

2014 APR 30 A 10: 16

HEARINGS OFFICE



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

In the Matter of)	PDH-2014-005
)	
SAFETY SYSTEMS AND SIGNS HAWAII, INC.,)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
)	
Petitioner,)	
)	
vs.)	Senior Hearings Officer:
)	David H. Karlen
DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
ZIP U THERE, INC.,)	
)	
Intervenor.)	
)	

**HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION**

I. INTRODUCTION

On March 28, 2014, Petitioner Safety Systems and Signs Hawaii, Inc. ("Safety Systems") filed its Request for Administrative Hearing ("RFAH") with the Office of Administrative Hearings ("OAH") of the Department of Commerce and Consumer Affairs ("DCCA"). The matter was given Case No. PDH-2014-005, and assigned to Hearings Officer David H. Karlen. Concurrently with filing the RFAH, Safety Systems filed a procurement protest bond in the amount of \$10,000.00.

By Order filed April 4, 2014, Zip U There, Inc. (“ZUT”) was allowed to intervene in these proceedings.

Respondent Department of Transportation, State of Hawaii (“DOT”) filed a Response to the RFAH on April 9, 2014.

On April 9, 2014, the DOT filed its Motion to Dismiss Petitioner’s Request for Hearing Filed March 28, 2014 or in the Alternative for Summary Judgment (“DOT Motion”). On April 10, 2014, ZUT filed its Motion to Dismiss and/or in the Alternative, Motion for Summary Judgment (“ZUT Motion”). On April 16, 2014, Safety Systems filed separate memoranda in opposition to the DOT Motion and the ZUT Motion.

Safety Systems had filed a previous RFAH regarding the solicitation at issue herein, In the Matter of Safety Systems and Signs Hawaii, Inc. v. Department of Transportation, State of Hawaii, PDH-2013-012. Pursuant to the Hearings Officer’s Findings of Fact, Conclusions of Law, and Decision filed March 10, 2014, in that matter, the previous RFAH was dismissed. Safety Systems appealed that decision to the First Circuit Court in Case Number 14-1-000729. By minute order dated April 15, 2014, the First Circuit Court, the Honorable Rhonda A. Nishimura presiding, dismissed Safety Systems’ appeal.

The two motions listed above came on for hearing before the undersigned Hearings Officer on April 17, 2014. Safety Systems was represented by Steven K. Hisaka, Esq., and David Y. Suh, Esq. The DOT was represented by Glenn I. Kimura, Esq. Also present on behalf of the DOT was Ms. Tammy Lee, DOT Contracts Officer. ZUT was represented by Alan K. Lau, Esq. Also present on behalf of ZUT was Mr. Bruce Kagawa.

Although not formally filed in this matter, Judge Nishimura’s minute order of April 15, 2014, referred to above was available during the hearing to all parties and to the Hearings

Officer. During the course of the hearing, the undersigned Hearings Officer orally granted the DOT's Motion and orally granted in part and denied in part ZUT's Motion. This Decision, based on the record as of the conclusion of oral argument on April 17, 2014, more fully sets forth the Hearings Officer's rulings and stands as the formal order with respect to both of the aforesaid motions.

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.

A. During the course of oral argument on the motions, the parties debated over whether Safety Systems' appeal of the dismissal of the prior RFAH, PDH-2013-012, involved a challenge to any of the Findings of Fact in the Hearings Officer's decision in that matter.

B. Whether or not Safety Systems challenged on appeal any of the Hearings Officer's Findings of Fact in the Decision in PDH-2013-012, the minute order of the First Circuit Court in Safety Systems' appeal, Civil No. 14-1-000729, affirmed the Hearings Officer's Decision and did not modify any of the Hearings Officer's Findings of Fact.

C. In the present case, Safety Systems has not sought to modify any of the Hearings Officer's Findings of Fact in the prior Decision in PDH-2013-012.

D. The following Findings of Fact Nos. 1 through 38 are contained in the Hearings Officer's Findings of Fact in the prior Decision in PDH-2013-012 and are hereby repeated and incorporated herein. Minor changes have been made to some of these Findings of Fact in order to make clear their references to the prior case, PDH-2013-012.

1. On or about June 21, 2013, DOT issued an invitation for Bids (“IFB”) for a project entitled “Furnishing Operation and Maintenance Service for the H-1 Contra-Flow Zipper Lane, Island of Oahu, Project No. HWY-C-22-13” (“Project”).

