robert's could determine the answer to Question No. 74 from the answer to Question No. 73 and the answer to Question No. 75 from the answers to Question Nos. 73 and 74.

13. Robert's knew no later than August 2, 2013, that the RFP could possibly lead to cancellation of all routes already covered by existing contracts. See Robert's letter of August 2, 2013, Exhibit "F" to the DOE's Supplemental Brief filed October 11, 2013, at pages 3-4. At that point, Robert's essentially knew the answer to Question No. 75.

III. CONCLUSIONS OF LAW

A. General Considerations

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The

evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. Reed v. City & County of Honolulu, 76 Haw. 219, 225, 873 P.2d 98, 104 (1994).

B. The RFP and Addendum No. 3 Together Sufficiently Satisfy HAR §3-122-16.06

The stated basis of Robert’s Motion is HAR §3-122-16.06(a)(1), entitled, overall, “Amendment and clarification to solicitation.” It states:

(a) An addendum shall be issued for amendments and clarifications to a solicitation prior to submission of offers, except as provided in subsection (f):

(1) Amendments include any material changes to the solicitation as in quantity, purchase descriptions, delivery schedules, scope of work, and opening dates. The addendum shall reference the portion of the solicitation it amends and detail the amendments.

This section of the regulation, however, does not specifically relate to Robert’s complaint because Robert’s is not concerned with any unreported material changes in the solicitation made by the DOE.

More specific to the point of Robert’s protest is HAR §3-122-16.06(b)(3), cited at page 4 of Robert’s motion, which provides that:

(b) Addenda shall be used to:

(3) Provide any other information or clarification to the solicitation that will result in fair competition.

While this portion of the regulation is not cited in the title of Robert's motion, there is no prejudice to the DOE in allowing Robert's to cite it in support of its motion. The DOE had ample to reply to Robert's motion.

Assuming, however, for the sake of argument only that the original solicitation plus Addendum No. 1 were, together, so inadequate that some portion or portions of HAR §3-122-16.06 required a clarifying addendum, the DOE has issued such a clarifying addendum with respect to Question Nos. 73 and 74. Addendum No. 3 supplies the answers to those questions.

Robert's has not filed a protest challenging the contents of Addendum No. 3. Presumably, it was instead relying on its position that Addendum No. 3 was issued in violation of the stay provisions of HRS §§103D-701(f) and 103D-709(g). However, that reliance was misplaced, as Robert's Motion for Partial Summary Judgment on HRS §103D-709(g) Stay, filed October 7, 2013, has been denied.

Accordingly, Robert's protest has become moot insofar as Question Nos. 73 and 74 are concerned.

The DOE did not answer Question No. 75, regarding cancellation of existing contracts, in Addendum No. 1. In addition, Addendum No. 3 did not specifically answer that question. However, the Hearings Officer concludes that HAR §3-122-16.06 does not require the DOE to specifically answer that question. Robert's concedes, as it must, that a bid protest is not the proper forum to resolve contract administration or breach of contract issues. Further, the requested information is not necessary to the submission of a proposal because the answers to Question Nos. 73 and 74 provide, in essence, the answer to Question No. 75

that all contracts for existing routes may be cancelled. In addition, based on its letter of August 2, 2013, Robert's appears to have already known that all contracts for existing routes might be cancelled.

If there was an unbalanced playing field because of this issue before Addendum No. 3 was issued, that is no longer the case. Offerors with or without existing contracts all have the same information—all existing contracts may be cancelled and offerors must proceed with their submissions accordingly.

C. **Partial Summary Judgment in Favor of the DOE on Robert's Claim that Addendum No. 1 Does Not Satisfy HAR §3-122-16.06(a)(1) is Warranted**

The DOE did not file a cross-motion for partial summary judgment to dismiss the claim Robert's was asserting in Robert's motion for partial summary judgment. Nevertheless, at the hearing on October 17, 2013, the Hearings Officer *sua sponte* brought up the subject of dismissal on summary judgment of Robert's claim.

All of the legal issues concerning Robert's claim were fully briefed and argued by the parties. No additional evidence concerning this claim could reasonably be anticipated to be submitted at a subsequent evidentiary hearing. There was no apparent prejudice to Robert's in the consideration of motion for partial summary judgment against Robert's on the issue in question. At the hearing on October 17, 2013, Robert's agreed that it would be procedurally appropriate to consider a partial summary judgment motion against Robert's claim at that time.

Based on the foregoing findings of fact and conclusions of law, the DOE is entitled to partial summary judgment dismissing Robert's claim in its protest that Addendum No. 1 does not satisfy the requirements of HAR §3-122-16.06(a)(1). Cf. Querubin v. Thronas, 107 Haw. 48, 109 P.3d 689 (2005).

IV. ORDER

For the reasons set forth above, Robert's Motion for Partial Summary Judgment that RFP Addendum No. 1 Fails to Satisfy HAR §3-122-16.06(a)(1), filed herein on October 9, 2013, is hereby denied.

In addition, partial summary judgment in favor of the DOE is granted, and Robert's claim that RFP Addendum No. 1 fails to satisfy HAR §3-122-16.06(a)(1), found at pages 4-6 of Robert's RFAH, is dismissed.

DATED: Honolulu, Hawaii, October 28, 2013



DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs

At the prehearing conference on October 9, 2013, the Hearings Officer raised the question of whether a portion of the RFAH was timely filed. In particular, the Hearings Officer was concerned with Robert's claim that "the DOE has not justified issuing an RFP rather than an IFB" that can be found at pages 9-11 of the RFAH. The Hearings Officer established a schedule for briefing the issue of the timeliness of this claim.

In accord with this schedule, both Robert's and the DOE filed supplemental briefs on October 11, 2013. Also in accord with this schedule, on October 16, 2013, the DOE filed a response to Robert's supplemental brief. Robert's chose not to file a response to the DOE's supplemental brief.

In its supplemental brief, at page 3, the DOE also asserted that Robert's did not timely raise the issue that the RFP's evaluation criteria failed to consider findings in a November 2012 Student Bus Transportation Study Final Report prepared by Management Partnership Services, Inc. ("MPS Audit Report"). Robert's claim regarding the MPS Audit Report is raised on page 9 of its RFAH.

The timeliness issues came on for hearing before the undersigned Hearings Officer on October 17, 2013. Robert's was represented by Jonathan S. Moore, Esq., and Charles D. Hunter, Esq. The DOE was represented by Deputy Attorney General Gregg M. Ushiroda, Esq.

At the conclusion of oral argument on the timeliness issues, the Hearings Officer orally ruled that Robert's claims regarding the use of the RFP method of procurement and regarding the lack of consideration of the MPS Audit Report were not timely filed and should therefore be dismissed. This Order, based on the record as of the conclusion of oral

argument on October 17, 2013, more fully sets forth that ruling and stands as the formal order with respect to the timeliness of Robert's claims regarding use of the RFP method of procurement and regarding the MPS Report.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On November 19, 2012, the MPS Audit Report was presented to the DOE.
2. On or about November 28, 2012, the DOE posted on its website a Notice of Informational Briefing on the MPS Audit Report to be held on December 4, 2012. The MPS Audit Report itself was available to the public as a download through a link attached to this notice.
3. On December 4, 2012, the company that prepared the MPS Audit Report conducted a public informational briefing before the DOE on the MPS Audit Report. In attendance at this briefing were representatives from various transportation service providers, including representatives of Robert's.
4. On July 19, 2013, the DOE issued its Request for Proposals RFP D13-010 for Student Transportation Services ("RFP"). Proposals were to be submitted by 2:00 p.m. on October 4, 2013.
5. On July 22, 2013, Robert's registered to receive addenda and other notices related to the solicitation by submitting the Registration Form for Online Solicitations.
6. On July 23, 2013, the DOE held a Mandatory Proposal Conference. Robert's attended this conference. See Robert's Protest Letter to the DOE dated August 26, 2013, at page 2.