2. Operation of the Zipper Lane utilizes specialized equipment owned by the DOT—movable barrier transfer machines—known as Zipper Machines.

3. Per Sections 10.1 and 10.3 of the specifications in the IFB, the successful bidder was to maintain and operate the Zipper Machines.

4. At the time of the IFB, Safety Systems held the contract for the operation of the Zipper Machines. That contract expired on October 19, 2013.

5. All sealed bids were to be submitted no later than 2:00 p.m. on July 18, 2013.

6. The following bids were submitted and opened on July 18, 2013:

ZUT - \$1,584,558.52

GP Roadway Solutions - \$1,684,600.00

Safety Systems - \$1,945,000.00.

7. Section 10.3 of the Contract Specifications contained in the IFB is entitled “CONTRACTOR RESPONSIBILITIES AND REQUIREMENTS.” Subsection A of Section 10.3 states in relevant part:

Zipper Machine Operators – the CONTRACTOR shall provide four operators trained and certified by Lindsay Transportation Solutions. Verification of certification will be required prior to the award of the contract.

Each Operator shall receive the proper training before operating the “Zipper Machine.” The training shall be provided and certified by Lindsay Transportations Solutions, manufacturer of the “Zipper Machine.” The Operator shall be knowledgeable of the duties and be alert and observant in operating the “Zipper Machine.”

8. Section 10.14 of the Contract Specifications contained in the IFB is entitled “BIDDER REQUIREMENTS” and states in relevant part that:

The bidder shall complete and sign a Statement of Capabilities form. The completed Statement of Capabilities form, including any attachments shall then be placed in a separate sealed envelope marked “confidential” and submitted to the Department of Transportation, Highways Division, Construction and Maintenance Branch, 869 Punchbowl Street, Room 404, Honolulu, Hawaii 96813, prior to bid opening.

Failure to submit a thoroughly completed Statement of Capabilities form prior to bid opening may result in the rejection of bids. The Statement of Capabilities is considered complete if all required information (except items marked “optional”) that is requested in the form is provided. Upon request, the signed Statement of Capabilities, including any attachments, shall be returned to the bidder after serving its purpose.

9. A blank Statement of Capabilities form was included in the IFB. On the first page of the form, under the heading of “Contractor Qualifications,” the form states, in relevant part:

To substantiate the Contractor’s qualifications provide the names of four individuals that have been trained and certified by Lindsay Transportation Solutions to operate the Zipper Machine. Include a copy of the certification of each trained operator with this Statement of Capabilities. Names listed below may be contacted for verification purposes.

10. The Statement of Capabilities form stated that, by signing the form, bidders did:

hereby certify that our company is capable to perform the services as specified in the Special Provisions, Specifications and Proposal for the above subject project throughout the duration of the contract, including any extensions.

11. The Statement of Capabilities form submitted with ZUT’s bid was signed by Bruce S. Kagawa, president of ZUT, and dated July 7, 2013. Exhibit G to Respondent’s Motion to Dismiss filed February 7, 2014, in PDH-2013-012.

12. Per the Declaration of Greg Grosch, Chief Executive Officer of Safety Systems, dated December 3, 2013, and attached to Safety Systems’ Memorandum in Opposition to the DOT’s Motion, filed February 13, 2014, in PDH-2013-012, Safety Systems knew the names of the four employees submitted in ZUT’s Statement of Capabilities “soon after” the bid opening date of July 18, 2013.

13. On July 24, 2013, Safety Systems sent a letter to the DOT that demonstrated it knew the identities of at least two of the operators on ZUT’s Statement of Capabilities. See

Exhibit A to Safety Systems' Memorandum in Opposition to ZUT's Motion to Dismiss, filed December 4, 2013, in PDH-2013-012.

14. On August 12, 2013, Safety System's attorney sent a letter to the DOT stating that Safety Systems currently employed four certified Zip Machine operators and that these four individuals were subject to non-compete agreements. The letter alleged that it would be inappropriate for any other bidders for the Project to solicit or enlist any of these four employees or to list any of them as certified operators for their company.

15. On August 21, 2013, Safety Systems' attorney sent a letter to the DOT identifying Safety Systems' four operators and providing copies of their non-compete agreements. The letter asserted that it would be highly inappropriate for any other company in a similar business to attempt to retain any of these operators or list any of them as potential operators for that company.

16. On or about August 21, 2013, DOT informed ZUT that it would be awarded the contract for the Project.

17. On August 27, 2013, Safety Systems submitted a letter to the DOT protesting the proposed award of the Project's contract to ZUT.

18. In this protest letter, Safety Systems identified by name two individuals it thought ZUT had listed as certified operators on its response to the IFB. Safety Systems also asserted in that letter that the other two certified operators listed by ZUT were actually Safety Systems' employees.

19. In addition, Safety Systems asserted in its protest letter that ZUT did not submit with its bid formal certifications from Lindsay Transportation Solutions of the training in operation and maintenance of the individuals ZUT listed as operators.

20. ZUT submitted a second Statement of Capabilities to the DOT. See Exhibit "I" to Respondent's Motion to Dismiss Petitioner's Request for Hearing, filed February 7, 2014, in PDH-2013-012. This second Statement of Capabilities is dated July 7, 2013. However, at the February 28, 2014, hearing on the motions in PDH-2013-012, it was stipulated by ZUT and DOT that this second Statement was submitted to the DOT on September 19, 2013.

21. The four operators listed in this second Statement of Capabilities did not include anyone currently employed by Safety Systems.

22. A letter from Lindsay Transportation Solutions to the DOT, dated September 13, 2013, regarding the four operators listed on this second Statement was submitted to the DOT around September 19, 2013.

23. On November 4, 2013, the DOT denied Safety Systems' protest.

24. The DOT's protest denial letter of November 4, 2013 stated that the DOT "has determined and verified that Zip U There has four Zipper Machine Operators trained and certified by Lindsay Transportation Solutions."

25. The DOT's protest denial letter of November 4, 2013 did not reveal that ZUT had submitted a second Statement of Capabilities or that the DOT had considered the second Statement before denying Safety Systems' protest.

26. On November 8, 2013, Safety Systems filed a Request for Administrative Review and Hearing ("RFAH") with the OAH. This RFAH is PDH-2013-012.

27. On November 12, 2013, the DOT filed with OAH, in PDH-2013-012, its written response to Safety Systems' RFAH. On page 5 of that written response, the DOT stated:

Thereafter ZUT submitted another Statement of Capabilities which included names of four (4) individuals supported by a notarized letter from Lindsay Transportation Solutions which certified these named individuals. Names identified in the original Statement of Capabilities were deleted and new names were added in what appears to be

the result of Safety Systems' employees being advised of the circumstances. This amendment is viewed simply as a result of changed circumstances.

28. This was the first notice to Safety Systems that the DOT had considered materials submitted by Safety Systems¹ after the bids had been opened.

29. Until its protest letter of March 14, 2014, that is the basis for the RFAH in PDH-2014-005, Safety Systems had not filed a protest with the DOT that receipt and consideration of this second Statement of Capabilities was a violation of the automatic stay provisions of HRS §103D-701(f).²

30. Safety Systems' RFAH in PDH-2013-012 was dismissed by order of Hearings Officer Sheryl Lee A. Nagata on December 19, 2013 for lack of standing.

31. On December 20, 2013, the DOT awarded the contract for the Project to ZUT.

32. The contract was subsequently executed but, as of February 28, 2014, the date of the hearing on the motions in PDH-2013-012, no work had been done by ZUT on the Project.

33. In the meantime, on December 27, 2013, Safety Systems appealed the order dismissing its RFAH. On January 24, 2014, the First Circuit Court reversed Hearings Officer Nagata's dismissal of Safety Systems' RFAH for lack of standing and remanded the matter back to OAH.

34. On February 7, 2014, Safety Systems first received a copy of ZUT's second Statement of Capabilities and the Lindsay Transportation Solutions letter dated September 13, 2013. The documents were attached as Exhibits "I" and "J" respectively to the DOT's Motion to Dismiss filed that day in PDH-2013-012.

¹ This reference to "Safety Systems" is a scrivener's error and should be a reference to "ZUT." All parties in this proceeding have recognized what the correct reference should be and have proceeded on that basis.

² The Hearings Officer expressed no opinion, one way or another, in PDH-2013-012 on whether there was in fact a violation of the automatic stay provision.

35. The aforesaid Exhibits “I” and “J” were supplied in redacted format so that the identities of the four listed operators were blacked out.

36. On February 13, 2014, as part of its Memorandum in Opposition to the DOT’s Motion in PDH-2013-012, Safety Systems asserted that Lindsay Transportation Solutions’ letter of September 13, 2013 identified only one operator who was considered “certified” and did not indicate that any of the operators were certified to operate the Zipper Machines used in Hawaii.