7. On August 2, 2013, Robert's, through its attorney, submitted a letter to the Superintendent of the DOE. In part, the letter stated "it is clear that the DOE is intent on pushing the RFP process forward despite" five alleged facts:

- a. the DOE is not prepared to properly do so
- b. The DOE is ignoring the mandate of the Legislature to reduce the costs of school bus transportation;
- c. The DOE favors larger and out state school bus vendors over the local vendors;
- d. The DOE favors technical requirements over the lowest cost;
- e. The DOE ignores the advantages of the economies of scale; and
- f. The RFP is contrary to an earlier position of the DOE's special attorney general that all contracts cannot be unilaterally cancelled.

The letter went on for over five more pages detailing these allegations.

Exhibit "F" to the DOE's supplemental brief (Emphasis supplied).

8. Among the detailed allegations in the August 2, 2013 letter were the following:

a. The DOE's position, up to the issuance of the "bad faith RFP" was that existing contracts would not be cancelled. Now, the DOE has issued an RFP covering the same routes already covered by existing contractors. This is "further evidence of the DOE's bad faith intent to harm existing contractors." Letter of August 2, 2013, at pages 3-4.

b. Terminating a contract simply to obtain a better bargain for the same services is a bad faith termination for convenience, "which is exactly what the State appears to be doing by issuing an RFP covering routes which are already under contract." Letter of August 2, 2013, at page 4.

c. The RFP does not substantiate the claimed justification for reducing costs because its scoring methodology is not calculated to award routes to the lowest priced vendor. “Rather, the RFP appears to merely be a bad faith effort by the DOE to give itself the flexibility to play fast and loose with the selection process, by placing 70% of the score on the “technical” aspects of the proposals, rather than specifying the technical requirements and asking for bids based on the lowest cost to the DOE. Letter of August 2, 2013, at pages 4-5.

d. The letter contains further complaints about the scoring system not being calculated to guarantee that a lower cost proposal is selected. Under the RFP, it is possible the State would end up paying more for bus services than it presently paid under existing contracts. “One of the concerns that apparently has not been thought through is whether the cancelling of all existing contracts is in the best interests of the DOE.” Letter of August 2, 2013, at page 5.

e. The RFP has an arbitrary requirement that a single contractor may only be awarded 75% of the routes. Removal of this requirement and use of an IFB would allow the DOE to take advantage of economies of scale. Letter of August 2, 2013, at page 6.

f. The DOE should withdraw the RFP and replace it with an IFB. This would allow the DOE to incorporate its desired technical specifications and leave cost as the sole issue to be evaluated. Letter of August 2, 2013, at pages 6-7.

9. The RFP established August 9, 2013, as the “final date to submit questions.” RFP, pages 7-8.

10. With respect to these questions, the RFP further required that “[a]ny exceptions to the proposed specifications or the items in the Request for Proposals must be identified in the submitted questions.” RFP at page 8.

11. On August 9 2013, Robert's submitted written questions to the DOE regarding the RFP. Robert's Protest Letter to the DOE dated August 26, 2013, at page 2. The questions can be found at Exhibit 1 to Robert's supplemental brief filed October 10, 2013.

12. The written questions submitted by Robert's contained exceptions to some distinct portions of the RFP. However, they did not contain exceptions to the use of an RFP method of procurement as compared to an IFB method of procurement.

13. On August 19, 2013, the DOE issued Addendum 1 to the RFP.

14. By letter dated August 26, 2013, Robert's submitted to the DOE its Protest of the RFP.

15. On pages 7 to 9 of this Protest, Robert's asserted that "The DOE Has Not Justified Issuing an RFP Rather Than an IFB"

16. In support of the claim in its Protest, Robert's stated the following:

a. Robert's was unaware of any justifications for using an RFP "particularly in light of the history of school bus procurements in Hawaii, where the specifications of service have been well established for decades, and the only matter of concern is price."

b. Because of budget shortfalls and mounting public concern about the price of bus services, it is "counterintuitive" to issue an RFP and "give itself the flexibility to award bus contracts to higher priced vendors by weighing only 30% of the score to cost.

c. If the DOE was truly concerned with reducing costs, the "sensible solution" would be an IFB covering larger groups of routes so that bidders could take advantage of economies of scale.

d. The technical specifications are so detailed that they cover all of the legal, technical, service, operating and reporting requirements and standards recommended by MPS. Using the RFP process “appears to have no purpose other than to allow the DOE the flexibility to choose a vendor who will cost the state more.”

17. By letter dated September 18, 2013, the DOE denied Robert’s Protest of the RFP.

18. On September 25, 2013, Robert’s filed its RFAH with the Office of Administrative Hearings appealing the denial of its Protest of the RFP.

III. CONCLUSIONS OF LAW

A. General Considerations

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. Reed v. City & County of Honolulu, 76 Haw. 219, 225, 873 P.2d 98, 104 (1994).

The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the hearings officer *sua sponte*, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. Captain Andy's Sailing, Inc. v. Department of Natural Resources, 113 Haw. 184, 193-194, 150 P.3d 833, 842-843 (2006); Koga Engineering & Construction, Inc., v. State of Hawaii, *supra*, 122 Haw. at 84, 222 P.3d at 1003.

B. Robert's Claim that the DOE Has Not Justified Issuing an RFP Rather Than an IFB was Not Timely Raised

Hawaii Revised Statutes ("HRS") Section 103D-701(a) sets forth the time requirements for filing a procurement protest. In relevant part, it states:

a protest shall be submitted in writing within five working days after the aggrieved persons 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 supplied)

Strict compliance with the time constraints set forth in HRS §103D-701(a) is required. See, e.g., Okada Trucking Co., Ltd. V. Department of Education, State of Hawaii, PCH 2009-18 at page 15 (November 15, 2011).

Although it may be assumed that Robert's learned of the RFP on the date it was issued, the record does not contain any specific evidence on that point. However, it cannot be disputed that Robert's was aware of the RFP when it registered on July 22, 2013 to receive addenda and other notices related to the solicitation.

It is also undisputed that Roberts knew, at the very latest, that the DOE was using the RFP method of procurement, rather than using an IFB, when its attorney wrote the letter of August 2, 2013 to the Superintendent of the DOE complaining that the RFP method of procurement should not be used and, instead, the IFB method should be used.

Since the latest date Robert's actually knew of the use of the RFP method of procurement instead of the IFB method can be set at August 2, 2013, and since that date was well over five working days from the submittal to the DOE of Robert's protest on August 26, 2013, Robert's claim over the use of the RFP method of procurement was untimely under the terms of HRS §103D-701(a).

In defending the timeliness of its protest, Robert's claims that the issue is not that, in the abstract, an RFP could not be used. Rather, according to Robert's, the issue is whether the DOE had a sufficient legal basis to use an RFP format. Further, according to Robert's, it did not know, and should not be expected to have known, that the DOE lacked sufficient cause to use an RFP format until Addendum No. 1 was issued on August 19, 2013. If the time for filing the protest is measured from that date, the filing of Robert's protest on August 26, 2013 would be timely.

Under HRS §103D-303(a), an RFP may be used as the form of procurement for "goods, services, or construction that are either not practicable or not advantageous to the State to procure by competitive sealed bidding." Robert's asserts that the DOE had to make a written determination to use the RFP method, but it admitted at the hearing on October 17, 2013, that it made no request for a copy of that written determination.

Instead of making that request, Robert's submitted a series of questions to the DOE which Robert's alleges were aimed at eliciting information that Robert's would use to evaluate the DOE's decision. These questions are identified on page 3 of Robert's supplemental memorandum as Question Nos. 62 through 67. These questions did not request a copy of the aforesaid written determination.