37. While PDH-2013-012 was pending, Safety Systems had not filed a protest with the DOT that the combination of ZUT’s second Statement of Capabilities and the Lindsay Transportation Solutions’ letter of September 13, 2013, made ZUT either a nonresponsive or a nonresponsible bidder.

38. At the February 28, 2014 hearing on the motions in PDH-2013-012, counsel for Safety Systems represented that Safety Systems first learned of the specific names of the four listed operators on ZUT’s second Statement of Capabilities on February 14, 2014. There were no objections by counsel for ZUT or DOT to this representation by counsel. Accordingly, the Hearings Officer considers the representation of Safety Systems’ counsel to be a stipulated fact.

39. The Hearings Officer’s Findings of Fact, Conclusions of Law, and Decision dismissing Safety Systems’ RFAH in Case No. PDH 2013-012 was filed on March 10, 2014.

40. By means of a letter dated March 14, 2014, Safety Systems filed a second protest with the DOT concerning the Project. The letter was “to protest and object to the actions taken by the [DOT] in violation of the automatic stay pursuant to §§ 103D-701(f) and 103D-709(g), Hawaii Revised Statutes (“HRS”).”

41. The protest letter asserted, at page 3, that the “DOT’s actions in receiving and considering such materials [the second ZUT Statement of Capabilities and Lindsay’s September

13, 2013 letter] in connection with this procurement while the stay was in effect clearly violated HRS §103D-701(f).”

42. The March 14, 2014, protest letter further stated at page 3 that the award of the contract on December 20, 2013 was premature because the initial decision to dismiss the RFAH by Hearings Officer Nagata was reversed by the Circuit Court on January 24, 2014. This was alleged to render the contract award “defective and contradictory to the stay under HRS §103D-709(g).”

43. The March 14, 2014, protest letter further stated that ZUT’s second Statement of Capabilities and the September 13, 2013 Lindsay letter supported Safety System’s first protest that ZUT did not have at the time of bid opening, and still does not have, the requisite number of certified operators for the Project.”

44. By letter dated March 21, 2014, the DOT denied Safety Systems’ second protest on the following bases:

a. The protest was untimely. Safety Systems knew or should have known about the Second Statement of Capabilities upon review of the DOT’s response to the first RFAH filed in PDH-2013-012 on November 11, 2013, as of the award of the contract on December 20, 2013, or, at the latest, as of the February 20, 2014 motions hearing in PDH-2013-012.³

b. The second Statement of Capabilities was a submission not solicited by the DOT, and no further action was taken until the award of the contract on December 20, 2013, the day after dismissal of the protest in PDH-2013-012.

³ The undersigned held the motions hearing on February 28, 2014. See Finding of Fact No. 38 above. Hearings Officer Craig Uyehara had previously held a hearing on the motions on February 20, 2014, but did not issue a decision.

c. The contract award on December 20, 2013, did not violate any stay provision because the automatic stay had expired upon dismissal of the protest in PDH-2013-012 the previous day.

45. In its RFAH filed herein on March 28, 2014, Safety Systems made the following claims:

a. Upon filing of the first protest by Safety Systems, the DOT was precluded from considering or relying on the second Statement of Capabilities and the September 13, 2013 Lindsay letter because of the provisions of HRS §§103D-701(f) and 103D-709(g) as well as HAR §3-126-5. RFAH, pages 8-9.

b. The Hearings Officer's Decision in PDH-2013-012 of March 10, 2014, informed the parties that the DOT had considered and relied on the second Statement of Capabilities and the September 13, 2013, Lindsay letter after the bid opening. This was a violation of the provisions of HRS §§103D-701(f) and 103D-709(g) as well as HAR §3-126-5. RFAH, page 9.

c. Because the Circuit Court reversed Hearings Officer Nagata's dismissal of the first protest, the contract award on December 20, 2013 was made prior to a resolution of the first protest, all in violation of the provisions of HRS § 103D-709(g) and HAR §3-126-5. RFAH, page 9.

d. The second Statement of Capabilities and the September 13, 2013 Lindsay letter further demonstrate that ZUT did not at the time of bid opening, and still does not, have the requisite number of certified operators for the Project. This makes ZUT non-responsible. RFAH, pages 9-10.

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.

1. Standards for Summary Judgment Motion

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).

2. Scope of Review

Under the State Procurement Code, the Hearings Officer engages in a *de novo* review of the claims in the RFAH. HRS §103D-709(a) states:

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, or 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.

B. The Motions of DOT and ZUT to Dismiss, or, in the Alternative, for Summary Judgment

The DOT's Motion, filed April 9, 2014, asserted that:

1. Safety Systems' protest was untimely because it should have been filed by November 19, 2013. Safety Systems had received notice of the submission of the second Statement of Capabilities on or about November 12, 2013, when Safety Systems received the DOT's Response to Safety Systems' first RFAH. DOT Motion, page 6.

2. The contract was awarded on December 20, 2013. Pursuant to HRS §103D-701(a), the latest date Safety Systems could protest this award was five working days after the posting, i.e., December 30, 2013. Therefore the second protest was untimely for this reason as well. DOT Motion, pages 6-7.

Safety System's opposition to the DOT's Motion, filed April 16, 2014, asserted that:

1. The facts giving rise to its second protest were that the DOT "considered" and/or "relied" on the second Statement of Capabilities and the September 13, 2013 Lindsay letter, and these facts were not "confirmed" until the Hearings Officer's decision of March 10, 2014. The protest filed on March 14, 2014 was therefore timely.

2. While the contract was awarded on December 20, 2013, making the protest deadline December 30, 2013, per HRS §103D-701(a), the Circuit Court's subsequent vacation of Hearings Officer Nagata's dismissal of the first RFAH effectively restored the status quo and the automatic stay so that the statutory deadline cannot be strictly construed or applied against Safety Systems' second protest.

ZUT's Motion, filed April 10, 2014, made the following assertions:

1. Safety Systems' protest was untimely because it should have been filed on December 5, 2013, five working days after November 27, 2013 when the DOT filed its Response to Safety Systems' first RFAH⁴ and revealed that there was another Statement of Capabilities. ZUT Motion, page 7.

2. The submission of the second Statement of Capabilities and the Lindsay Transportation letter was disclosed in a ZUT Motion to Quash Subpoena filed February 14, 2014, and at the hearing on the two Motions to Dismiss held February 28, 2014. Thus, as an alternative to the first argument, the RFAH should have been filed no later than either February 21, 2014, or March 7, 2014. ZUT Motion, page 7.

⁴ The DOT Response was actually filed November 12, 2013. See Finding of Fact No. 27.

3. Alternatively, the very last day to file the protests was December 30, 2013, five working days after the award of the contract. ZUT Motion, page 8.

4. There was no violation of the automatic stay because “consideration” of the second Statement of Capabilities would not violate the statute, and the automatic stay was not in effect when DOT awarded the contract to ZUT on December 20, 2013. ZUT Motion, pages 10-11.

5. The issue of whether ZUT was a responsive and responsible bidder was the subject of the prior bid protest and was not raised in Safety Systems’ second protest. ZUT Motion, page 11.

Safety Systems opposition to ZUT’s Motion, filed April 16, 2014, asserts:

1. The facts giving rise to its second protest were that the DOT “considered” and/or “relied” on the second Statement of Capabilities and the September 13, 2013 Lindsay letter, and these facts were not “confirmed” until the Hearings Officer’s decision of March 10, 2014. The protest filed on March 14, 2014 was therefore timely.

2. Consideration of the second Statement of Capabilities and the September 13, 2013 Lindsay letter were indeed a violation of the automatic stay as that provision has been construed by International Display Systems, Inc. v. Okimoto, 129 Haw. 335, 300 P.3d 601 (Haw. App. 2013).

3. The contract was awarded prior to a final resolution of the first protest, violating HRS §103D-709(g) and HAR §3-126-5. It is therefore subject to termination pursuant to HRS §103D-707(1)(B).

4. The second Statement of Capabilities and the Lindsay letter relate to the issues of responsiveness and responsibility. If the DOT’s consideration of them violated the provisions of the automatic stay, the ultimate result should be a finding that ZUT was not responsive or responsible.

1. The Deadline for Filing Safety Systems’ Second Protest Was Not Five Working Days After the DOH Filed its Response in the First RFAH Proceeding

It is undisputed that Safety Systems’ first notice of the existence of the second Statement of Capabilities and the Lindsay Transportation letter was in the DOT’s Response to the first RFAH filed November 12, 2013. HRS §103D-701(a) states in relevant part that: “a protest shall

be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.” The first question in these motions is therefore whether, based on the DOT Response, Safety Systems knew or should have known that the DOT would consider these materials in violation of the automatic stay.

In addition to the undisputed fact of notice of the existence of the documents on November 12, 2013, it is also undisputed in this case that Safety Systems knew or should have known as of that date that the DOT had considered those materials after the bids had been opened. That consideration was inherently revealed by the DOT’s statement that at least some names had been deleted, at least some new names had been inserted, and that ZUT had submitted an “amendment” of its previous bid submission. The word “amendment” is not an interpretation by the Hearings Officer—it is directly used by the DOT in its November 12, 2013 Response.

Furthermore, any issue here was decided in the previous proceeding, as Finding of Fact No. 28 in the first proceeding was not amended by the appeal to Circuit Court. It states that “the first notice to Safety Systems that the DOT had considered materials submitted by [ZUT] after the bids had been opened” was the DOT’s November 12, 2013 Response.

However, giving Safety Systems the benefit of the doubt in terms of inferences that can be drawn from these facts, it was not possible to conclude as of Safety Systems’ receipt of the DOT’s November 12, 2013 Response that the DOT consideration of these materials would be in violation of the automatic stay. The contract was not awarded until December 20, 2013, and as of November 12, 2013, Safety Systems had no basis to know that the contract would be awarded one day after dismissal of the first RFAH (with the reasonable implication that the DOE had acted so quickly because it had considered the materials during the time the automatic stay was in effect).

Further, Safety Systems did not have a copy, even a redacted copy, of the materials until well after November 12, 2013. Finding of Fact No. 28 relates to notice of the existence of the materials but does not relate to notice of the specific content of the materials, i.e., the names that were changed or the new Lindsay Transportation letter.

For these reasons, the DOT's Motion and ZUT's Motion, insofar as they are based on an alleged filing deadline of five business days after the November 12, 2013 submittal of the DOT's Response, should be denied.

2. The Deadline for Filing Safety Systems' Second Protest Cannot, on This Record, be Five Working Days After Award of the Contract

An alternative argument asserted by both the DOT and ZUT is that the filing date for the second protest should be December 30, 2013, five working days after award of the contract. For this argument, the relevant portion of HRS §103D-701(a) states: "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."

The contract was awarded after Hearings Officer Nagata's dismissal of the first protest, and the automatic stay had therefore terminated prior to the award. HRS §103D-709(g) does not extend the automatic stay due to Safety Systems' post-award appeal to the Circuit Court. In the literal technical sense, therefore, Safety Systems' second protest was untimely because it was filed after December 30, 2013.

However, it is also undisputed that Safety Systems did not have knowledge of the contents of the materials—the new names or the new Lindsay Transportation letter—by December 30, 2013.

In addition, at oral argument on the motions herein, counsel for the DOT referred to an attempt by the DOT to submit the materials in question, under seal, to Hearings Officer Nagata during an apparently unrecorded conference. The undersigned Hearings Officer was obviously not present at that conference, and the DOT's counsel's reference is not reflected in any declaration or affidavit submitted in connection with the motions at issue. However, the present state of the record supports the inference that the DOT never provided a copy of the materials to Safety Systems before Hearings Officer Nagata's dismissal order even though they were available and there was no protective order in place authorizing the DOT to refuse to provide them to Safety Systems. Therefore, perhaps out of an excess of caution in giving Safety Systems the benefit of inferences from the facts, there may be an argument that the DOT's refusal to provide the materials can somehow work as an estoppel factor precluding the reliance on the date of the award as the trigger date for the timely filing of Safety Systems' second protest. In the somewhat unusual context herein of a hearings officer's dismissal order, an award of contract the next day, a subsequent Circuit Court reversal of that dismissal order with a remand for further proceedings, plus a disclosure of materials occurring only after that court order when they could have been disclosed earlier, the Hearings Officer is unwilling to grant summary judgment on this record on the basis of utilizing December 30, 2013, as the last possible date for filing of the second protest.

3. Safety Systems' Protest Was Untimely Because it Was Not Filed Within Five Business Days of the Date Safety Systems Obtained a Copy of the Second Statement of Capabilities and the Lindsay Transportation Letter of September 13, 2013

The third alternative date for triggering the time limit on Safety Systems' second protest is asserted by the DOT in its protest denial letter to be February 20, 2013, the date of the motions before a previous hearings officer in PDH-2013-012. This argument, however, is not asserted in

the DOT's Motion. ZUT's Motion, however, does argue that February 28, 2013, the date of the second hearing on the motions in PDH-2013-012, should be the trigger date.

The Hearings Officer concludes that the February 28, 2013 date is actually too generous to Safety Systems. By February 7, 2014, Safety Systems had a copy of the second Statement of Capabilities and the Lindsay letter of September 13, 2013. See Finding of Fact No. 34. By February 14, 2014, Safety Systems knew the specific names of the four listed operators in the second Statement of Capabilities even though they had been redacted from the materials it had received on February 7, 2014. See Finding of Fact No. 38.

Thus, by February 14, 2014, Safety Systems knew that the DOT had the materials in question during the time the automatic stay was in place and it knew the contents of the materials. Further, given the one day difference between Hearings Officer Nagata's dismissal order and the award of the contract, Safety Systems' knew or should have known that those materials had, with reasonable certainty, likely been considered by the DOT while the automatic stay had been in place.

The Hearings Officer does not consider significant the fact that ZUT's Motion is willing to grant Safety Systems fourteen more days before the time limit for filing the second protest was triggered. Even if February 28, 2014, is considered the trigger date, the March 14, 2014 filing was more than five business days later. Accordingly, ZUT's Motion should be granted on this basis.⁵

⁵ As the parties realize, and were cautioned at the motions hearing herein, an oral decision made directly after conclusion of oral argument is preliminary and not final and conclusive. Only this written order is final and conclusive. Since any reliance on a trigger date in February 2014 was not specifically asserted in the DOT's Motion, the DOT's Motion should not be granted on the basis of a February 14, 2014, or February 28, 2014, trigger date. Any oral statement to the contrary at the conclusion of this hearing is not confirmed by this written order.

4. On This Record, the Hearings Officer Cannot Conclude There Was No Violation of the Automatic Stay

ZUT argues that there was no violation of the automatic stay because “considering” the second Statement of Capabilities and the Lindsay letter is not an “award” of the contract nor is it “action on the award.” However, ZUT did not present any evidence of how the DOT handled the new materials while the automatic stay was in effect.

International Display Systems, Inc. v. Okimoto, *supra*, considered whether cancellation of a solicitation while the automatic stay was in effect pursuant to HRS §103D-701(f) was a violation of the automatic stay. The decision concluded that there was no violation of the stay because termination was not an action “in furtherance of establishing or completing the contract.” 120 Haw. at 344, 300 P.3d at 610. Since the contract at issue in that case had already been awarded prior to the termination, the use of the words “establishing ...the contract” might be considered superfluous to the opinion. However, the decision also relied on a Florida case involving a similar statute that held that the bidding process leading up to an award is halted by an automatic stay. Caber Systems, Inc. v. Dep’t. of Gen. Services, 530 So. 2d 325 (Fla. App. 1988), cited in International Display Systems, Inc. v. Okimoto, *supra*, 129 Haw. at 344, 300 P. 3d at 610.

ZUT’s position also contradicts actions taken by the Department of the Attorney General in previous bid protests. In some of those cases, the Department had discerned that further analysis of competing bids, for example, might establish facts that would resolve a bid protest by means of settlement rather than litigation. However, no further analysis was taken by the procuring agency until the Department obtained a stipulation from the protestor allowing the analysis despite the existence of the automatic stay or until the Department obtained a stipulated dismissal of the protest without prejudice on the ground that the protest was premature until that

analysis took place. While this practice is not necessarily legally conclusive, it does indicate a viewpoint contrary to the assertions in ZUT's Motion.

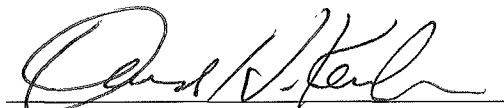
Because the factual predicate for what occurred during the automatic stay was not established by ZUT and nothing improper was admitted by the DOT, the legal issues discussed above need not be resolved. ZUT's Motion on the ground discussed herein should be denied.

IV. ORDER

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

- a. The DOT's Motion to Dismiss or, in the Alternative, for Summary Judgment is denied.
- b. ZUT's Motion to Dismiss and/or, in the Alternative, for Summary Judgment is granted in part and denied in part.
- c. Due to the partial granting of ZUT's Motion, Safety System's Request for Administrative Hearing herein is dismissed with prejudice.
- d. The cash or protest bond of Safety Systems shall be deposited into the general fund.
- e. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, APR 30 2014



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