The DOE's responses to these questions, renumbered to be Question Nos. 128-133, are identified on pages 3 and 4 of Robert's supplemental memorandum. It is fair to conclude that these answers are, in practical terms, non-answers to the questions.

In this case, however, Robert's already knew what it believed were the answers. Its attorney's letter of August 2, 2013, was very specific—there was no justification to use the RFP process where cost would be only a 30% factor in the evaluation of proposals, and the RFP should be withdrawn and replaced with an IFB.

In addition, the four points of Robert's protest regarding the use of the RFP method, summarized in Finding of Fact No. 16 above, do not depend on answers to Robert's written questions. They are based on information available to Robert's no later than August 2, 2013:

a. The first point is based on “the history of school bus procurements in Hawaii, where the specifications of service have been well established for decades, and the only matter of concern is price.” Nothing in this point was not known as of August 2, 2013.

b. The second point is based on it being “counterintuitive” to have an RFP that could allow contracts to be issued to higher priced vendors by weighting only 30% of the score to cost. Nothing in this point was not known as of August 2, 2013.

c. The third point is that the “sensible solution” is to use an IFB to reduce costs. Nothing in this point was not known as of August 2, 2013.

d. The fourth point was that the technical specifications were so complete that there was no need for an RFP process, and the only possible purpose of an RFP was to allow the selection of a higher-priced vendor. Nothing is this point was not known as of August 2, 2013.

Robert's has not provided sufficient justification for the delay past August 9, 2013 (five working days after its August 2, 2013 letter) in the filing of its protest regarding use of the RFP method of procurement.

C. Robert's Claim that the RFP Evaluation Criteria Fail to Consider the Findings of the MPS Audit Report was Not Timely Raised

The Pre-Hearing Order in this case contemplated, as was discussed at the pre-hearing conference, a supplemental brief from each party on the issue of the timeliness of the protest regarding use of the RFP method of procurement. No other issues were discussed at the Pre-Hearing conference in connection with the submission of the supplemental briefs.

Nevertheless, the DOE unilaterally expanded the scope of its supplemental brief to include an additional issue—the timeliness of Robert's claim regarding reference to the MSP Audit Report.

While Robert's could not anticipate that the DOE would raise this additional issue in its supplemental brief, Robert's did have the opportunity to object to this procedure and/or contest the merits of the DOE's assertions—it could have done so in a response brief. The Pre-Hearing Order provided that responses to the supplemental briefs were to be filed the day before the hearing. Robert's however, chose not to file any response brief. When this point was discussed at the hearing on October 17, 2013, Robert's acknowledged its decision to forego filing a response brief and instead relied upon its previous filings as well as any oral argument on the MSP Audit Report issue.

Under these circumstances, the Hearings Officer has decided that the DOE's unauthorized expansion of the scope of the supplemental brief was not prejudicial to Robert's and that the merits of the DOE's assertions on the MSP Audit Report issue should be reached.

It is undisputed that prior to the issuance of the RFP Robert's knew of the MSP Audit Report and either had a copy or could have obtained a copy . The alleged lack of reference in the RFP to the MSP Audit Report is or should be apparent on the face of the RFP.

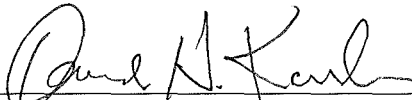
Robert's letter of August 2, 2013 shows that it had the opportunity to fully analyze the terms of the RFP by that date. Accordingly, Robert's knew or should have known of this MSP Audit Report issue no later than August 2, 2013, and the filing of its protest regarding this issue on August 26, 2013 was untimely under HRS §103D-701(a).

IV. ORDER

For the reasons set forth above, Robert's claim that the DOE has not justified issuing an RFP rather than IFB, asserted at pages 9-11 of Robert's RFAH, is hereby dismissed.

In addition, Robert's claim that the RFP's evaluation criteria fail to consider the findings of the MPS Audit Report, asserted at page 9 of Robert's RFAH is hereby dismissed.

DATED: Honolulu, Hawaii, October 28, 2013.



DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs