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

In the Matter of	PDH-2014-002
GREENPATH TECHNOLOGIES, INC., Petitioner,	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION; EXHIBITS "A"-"B"
vs.	
DEPARTMENT OF FINANCE, COUNTY OF MAUI, Respondent,	Senior Hearings Officer: David H. Karlen
and	
HAWAII PACIFIC SOLAR,LLC, Intervenor.	

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

I. INTRODUCTION

On February 4, 2014, Petitioner GreenPath Technologies, Inc. ("GPT") filed its Request for Hearing ("RFAH") in this matter, which was assigned case number PDH-2014-002. Respondent was the Department of Finance, County of Maui ("County").

A Notice of Hearing and Prehearing Conference was filed on February 4, 2014, setting a prehearing conference for February 13, 2014, and a hearing for February 20, 2014.

Hawaii Pacific Solar LLC ("HPS") was allowed to intervene in the matter pursuant to a Stipulation and Order filed February 7, 2014.

On February 10, 2014, a status conference was held by telephone. All parties were represented by counsel during that status conference. Pursuant to a stipulation of the parties reached during that status conference, the hearing date was continued to March 1, 2014. In addition, a date of February 26, 2014, was set for a hearing on all motions for dismissal and/or for summary judgment. As a result of this scheduling, the prehearing conference was cancelled.

Thereafter, the following motions and related memoranda were filed:

1. a. County's Response and Motion to Dismiss, filed February 18, 2014. HPS filed a Joinder in the County's Motion on February 19, 2014. GPT filed a Memorandum in opposition to the County's Motion on February 24, 2014.

2. a. HPS' Motion to Dismiss, or in the Alternative, for Summary Judgment, filed February 18, 2014. The Memorandum in support of this Motion will be referred to as "HPS Memorandum #1."

b. GPT's Memorandum in Opposition to HPS' Motion to Dismiss, or in the Alternative, for Summary Judgment, filed February 24, 2014. This Memorandum will be referred to as "GPT Memorandum #1."

3. a. GPT's Motion for Summary Judgment that the Bid Submitted by HPS/Rockwell/Phoenix Solar Does Not Identify a Bidding Entity, filed February 18, 2014. The Memorandum in Support of this Motion will be referred to as "GPT Memorandum #2."

b. HPS Memorandum in Opposition to GPT's Motion for Summary Judgment that the Bid Submitted by HPS/Rockwell/Phoenix Solar Does Not Identify a Bidding Entity, filed February 24, 2014. This Memorandum will be referred to as "HPS Memorandum #2."

c. County's Memorandum in Opposition to GPT's Motion for Summary Judgment that the Bid Submitted by HPS/Rockwell/Phoenix Does Not Identify a Bidding Identity[sic], filed February 25, 2014. This Memorandum will be referred to as "County Memorandum #2."

4. a. GPT's Motion for Summary Judgment on "Price to Rise" Requirement filed February 18, 2014. The Memorandum in support of this Motion will be referred to as "GPT Memorandum #3."

b. HPS' Memorandum in Opposition to GPT's Motion for Summary Judgment on "Price to Rise" Requirement, filed February 24, 2014. This Memorandum will be referred to as "HPS Memorandum #3."

c. County's Memorandum in Opposition to GPT's Motion for Summary Judgment on "Price to Rise" Requirement, filed February 25, 2014. This Memorandum will be referred to as "County Memorandum #3."

5. a. GPT Motion for Summary Judgment on Ambiguous Price, filed February 18, 2014. The Memorandum in support of this Motion will be referred to as "GPT Memorandum #4."

b. HPS' Memorandum in Opposition to GPT's Motion for Summary Judgment on Ambiguous Price, filed February 24, 2014. This Memorandum will be referred to as "HPS Memorandum #4."

c. County Memorandum in Opposition to GPT's Motion for Summary Judgment on Ambiguous, filed February 25, 2014. This Memorandum will be referred to as "County Memorandum #4."

All of the above motions came on for hearing on February 26, 2014. GPT was represented by Nathan H. Yoshimoto, Esq., and T.F. Mana Moriarty, Esq. The County was represented by Deputy Corporation Counsel Thomas Kolbe, Esq. HPS was represented by Corianne W. Lau, Esq., and Jessica Y.K. Wong, Esq. At the conclusion of arguments on the motions, all motions were taken under advisement by the Hearings Officer.

On February 27, 2014, the Hearings Officer sent a letter by facsimile to all counsel stating that the decision on the motions would be dispositive and there was, therefore, no need for an evidentiary hearing on March 1, 2014.

On March 4, 2014, HPS filed an additional Motion to Dismiss. The basis of this Motion was the contention of HPS that the procurement protest of GPT failed to prove that it concerned a matter equal to no less than ten per cent of the estimated value of the contract at issue. The Memorandum in Support of this Motion will be referred to as "HPS Memorandum #5." The County filed a joinder to this Motion on March 10, 2014.

On March 7, 2014, GPT filed its Memorandum in Opposition to HPS' Motion to Dismiss. This Memorandum will be referred to as "GPT Memorandum #5."

By stipulation of the parties, the HPS Motion to Dismiss was submitted for a decision without oral argument.

On March 10, 2014, the Hearings Officer sent a letter by facsimile to all counsel stating that his decision would be to deny the HPS Motion to Dismiss. In addition, the letter stated that an order granting, *sua sponte,* a motion for partial summary judgment for GPT that it had established that its procurement protest concerned a matter equal to no less than ten per cent of the estimated value of the contract at issue appeared to be in order. HPS and the County were granted additional time to file memoranda opposing such a result.

On March 14, 2014, HPS filed its Memorandum in Opposition to Hearings Officer's Proposal to *Sua Sponte* Grant Partial Summary Judgment to GreenPath Technologies, Inc. on the Issue of Jurisdictional Amount in Dispute under HRS §103D-709. This Memorandum will be referred to as "HPS Memoranda #6."

Having considered all of the filings and records herein, as well as the oral argument on February 26, 2014, the Hearings Officer enters the following Findings of Fact, Conclusions of Law, and Decision in this case.

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.

Note: One of the major issues in this case was the identity of the offeror of the proposal that received the highest points from the County's evaluators. Hawaii Pacific Solar, LLC ("HPS"), claims to be that offeror and was allowed to intervene in this proceeding. It will be continue to be referred to as "HPS" throughout this Decision. To also identify the actual offeror as "HPS," as HPS does in its filings, however, would be to prejudge the identity of the offeror. For the same reason, this Decision does not use "HPS Group" as GPT essentially does to identify the offeror in its memoranda. Accordingly, the offeror will be identified throughout this Decision as "HPS*"—this designation is utilized solely for purposes of identifying the offeror as being the subject of discussion and does not prejudge the actual identity of the offeror.

1. On or about May 17, 2013, the County issued a Request for Competitive Sealed Proposals ("RFP"), RFP No. 12-13/P-103, to furnish, deliver, install, operate, maintain, and own solar photovoltaic systems and sell renewable energy to the County under a Power Purchase Agreement ("PPA"). Addendas 1 through 3 to the RFP were subsequently issued.

2. The RFP initially sought written proposals to provide renewable energy services at up to 24 sites in Maui County. Per Addendum 2, the RFP sought written proposals to provide renewable energy services at 18 sites in Maui County.

3. Special Provision 2 of the RFP required all bidders to submit a pre-qualification form by filling out the form provided with the RFP.

4. The pre-qualification form submitted to the County identifies Hawaii Pacific Solar LLC ("HPS") as the party to act as "Provider" under the PPA.

5. The words "see attached" are written in by hand on page 1 of this pre-qualification form. Attached to this form was an additional typed page with a heading stating that it was the "County of Maui Solar PPA Bidder Pre-Qualification Form (continued)." This page states that "Hawaii Pacific Solar LLC will team with two others, "RC Energy Group" and "Phoenix Solar Incorporated."

6. Under the terms of the RFP, the County sought to buy electricity for the 20 year term of the PPA at prices below the Maui Electric Company ("MECO") rate at all of the sites.

7. Paragraph 9 of the RFP states:

> 9. Bidder shall not submit more than one offer for each item specified in the Offer Form. Doing so shall be cause for rejection of all offers from that bidder.

8. Paragraph 16 of the RFP states that:

> 16. A contract shall be awarded to the responsive bidder that scores the highest under the RFP Evaluation Scoring Worksheet shown as Attachment "B".

9. Paragraph 17 of the RFP states that:

> 17. All items in the Offer Form must be filled in to qualify as a complete bid. Incomplete, conditional and irregular bids shall be rejected.

10. For each site over 50kW, the RFP required bidders to provide two prices: (1) a price for grid-tied pv, and (2) a price for micro-grid pv (which would provide a combination of pv and storage). Addenda 2 clarified that the bidder was only required to provide micro-grid options and pricing for a minimum of 5 sites.

11. Nine companies submitted proposals in response to the RFP.

12. Paragraph 1 of the RFP states that the work "shall be subject to the Technical Specification, Special Provisions, Offer Form and General Terms & Conditions in this order of priority."

13. Attachment B to the RFP was a copy of an existing PPA from 2011. The RFP's technical specifications state:

> Other than replacing the Exhibits [to the sample PPA] with accurate Site specific information for this 2013 RFP, and identifying the winning bidder from the 2013 RFP as the Provider, the bidder agrees to **ACCEPT THE TERMS OF THE PPA "AS IS" WITHOUT FURTHER NEGOTIATION OR REQUESTED CHANGES.** (Emphasis in original)

14. The PPA example attached to the RFP as Attachment B has an attached Exhibit C that concerns the prices for that PPA. All pricing is based on an initial amount plus an "Escalation Rate" to determine the price for the next 19 years. In addition, that Exhibit C has pricing provisions for the recovery of two types of costs that both provide for escalation over the life of the PPA.

15. The RFP's technical specifications provide, as part of Paragraph 8, that:

> The PPA terms are not negotiable; and proposals that attempt to condition the proposal based on contractual changes will be disqualified.

16. The RFP contained a two page Offer Form that offerors were required to fill out and submit. A copy of that Offer Form is attached to this Decision as Exhibit "A."

17. The Offer Form has two spaces where the "Name of the Bidder" must be supplied. One is in the left hand column of the form and one is in the right hand column of the form (the right hand column requires the offeror to "Print or Type Name of Bidder").

18. The Offer Form states that a party submitting an offer represents that its offer is "in strict compliance with the PPA, Minimum Specifications, General Terms & Conditions and this Offer Form."

19. In the left hand column of the Offer Form submitted by HPS*, the "Name of Bidder" is "Hawaii Pacific Solar, LLC, Rockwell Financial Group/Phoenix Solar." In the right hand column of the Offer Form submitted by HPS*, the "Name of Bidder" is stated to be "Hawaii Pacific Solar, LLC et al." In the lower portion of the form where the offeror is supposed to "Specify Type of Organization" and is given three choices to check off ("Individual," "Partnership," and "Corporation"), the HPS* Offer Form left all of those spaces blank. In the lower portion of the form where the offeror is supposed to specify the "State of Incorporation" and is given the choice of "Hawaii" or "Other," The HPS* Offer Form checked "Other." In the space where "Other" was supposed to "Please Specify" (which obviously refers to a state "other" than Hawaii), the HPS* Offer Form is filled in with "LLC." A copy of the HPS* Offer Form is attached hereto as Exhibit "B."[1]

20. Mr. Robert Johnson signed the HPS* Offer Form in his capacity of "President" of Hawaii Pacific Solar LLC.

21. The Federal Tax ID number and the Hawaii State General Excise Tax License Number on the HPS* Offer Form are those of Hawaii Pacific Solar LLC

22. HPS, Rockwell Financial Group, and Phoenix Solar are three separate legal entities.

[1] Although no protective order was requested, financial information has been redacted from this Exhibit "B."

23. HPS is a limited liability company ("LLC") organized and registered in Hawaii. Mr. Robert Johnson is a manager of HPS.

24. Phoenix Solar is a Delaware corporation that is registered to do business in Hawaii.

25. Rockwell Financial Group is a Colorado limited liability company that is not registered to do business in Hawaii.

26. There is no business registered to do business in Hawaii under the name "Hawaii Pacific Solar LLC, Rockwell Financial Group/Phoenix Solar."

27. Included with the HPS* Offer Form were additional documents submitted on behalf of that offeror. Copies of these documents are part of Exhibit "B" attached hereto. The cover page of the submittal states that it was prepared by three entities, namely Hawaii Pacific Solar LLC, Phoenix Solar, and Rockwell Financial Group.

28. The three page letter of transmittal of the offer, dated August 14, 2013, that is part of Exhibit "B," also contains critical pricing information and is on stationary containing the logos of Hawaii Pacific Solar LLC, Phoenix Solar, and Rockwell Financial Group on all three pages. The letter states that it is "respectfully submitted" by HPS and is signed by Mr. Robert Johnson in his capacity as "President & CEO."

29. The letter identifies Phoenix Solar and "Rockwell Financial Group (RC Energy)"[2] as "co-proposers." It further states that "[t]he individual(s) signing this proposal have the authority to bind the partnership and the venture." It further states: "The proposers understand and will comply with all terms and conditions set forth in the RFP," using the plural word "proposers."

[2] On the second page of the letter, this entity is identified as "RC Energy (Rockwell Financial)."

30. The third page of this letter states that:

> This offer is **NOT** conditional upon third party financing. All financing has been secured and committed as evidenced by the attached offering letter from RC Energy a division of Rockwell Financial Group and member of the HPS Team." (Emphasis in original)

31. The referenced financing letter from Rockwell Financial Group, dated August 13, 2013, is also part of Exhibit "B." It states that "Rockwell Financial Group, together with its partners," with the partners being unspecified, "has agreed to provide funding for the projects based on the award to Hawaii Pacific Solar."

32. Another page in the submittal, Exhibit "B" attached hereto, is entitled "Offeror's Proposal" and states that the "Service Provider" is "Energy Production Company supported by Rockwell Financial Group, Phoenix Solar USA, and Hawaii Pacific Solar," and seeks the County's "acceptance of this Proposal."

33. The HPS* Offer Form provides no further information about RC Energy or Energy Production Company.

34. The County asserts that the cover letter of August 14, 2013 that was submitted with the HPS* Offer Form was sent solely by "Hawaii Pacific Solar LLC" and not some "nameless unidentified entity." County's Response and Motion to Dismiss at page 8.

35. In his Declaration of February 18, 2014, submitted with the County's Response and Motion to Dismiss, one of the County's three evaluators of the proposals states that the "winner of the award (Hawaii Pacific Solar LLC)" was announced in a County press release and formally notified by a County letter of October 2, 2013 of the County's intent to award it the contract.

36. HPS insists that it is the offeror on the proposal. HPS Memorandum #1 at pages 25-29. This assertion is based upon the following:

a. HPS is alleged to be the offeror on the proposal. The entity that signed the Offer Form was HPS, through Mr. Johnson in his capacity as Presient and CEO of HPS. HPS certified that it had reviewed the RFP documents and "hereby proposes" to perform the contract work. HPS Memorandum #1, page 25.

b. No representatives of Rockwell Financial Group or Phoenix Solar signed the Offer Form. HPS Memorandum #1, pages 25-26.

c. The August 14, 2013 cover letter was submitted solely by HPS and no other person or party signed the letter. HPS Memorandum #1, pages 25-26.

d, HPS, Rockwell, and Phoenix are "parties to a teaming agreement under which the members agreed Hawaii Pacific would submit a Proposal for the work solicited under the RFP, and, upon award, the members would perform the contract work." HPS Memorandum #1, pages 26-27. In support of this contention, HPS cites a federal regulation that states:

> Contractor team arrangement ...means an arrangement in which (a) [t]wo or more companies form a partnership or joint venture to act as a potential prime contractor; or (b) [a] potential prime contractor agrees with one or more companies to have them act as its subcontractors under a specified Government contract or acquisition program.

HPS Memorandum #1 at page 26, citing 48 C.F.R. §9.601. Further, the teaming agreement here was allegedly not organized into a legal entity and was not a joint venture. HPS Memorandum #1 at pages 26-27.

e. Rockwell stated in its Financing Submissions that Rockwell agreed to provide funding based on the award to Hawaii Pacific Solar. HPS Memorandum #1 at page 27.

f. The County "clearly understood who was making the offer." HPS refers to the County evaluations sheets, and the County's press release. HPS Memorandum #1 at pages 27-28

g. HPS tried to explain the "Energy Production Company" referenced in the Rockwell financing letter as a "special purpose entity" to manage the contract. HPS Memorandum #1 at page 28.

h. HPS also submitted an Affidavit from Mr. Kalvin Kobayashi, one of the County's evaluators of the proposals submitted in response to this RFP, stating that HPS was the winner of the award.

37. Part of the RFP's Offer Form, Exhibit "A" hereto, states "Price to rise by ___% ___ year." Offerors were supposed to insert a percentage figure in the first blank and a time period (e.g. "year") in the second blank.

38. On the HPS* Offer Form, the word "rise" is specifically crossed out and the word "decrease" is typed in to replace it, so that the HPS* Offer Form reads "Price to decrease" instead of "Price to rise."

39. The August 14, 2013 letter states that the "Rate structure is a reverse inflator or deflator" and the "Annual DESCALATION [sic] rate is" the same percentage figure as that filled in for the "Price to decrease" line on the HPS* Offer Form.

40. The RFP Offer Form, Exhibit "A" hereto, contained a blank where offerors were to fill in their price, in "cents per kilowatt hour" for supplying grid tied pv, and another blank where offerors were fill in their price, in "cents per kilowatt hour" for micro grid pv systems. The form had an additional blank where offerors were to fill in their "FIRST YEAR PRICE per kwh from grid tied pv."

42. The HPS* Offer Form provided prices as follows:

a. A "levelized cost" in cents per kilowatt hour for grid tied pv.

b. A "levelized cost" in cents per kilowatt hour for micro grid pv.

c. A first year price in cents per kilowatt hour for grid tied pv which is not expressed as a levelized cost.

d. An additional "Year 20 price per kWH" which is not expressed as a levelized cost. This price was not called for in the RFP's Offer Form.

e. These prices were repeated in the letter of August 14, 2013 that accompanied the HPS* Offer Form.

f. The letter also provided first and last year prices for micro grid pv that were not expressed as a levelized cost. Neither of these prices was called for in the RFP's Offer Form.

43. The levelized prices set forth in the HPS* Offer Form differ from the levelized prices calculated by the County. The County's first calculations of the levelized price for grid-tied pv was 2.7% higher than that on the HPS* Offer Form. Similarly, the County's first calculation of the levelized price for micro-grid pv was just under 2.8% higher than that on the HPS* Offer Form. The County later recalculated the levelized prices for the HPS* offer and came up with figures that were about 30% less than the levelized prices on the HPS* Offer Form. See County's Exhibit 5.

44. The County's Evaluation Committee scoring worksheets indicate that the County used its own calculations of levelized cost when evaluating the HPS* proposal.

45. The County admitted in its letter of January 28, 2014, that it assumed all proposals would be structured on a "price to rise" basis.

46. When the proposals were first evaluated and scored, HPS* received the highest total score, with 265 points. GPT had the second highest score, with 252 total points.

47. After the County's announcement of its intent to award the contract to HPS*, the County learned that its scoring on the pricing of the offers was erroneous because it had not used the price formula required by HAR §3-122-52(d).

48. The County thereupon recalculated the scoring based upon the formula in that regulation. After the County's recalculation, it appears from the County's Exhibit 5 to its Response and Motion to Dismiss, filed February 18, 2014, that HPS* remained the highest scorer at 252 points and GPT remained the second highest scorer at 248 points. It also appears from that exhibit that this revision was done on February 13, 2014.

49. On October 2, 2013, the County issued a press release announcing its intent to award the PPA to "a group of companies led by Hawaii Pacific Solar LLC of Lahaina, Hawaii submitted the highest scoring Proposal," referred to this group of companies as "Hawaii Pacific," and stated that the County "intends to award the contract to Hawaii Pacific."

50. The press release stated that "Hawaii Pacific" was the "only bidder to offer declining pricing."

51. On October 2, 2013, the County wrote a letter addressed to HPS, Rockwell Financial Group, and Phoenix Solar, care of HPS, providing formal notice that the County intended to award this contract to "your group."

52. On October 16, 2013, GPT submitted a bid protest letter to the County.

53. HPS received a copy of this letter on October 17, 2013.

54. On October 18, 2013, HPS submitted to the County a Notice of Intervention in GPT's Protest.

55. On October 18, 2013, HPS submitted a request to the County for access to the County's procurement file, which included a request for GPT's proposal.

56. On October 23, 2013, GPT submitted a supplemental bid protest to the County based on information received from the County on October 16, 2013 and October 18, 2013.

57. On November 1, 2013, HPS submitted to the County its response to GPT's October 16, 2013 protest.

58. On November 18, 2013, GPT responded to HPS' November 1, 2013 letter. HPS then responded on November 20, 2013, to the GPT November 18, 2013 letter.

59. On January 7, 2014, HPS submitted to the County its response to GPT's October 23, 2013 supplemental bid protest.

60. On January 28, 2014, by letter to GPT, the County denied GPT's bid protest and supplemental bid protest.

61. On February 4, 2014, GPT filed its RFAH. The RFAH incorporated GPT's initial bid protest, its supplemental bid protest, and a letter sent to the County dated November 18, 2013.

62. GPT filed another supplemental bid protest with the County on February 23, 2014. It appears that the County has not yet made a decision on this supplemental protest.

63. The RFAH raised the following matters:

a. The HPS* proposal based on a de-escalating pricing structure is non-responsive and therefore must be rejected;

b. The HPS* proposal contained a cost contingency in the form of an allowance and therefore must be rejected as non-responsive;

c. The HPS* proposal included non-compliant warranties and therefore must be rejected as non-responsive.

d. The HPS* proposal is from an LLC that does not exist and is therefore non-responsive and unacceptable.

e. Various errors in the HPS* bid render it non-responsive and unacceptable.

f. The County was required to re-score the HPS* and GPT proposals because the Evaluation Committee's scoring was clearly erroneous, arbitrary, capricious, and contrary to law.

g. The Evaluation Committee allowed HPS* to revise or clarify its submission, and the County withheld information from GPT; and

h. The PPA has not been awarded, and no further action can be taken on the solicitation or award of the contract.

64. On February 17, 2014, HPS received a redacted copy of GPT's proposal to the County.

65. On February 23, 2014, GPT submitted another supplemental bid protest to the County. This supplemental protest is not being considered in the present proceedings.

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.

A. Standards for Summary Judgment Motions

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. 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.

C. GPT May Utilize Declarations Instead of Affidavits

HPS asserts that GPT has improperly utilized declarations, instead of the required affidavits, in GPT's motions. HPS relies on HAR §3-126-51(b), which states in relevant part: "Motions referring to facts not of record shall be supported by affidavits."

HPS fails to take into account the recent amendment to HRS §103D-709(c) by Act 173 of the 2012 Legislature. The prior version of the statute made procurement protest proceedings very formalistic when it stated: "The rules of evidence shall apply." As part of the streamlining process mandated by Act 173, that sentence was eliminated from the statute. It was replaced by the following sentence: "Fact finding under section 91-10 shall apply."

HRS §91-10, when referencing the form of evidence to be utilized in contested case proceedings, provides that "any oral or documentary evidence" is allowed. The Hawaii Supreme Court recently held that this means that evidence cannot be excluded if it is not

presented in declarations or affidavits. Diamond v. Dobbin, ___ P.3d ___, 2013 WL 285388 (January 27, 2014) at pages *23-24. Therefore, anything to the contrary in HAR §3-126-51(b) is no longer operative because it is contrary to the pertinent portion of the Procurement Code as recently amended.

The use of declarations by GPT in support of its Motions is therefore authorized and the declarations can be considered in this proceeding.

There is a further consideration. As all persons familiar with civil litigation in Hawaii are aware, declarations can be used in lieu of affidavits in Circuit Court proceedings. Hawaii Circuit Court Rule 7(g). Even if there were no statutory and case authority on point, in light of this rule allowing use of declarations in Circuit Court litigation, the Hearings Officer considers a proper declaration in this proceeding as the substantial equivalent of an affidavit and would not penalize GPT for relying upon declarations.[3]

Accordingly, the HPS objection to GPT's use of declarations instead of affidavits is denied.

D. The HPS Motion Regarding the Amount in Controversy Should be Denied

The ability to initiate a procurement protest proceeding before the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs is not unlimited. Act 173 of the 2012 Legislature added a number of limitations on such protests. At issue in HPS' motion is what might be termed the "minimum amount in controversy" provision. In that regard, Act 173 inserted the following text, codified in HRS §103D-709(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-703 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

[3] It should also be noted that HAR §3-126-51(g) does not require that a failure to use affidavits must always result in a denial of the motion.

(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 percent of the estimated value of the contract.

Act 173 also added the following text, codified in HRS 103D-709(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.

The parties agree that the contract in question has an "estimated value" greater than $1,000,000 but disagree on what figure actually constitutes that "estimated value."

In its Motion to Dismiss filed March 4, 2014, HPS proposes three different methods of determining the "estimated value" of contract with the County: the total energy cost savings of the 20 years of the PPA, the net present value of those cost savings, or the total price of generating its energy to the County over the life of the PPA calculated by using levelized prices. HPS Memorandum #5 at pages 6-7.

The Legislature did not provide any further guidance in the statutes as to how to apply the minimum ten per cent rule. However, although not mentioned by HPS, the provision has been the subject of three prior decisions of the Office of Administrative Hearings.

The first decision was Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-2 and PCX-2011-3 (June 6, 2011). The decision concerned a statutory predecessor of Act 173. Although that statute "sunsetted" at the end of June, 2011, its terms were identical to the terms of Act 173 insofar as the minimum amount in controversy provision is concerned.

In that decision, the Hearings Officer held that HRS §103D-709(d) does not require a protestor to show that it would have obtained the award in order to have standing to protest the award. Page 62 at ¶82.

One protestor (Kiewit) asserted that the offeror selected by the State had been allowed to submit a nonresponsive proposal. Kiewit asserted that if it had been allowed to submit a similarly configured nonresponsive proposal, its proposal price would have been reduced by a little more than $12 million. This figure would have reduced the price of the Kiewit proposal below that of the apparent winning offeror. See page 27 of the decision at ¶99.

However, Kiewit failed to prove that its $12 million reduction was a reliable and acceptable figure. It thus failed to have standing to protest because of a failure of proof. See pages 63-64 at ¶¶85-86. The failure involved lack of proof that the alleged reduction exceeded 10% of the estimated value of the contract—it was not a failure to prove that the reduction would have made it mandatory to award Kiewit the contract.

The case is significant because it rejected the idea that the "matter" that is the "concern" of the protest (per the terms of HRS 103D-709(d) and that must be over ten percent) must be the differential between the successful offeror's price and the protestor's price. If that had been the case, the Legislature could easily have said so in no uncertain terms, e.g. "the protest concerns a difference between the value of the protestor's bid or proposal and the estimated value of the contract."

In enacting Act 173, the Legislature was concerned with eliminating bid protests that involved relatively minor issues so that the procurement would not be delayed while those minor issues were resolved. Air Rescue Systems Corp. v. Finance Department, County of

Hawaii, PDH-2012-006 (December 10, 2012) at page 14. Adoption of the test advocated by HPS would thus lead to an unacceptable result at odds with the Legislature's intent. HPS' interpretation would allow a bid protest over a minor, even trivial, matter, such as use of an unlicensed subcontractor performing a relatively minor portion of the work, to hold up the procurement if there was a big difference in price between the first and second bidder but not if there was less than a ten percent price difference. Not only would this interpretation delay the procurement on account of minor issues, a meritorious protest would result in the State having to pay more to the winning protestor only if that winning protestor's bid was more than ten percent higher than the low bid. This would certainly be a backwards way of streamlining the procurement protest process. The Hearings Officer cannot believe the Legislature intended to significantly increase procurement costs even if there were only a relatively minor defect in the low bid.

This point was briefly and tangentially discussed in the Kiewit Infrastructure West decision with respect to the second protestor, Goodfellow Bros., Inc. ("GBI")

> GBI [asserted] that HDCC's proposal would have been much higher if its proposal did not have any variations from the RFP requirements. While the statute does not define the "matter" that must be greater than ten percent of HDCC's proposal, it was not reasonable to believe that the "matter" would involve an increase in [the] lowest proposal price. In passing Act 175 [of the 2009 Legislature, the statutory predecessor to Act 173 of the 2012 Legislature], the Legislature was not intending to encourage procurement protests, much less those that were based on an increase in the lowest price. Thus, besides being unquantified, this assertion does not establish standing for GBI.

Page 73 at ¶114.

The next case dealing with HRS §103D-709(d) was Sumitomo Corp. of America v. Director, Dept. of Budget and Fiscal Services, City and County of Honolulu, PCX-2011-5 (August 5, 2011), which also involved the statutory predecessor of Act 173. The contract at

issue there involved payments over an eighteen (18) year period. The "estimated value of the contract" was determined to be the total amount of the proposal without any reduction of the payments to their net present value. However, because of other considerations in the case, determination of the "estimated value of the contract" was not squarely at issue in the case.

The third case to discuss the terms of HRS §103D-709(d), is Air Rescue Systems Corp. v. Finance Department, County of Hawaii, PDH-2012-006 (December 10, 2012). For this case, Act 173 was in effect. The source of the protest was the insertion into the third lowest bidder's bid of an additional line item of charges for an on-call rate for helicopter services when the two lowest bids did not contain any on-call rates. The amount of the on-call services was determined to be $2,500. This was obviously less than the minimum amount of controversy of $10,000 for the contract there was for less than $1,000,000.

In an attempt to avoid this problem with its protest, the protestor asserted that the "matter" of "concern" was the entire amount of the low bid (which far exceeded $10,000) because the protestor's success with respect to the on-call rates issue would result in the rejection of the entire low bid. The decision squarely rejected this proposition:

> The Hearings Officer, however, cannot accept the proposition that the entire contract value is of concern in this particular procurement protest. Under Air Rescue's theory, a protest on any ground would challenge the entire contract value because a successful protest would lead to a rejection of the entire low bid. Such an interpretation would eliminate the threshold requirement because virtually all post-bid protests would bring into contention the full estimated value of the contract.
>
> The Hearings Officer believes that the legislative intent behind the minimum threshold amount requirement was to eliminate protests over matters of a very small amount. In the past, it was possible that a successful protest over a minor portion of a bid could result in the disallowance of the entire bid. At the very least, such a protest could tie up procurement amidst the uncertainty over whether a minor error could delay and ultimately detrimentally affect the entire procurement process.
>
> The Hearings Officer therefore concludes that the "matter" of "concern" here is the alleged absence of an on-call rate in the bids of the other two bidders.

PDH-2012-006 at page 14.

HPS' contention that the price differential between the HPS proposal and the GTP proposal is less than ten percent is set forth at pages 7 and 8 of its Memorandum #5. This Memorandum contains no legal analysis or citation of authority demonstrating that this is the proper method of determining the "matter" of "concern" in terms of HRS §103D-709(d). With respect to HPS' contention here, it is irrelevant that the parties may dispute how to determine the actual cost of the contract or that their figures for the actual cost may differ. Pursuant to the analysis and the cited authorities set forth above, HPS's proposal to use the differential between the actual contract costs of the two offers is incorrect and unacceptable as a matter of law no matter what the specific cost figures may turn out to be.

Another method proposed by HPS for determining the amount of the "matter" of "concern" is to use the total value of the savings to the County from the services provided over the 20 year term of the PPA. HPS' Memorandum #5 at page 6. Again, HPS' Memorandum contains no legal analysis or citation of authority demonstrating that this is the proper method of determining the "matter" of "concern." There is no demonstration that GPT's entire procurement protest is based on a claim that defects in HPS's offer concerning the total value of the savings to the County over what it might cost to continue to use the services of Maui Electric is the sole "matter" of "concern."

In addition, HPS has not demonstrated that the total value of the savings is the "estimated value" of the contract under the terms of HRS §103D-709(j). That statute specifically defines "estimated value" when, as here, a request for proposal is involved, as "the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303." (Emphasis supplied) The "bid amount" clearly refers to the amount the County would pay, not save, under the contract.[4]

[4] The RFP Offer Form only asks offerors to list prices that the County will pay. The request to supply estimated savings is in another portion of the RFP.

HPS asserts at page 6 of its Memorandum #5 that offerors were required to include a spreadsheet showing the net present value of the savings to the County and that the County confirms that "this requirement was used as a measure of the value of the Contract." The accompanying affidavit of Mr. Kal Kobayashi does indeed state, but only in conclusory terms, that the total savings and the net present value of the savings to be the "estimated value of the contract." For its own internal purposes, the County might be entitled to look at things this way. However, that viewpoint does not meet the statutory requirements.

For all of the reasons stated above, HPS' contentions that the total value of the savings or the net value of the savings to the County from the HPS* proposal as compared to the GPT proposal determines the amount of the "matter" of "concern" is incorrect and unacceptable.

Insofar as HPS' Motion is based solely on either the difference between the total amounts of the two proposals, the total value of the savings in the HPS proposal, or the net value of the savings in the HPS proposal, the Motion fails as a matter of law even with the assumption that the facts alleged by HPS are undisputed. This HPS Motion should be denied.

E. GPT is Entitled to Summary Judgment on the Issue of Compliance With the "Matter in Controversy" Requirement in HRS §103D-709(d)

A party's opposition to a motion for summary judgment can demonstrate that it is itself entitled to summary judgment on the issue under contention. In that situation, the hearings officer can, *sua sponte,* grant summary judgment to the non-moving party as long as the moving party has had adequate notice and an opportunity to respond to the possibility that its motion will instead result in a ruling against it. Robert's Hawaii School Bus, Inc. v. Kathryn S. Matayoshi, et al., PDH2013-009 (October 29, 2013), Exhibit "C" at pages 6-7. Cf. Querubin v. Thronas, 107 Haw. 48, 109 P.3d 689 (2006). The Hearings Officer's letter of March 10, 2014, put HPS, and the County, on notice of the possibility that summary

judgment would be granted to GPT on the issue of whether the GPT protest complied with the minimum amount in controversy requirement of HRS §103D-709(d). HPS took advantage of the opportunity afforded it by the Hearings Officer's letter and filed a Memorandum in Opposition (Memorandum #6) on March 14, 2014.

In GPT's Memorandum #5, GPT asserted that the estimated value of the contract is the amount to be paid by the County for the HPS* proposal over the life of the contract, as that is in accord with the authorities cited above. The entire basis of the RFP was for a long term arrangement with the successful offeror. The Hearings Officer agrees. The Hearings Officer also agrees with GPT's contention that the relevant estimated amount pertains to the grid-tied pv system because the RFP allowed proposals to build micro-grid systems at only 5 sites rather than all of the sites required for the grid-tied pv system. See GPT Memorandum #5 at pages 14-17 and page 16 n.1.

The GPT challenge to the HPS* proposal on the ground that it is ambiguous and does not clearly identify the proposer is a direct challenge to the entire HPS* proposal. The failure of the HPS* proposal to unambiguously identify the proposer means that there is no proposal to consider. This is not a case of a challenge to a portion of the proposal which may or may not involve the jurisdictional amount. Cf. Air Rescue Systems Corp. v. Finance Department, County of Hawaii, PDH-2012-006 (December 10, 2012). The entire proposal is the "matter" of "concern" here; thus the jurisdictional minimum of ten percent is exceeded.

Similarly, GPT's claim that the HPS* Offer Form makes the HPS* proposal both conditional and non-responsive is a challenge to the entire HPS* proposal. The "matter" of "concern" is one of "all or nothing." As discussed below concerning the merits of this claim, a finding that the HPS* offer is conditional or that it is nonresponsive with respect to the "price to rise" requirement encompasses the entire pricing structure of the HPS* proposal.

In addition, GPT's claim that the HPS* proposed two different prices for each item is another challenge to the entire HPS* proposal. A challenge asserting there has been a submission of two prices goes to the very heart of the entire proposal.

All three of these bases for meeting the minimum jurisdiction amount requirement were clearly set forth in GPT's Memorandum #5 at pages 21-26. HPS' subsequent Memorandum #6 chose to reargue its *prima facie* case for a motion for summary judgment originally set forth in its Motion and Memorandum #5 (which has been found to be inadequate above). It did not attempt to directly counter any of GPT's arguments that the jurisdictional minimum amount had been met. The Hearings Officer, however, is not basing this portion of the Decision on the mere failure of HPS Memorandum #6 to engage GPT on its contentions. The Decision herein is based on the conclusion that the arguments by GPT set forth above are correct and entitle it as a matter of law to summary judgment on the issue at hand.

Under these circumstances, it is unnecessary for this part of the Decision to resolve any disputes over the actual amount of the proposal for grid-tied pv or whether any other matters raised in GPT's protest, either individually or collectively, concern a matter or matters greater than the required minimum jurisdictional amount.

F. The Requirement of Responsiveness Applies to this RFP

Procurement through competitive sealed proposals is initially governed by HRS §103D-303. which provides in relevant part:

> (g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. (Emphasis supplied.)

See also HAR §3-122-57(a), which states in relevant part:

> The award shall be issued in writing to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals...Other criteria may not be used in the evaluation.

In contrast, the statute and administrative regulation pertinent to procurement by competitive sealed bids specifically use the word "responsive," a word that is conspicuously absent from the statute and regulation cited above pertinent to procurement by competitive sealed proposals.[5]

The Procurement Code defines a "responsible bidder or offeror" in HRS §103D-104 as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." On the other hand, in HRS §103D-104 the Procurement Code defines a "responsive bidder" as "a person who has submitted a bid which conforms in all material respects to the invitation for bids." It is important to note that the Procurement Code has no definition for "responsive offeror," thus reinforcing the conclusion that the concept of "responsive" or "responsiveness" has no place in the statutes governing competitive sealed proposals.

The term "responsive" was deliberately omitted by the Legislature from the standard for determining the award in this procurement as set out in HRS §103D-303(g). The factors set forth in HRS §103D-303(g) are the exclusive factors to be considered ("No other factors or criteria shall be used in the evaluation") and "responsive" or "responsiveness" are pointedly not included as one of the recognized exclusive factors.

This statement, however, does not conclude the analysis. One of the determining factors specifically mandated in the evaluation of competitive sealed proposals by

[5] For procurement by competitive sealed bids, HRS §103D-302(h) and HAR §3-122-33(a) both use the term "responsive" as well as the term "responsible."

HRS §103D-303(g) is "the evaluation factors set forth in the request for proposals." Consistent with that statute, HAR §3-122-57(a) also says that "the evaluation criteria in the request for proposals" shall be taken into account.

Accordingly, the terms of the RFP must be reviewed in order to determine if those terms bring responsiveness into the picture as an evaluation factor or evaluation criteria. See Kiewit Infrastructure West Co,, v. Department of Transportation, State of Hawaii, PCX-2011-2 and PCX-2011-3 (June 6, 2011), at Exhibit "A"; Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH-2013-011 (November 27, 2013).

As noted in Finding of Fact No. 8, Section 16 of the RFP specifications requires award of the contract to the highest scoring bidder under the evaluation scoring procedures as long as that bidder is "responsive."

> 16. A contract shall be awarded to the responsive bidder that scores the highest under the RFP Evaluation Scoring Worksheet shown as Attachment "B".

It is not enough to obtain the highest evaluation score. The bid, or offer, of the highest scorer must also be responsive. Thus, by its terms, the RFP has made responsiveness a required element of this procurement.

H. There is No Jurisdiction to Determine that GPT's Offer Was Not Qualified or Should Have Been Disqualified

HPS' Motion asserts that GPT has no standing to challenge the decision that the County intends to award[6] the PPA to HPS* because flaws in GPT's own proposal meant it could not have been accepted by the County. According to HPS, this means that since GPT cannot obtain the contract GPT had no standing to protest to the County the intended award to HPS* and that GPT had no standing to bring this RFAH after the County denied GPT's protest.

[6] HPS phrases the issue as whether GPT has standing to challenge "the award of the PPA to Hawaii Pacific." HPS Memorandum, page 5. As discussed later in this decision, there has been no "award" to HPS*.

HRS §103D-709(a) confers jurisdiction to consider GPT's RFAH if GPT was "aggrieved by" the determination by the County's procurement official. The Hawaii Supreme Court has recently held that a "person aggrieved" is someone who has suffered an "injury in fact." Further, whether someone has suffered an injury in fact is determined by a three-part test:

> (1) whether person has suffered an actual or threatened injury as a result of the agency decision;
>
> (2) whether injury is fairly traceable to the agency's decision; and
>
> (3) whether a favorable decision would likely provide relieve for the injury.

Alohacare v. Ito, 126 Haw. 326, 342-343, 271 P.3d 621, 637-638 (2012)

The County's denial of GPT's protest clearly makes GPT an aggrieved party if GPT had standing to protest to the County in the first place.

The County's protest denial letter of January 28, 2014 did not find that GPT had no standing to make its initial protest. It never examined in any way the validity of GPT's offer in response to the RFP.

HRS §103D-701(a) limits protests to an offeror "who is aggrieved in connection with the solicitation or award of a contract." HAR §3-126-1 is to the same effect. HPT asserts that GPT cannot be aggrieved because it "has not, nor will it, suffer a direct economic injury as a result of the award" to Hawaii Pacific. HPS argues that GPT would be ineligible for an award of the contract even if Hawaii Pacific did not get the award. Flaws in GPT's proposal, it is argued, mean that the County is required to reject GPT's proposal irrespective of what might happen to Hawaii Pacific's proposal. HPS Memorandum #1 at pages 6-7.

The HPS Memorandum directly cites one OAH case regarding standing to file a procurement protest, but that case did not involve the same issue raised by HPS' motion.

Dick Pacific Constr. Co., Ltd. v. DOT, et al. PCH 2005-5 (September 5, 2005), involved rescission of an award made to another party. The protestor did not have standing to challenge that decision because it was not harmed by the decision—to the contrary, it benefited from the decision because rescission of the award to another party now meant that the protestor still had a chance to receive the award without having to first prevail on its protest. The issue of whether a protestor lacks standing because its own bid or offer is itself so flawed that it could not, as a matter of law, be accepted by the procuring agency appears to be one of first impression in Hawaii procurement law.

The concept, however, appears to have been in accepted in federal procurement protests. In Galen Medical Associates, Inc. v. United States, 369 F.3d 1324 (Fed. Cir. 2004), the low bidder intervened in a bid protest and asserted that the protestor had no standing because the protestor allegedly "has not suffered any prejudice because the facilities listed in its proposal did not meet the technical specifications of the VA solicitation, and therefore, Galen could not have been awarded the contract." This contention was considered on the merits but then rejected because the procuring agency had not rejected the protestor's proposal on account of non-complying facilities. It had only reduced the protestor's technical score. After that, it was still the second bidder and had standing to pursue the protest. See 369 F.3d at 1331.

Leaving aside any discussion of the differences between Hawaii's definition of standing and the federal definition of standing with respect to procurement protests,[7] it would appear that the allegations that GPT's offer was itself fatally flawed may mean that GPT had no standing under Hawaii law to protest the intent to award the contract to HPS*.

[7] Since Hawaii's Procurement Code was based in large part on the American Bar Association's Model Procurement Code and not on the federal procurement regulations, federal precedents must be cautiously applied. Bombardier Transportation (Holdings) USA, Inc. v. Director, Department of Budget and Fiscal Services, 128 Haw. 413, 419, 289 P.3d 1049, 1055 (Haw. App. 2012).

In the Galen Medical Associates case, the procuring agency first evaluated the claim that the protestor's own offer was inadequate under the terms of the RFP. There was no such review by the County in this case.

HPS asserts in its memoranda in opposition to GPT's motions that standing is a jurisdictional issue that can be raised *sua sponte* by the Hearings Officer even if not raised by the parties or the procuring agency. The Hearings Officer agrees with this conceptual statement.

The specific case cited by HPS, however, involved a completely different situation. In Hawaii NewspaperAgency et al. v. State Dept. of Accounting & General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-2 and PCH 00-3 (consolidated) (April 16, 1999), the protestor lacked standing because its failure to file a timely protest to the rejection of its proposal meant it could not challenge the subsequent award. This lack of standing was first recognized by the hearings officer because the procuring agency had previously addressed the merits of the protest. Here, however, the relatively simple matter of timeliness is not at issue. Instead, HPS' standing challenge is based directly on alleged defects in the GPT proposal that the County apparently did not consider when it scored the GPT proposal.

Despite substantial participation in the County's deliberations over the GPT protest, HPS never presented to the County its claim about GPT's allegedly unacceptable offer. By raising the claim for the first time in this OAH proceeding, HPS is asking OAH to usurp the County's role as the initial determiner of the validity of offers that it receives. It appears to the Hearings Officer that this is neither desirable nor in accord with the Procurement Code. When the standing issue is inextricably intertwined with the details of a complicated response to a complicated RFP, the procuring agency's decision on those details would

normally be a prerequisite to the hearings officer's ability to review whether GPT's proposal should be disqualified.

Pursuant to HRS §103D-709(a), the hearings officer:

> 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.[8]

This jurisdiction, however, is not unlimited. Instead, it is specifically 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.

Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH-2013-011 (November 27, 2013) held that in some circumstances the OAH hearings officers could uphold a procuring agency's protest decision on a ground not asserted by the procuring agency. That case, however, was limited to the procuring agency's review, albeit incomplete, of the offer being protested. It did not involve the procuring agency's review of the protestor's offer. The two situations are very different.

[8] This hearing involves Section 103D-701.

HPS would itself be an "aggrieved" party under the terms of HRS §103D-709(a) had it first protested to the County, and then, if it lost, appealed the County's decision to the OAH on the ground that the County should have disqualified GPT's offer. It had to expend funds to intervene in the County's evaluation of the GPT protest, and a County non-disqualification of the GPT proposal would increase the competition against HPS*. Cf. Alohacare v. Ito, supra. No such protest or appeal was filed.

In this case, HPS asserts that it could not have previously presented its claim regarding GPT's offer because it did not obtain a copy of the offer until February 17, 2014, the day before it filed its motion. See HPS' Memorandum #1 at page 5 n.1. Assuming that this assertion is not disputable, HPS would then have had five working days from the date it "knew or should have known" of the alleged problems with the GPT proposal to file a protest with the County. See HRS §103D-701(a). It did not do so.[9]

Furthermore, HPS need not have waited while the County put off the HPS request for a copy of the GPT proposal because of GPT's alleged insistence on the confidentiality of its proposal. HPS asked for a copy of GPT's proposal on October 18, 2013. HPS could have filed a protest with the County regarding the County's failure to disclose that proposal. Cf. Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-2 and PX-2011-3 (June 6, 2011) at pages 41-42 (Lack of administrative protest over DOT's failure to provide documentation precluded bringing up issue of adequacy of documentation for the first time in its RFAH filed with the Office of Administrative Hearings)

[9] There have been several instances where parties file additional protests during the time that the first protest is being decided. Even in this case, GPT filed supplemental protests as additional facts and/or documents became available to it during the course of the County's consideration of GPT's initial protest. Further, assuming that GPT's protest is found in this proceeding to have merit, any remedy awarded could be held in abeyance while the HPS protest filed no more than 5 working days after February 17, 2014 was decided by the County. There is nothing in the 45 day time limit in HRS §103D-709(b) to preclude such a course of action. The HPS protest would itself invoke the automatic stay on any County award to another party under HRS §103D-701f). Thus, a decision on the GPT protest could result in a conditional remedy calibrated to be in accord with a later decision on the merits of the HPS protest.

While these arguments were not asserted by GPT in responding to the HPS motion, jurisdiction cannot be conferred by the stipulation, or absence of objection, by the parties. Koga Engineering & Construction, Inc. v. State, supra.

For these reasons, the Hearings Officer concludes that there is no jurisdiction to consider the HPS contention that GPT does not have standing to protest the intent to award the contract to HPS because GPT's own offer could not have been accepted by the County.

H. The HPS* Proposal Does Not Clearly Identify a Bidding Entity, is Ambiguous, and is Nonresponsive

As discussed above, the requirement of responsiveness applies to the RFP at issue. When, by the terms of the RFP, an offer must be responsive, the offer must be rejected if it materially varies from the specifications and is therefore nonresponsive.

The parties have not cited any Hawaii cases directly concerning a situation where a bidder's identity is unclear. GPT relies on Southern Foods Group, L.P. v. State Department of Education, 89 Haw. 443, 974 P.2d 1033 (1996). The bid at issue in that case contained two prices. The Hawaii Supreme Court held that the bid was nonresponsive.

> It is elementary that submission of two bids in a sealed competitive bidding process that permits submission of only one bid is a material deviation from the Bid Solicitation special conditions and is nonresponsive. Moreover, Meadow Gold's deviation directly involved the price, a term that is typically and traditionally material. Furthermore, Meadow Gold's double bid was ambiguous. As noted above, the DOE is not required to engage in telepathy to discern what Meadow Gold intended by submitting two apparently different bids. Meadow Gold's multiple or double bid was nonresponsive to the instant Bid Solicitation and was properly rejected.

89 Haw. at 457, 974 P. 2d at 1047 (Emphasis supplied).

The identity of the offeror in this case is just as material as the statement of the price in the Southern Foods case. While HPS objects that Southern Foods does not involve bidder identity, the principles of that case apply equally well here. If the identity of the offeror in the HPS* proposal is ambiguous, or if there are two different offerors identified in the HPS* proposal, the proposal is nonresponsive.

GPT argues that decisions of the federal Comptroller General provide appropriate guidelines in this situation. In the first example it cites, Syllor, Inc./Ease, B-234803, 1989 WL 240912 (Comp. Gen. July 12, 1989), a bid was properly rejected as nonresponsive because it was ambiguous as to the bidder's legal status and identity. The bidder protested that it was a valid joint venture. However, when responding to the "Type of Business Organization" question, it marked both the corporation and joint venture boxes. Further, all the vital information to identify the bidder—address, telephone number, commercial identification number, and employer's identification number—were for only one member of the joint venture. This was unacceptable: "We find that since the bidding entity's identity was unclear, acceptance of the bid would not result in a binding commitment by a specific, clearly identified bidder."

In GPT's second example, In re Griffin Construction Company, 55 Comp. Gen. 1254, 1976 WL 13110 (July 9, 1976), the name on the bid supposedly indicated that a joint venture was supposed to perform the work. However, there was no joint venture entity in existence and the bid was signed by one corporation (and the bid bond listed that corporation as the sole principal). In the Comptroller General's opinion, an award to that corporation would be an improper substitution for the entity named as a bidder. Further, such an award would facilitate unsound competitive bidding procedures because it would allow parties to avoid or affirm bids, after bid opening, depending upon how others bid. To similar effect is GPT's third cited decision, Martin Company, B-178450, 1974 WL 7902 (Comp. Gen. May 8, 1974).

All of these examples are instructive and are consistent with Hawaii law as stated in the Southern Foods Group case.

Turning to the undisputed facts of this case, the Hearings Officer concludes that the HPS* offer was ambiguous as it was unclear as to the identity of the offeror and was thus nonresponsive. The following facts, with additional commentary in bold face type, are significant.

1. Finding of Fact No. 4. The pre-qualification form submitted to the County identifies Hawaii Pacific Solar LLC as the party to act as "Provider" under the PPA. **Comment: This is a representation that HPS was the offeror.**

2. Finding of Fact No. 5. The words "see attached" are written in by hand on page 1 of this pre-qualification form. Attached to this form was an additional typed page with a heading stating that it was the "County of Maui Solar PPA Bidder Pre-Qualification Form (continued)." This page states that "Hawaii Pacific Solar LLC will team with two others, "RC Energy Group" and "Phoenix Solar Incorporated." **Comment: In light of all of the Findings of Fact discussed in this portion of the decision, this is ambiguous. It could refer to three entities comprising the offeror or one entity assisted by two others that were not offerors.**

3. Finding of Fact No. 19. In the left hand column of the Offer Form submitted by HPS*, the "Name of Bidder" is "Hawaii Pacific Solar, LLC, Rockwell Financial Group/Phoenix Solar." **Comment: This represents that the offeror is a group of companies or one business organization with a long name. However, as stated in Findings of Fact Nos.22-26, this is a reference to three separate legal entities and there is no one business organization with that one name.** In the right hand column of the Offer Form submitted by HPS*, the "Name of Bidder" is stated to be "Hawaii Pacific Solar, LLC et al." **Comment: The use of "et al." means this is a direct representation that HPS is <u>not</u> the only offeror.** In the lower portion of the form where the offeror is supposed to "Specify Type of Organization" and is given three choices to check off ("Individual,"

"Partnership," and "Corporation"), the HPS* Offer Form left all of those spaces blank. In the lower portion of the form where the offeror is supposed to specify the "State of Incorporation" and is given the choice of "Hawaii" or "Other," The HPS* Offer Form checked "Other." In the space where "Other" was supposed to "Please Specify" (which obviously refers to a state "other" than Hawaii), the HPS* Offer Form is filled in with "LLC." **Comment: This is a representation that HPS, which is an LLC, is indeed the offeror. It contradicts the two other representations on the form discussed immediately above.** Mr. Robert Johnson signed the HPS* Offer Form in his capacity of "President" of Hawaii Pacific Solar LLC.

4. Finding of Fact No. 21. The Federal Tax ID number and the Hawaii State General Excise Tax License Number on the HPS* Offer Form are those of Hawaii Pacific Solar LLC. **Comment: This is a representation that HPS is the sole offeror.**

5. Finding of Fact No. 27. Included with the HPS* Offer Form were additional documents submitted on behalf of that offeror. (Exhibit "B" to this Decision) The cover page of the submittal states that it was prepared by three entities, namely Hawaii Pacific Solar LLC, Phoenix Solar, and Rockwell Financial Group. **Comment: In light of the previous Findings of Fact, this is ambiguous. It could refer to three entities comprising the offeror or one entity assisted by two others that were not offerors.**

6. Finding of Fact No. 28. The three page letter of transmittal of the offer, dated August 14, 2013, that is part of Exhibit "B," also contains critical pricing information is on stationary containing the logos of Hawaii Pacific Solar LLC, Phoenix Solar, and Rockwell Financial Group on all three pages. **Comment: In light of the previous Findings of Fact, this is ambiguous. It could refer to three entities comprising the offeror or one entity assisted by two others that were not offerors.** The letter states that it is "respectfully submitted" by HPS and is signed by Mr. Robert Johnson in his capacity as "President &

CEO." **Comment: In light of the previous Findings of Fact, this is ambiguous. It could refer to three entities comprising the offeror or one entity assisted by two others that were not an offeror.**

7. Finding of Fact No. 29. The letter identifies Phoenix Solar and "Rockwell Financial Group (RC Energy)"[10] as "co-proposers." **Comment: This is a representation that there are three proposers.** It further states that "[t]he individual(s) signing this proposal have the authority to bind the partnership and the venture." **Comment: This is a representation that the proposal is submitted by a partnership and joint venture, not a single entity.** It further states: "The proposers understand and will comply with all terms and conditions set forth in the RFP," using the plural word "proposers." **Comment: This is also a representation that there is more than one proposer.**

8. Finding of Fact No. 30. The third page of this letter states that:

> This offer is **NOT** conditional upon third party financing. All financing has been secured and committed as evidenced by the attached offering letter from RC Energy a division of Rockwell Financial Group and member of the HPS Team." (Emphasis in original)

Comment: This is ambiguous. Rockwell Financial Group is a member of the "team," which means it could a member of a joint venture or a group of subcontractors to HPS.

9. Finding of Fact No. 31. The referenced financing letter from Rockwell Financial Group, dated August 13, 2013, is also part of Exhibit "B." It states that "Rockwell Financial Group, together with its partners," with the partners being unspecified, "has agreed to provide funding for the projects based on the award to Hawaii Pacific Solar." **Comment: This is ambiguous. On the one hand, it refers to an award to HPS by itself. On the other hand it refers to Rockwell Financial Group being in a partnership, which, in light of other Findings of Fact set forth above means the offeror is a partnership or joint venture.**

10. Finding of Fact No. 32. Another page in the submittal, Exhibit "B attached hereto," is entitled "Offeror's Proposal" and states that the "Service Provider" is "Energy Production Company supported by Rockwell Financial Group, Phoenix Solar USA, and Hawaii Pacific Solar," and seeks the County's "acceptance of this Proposal." **Comment: This factor is not being considered in light of the potential disputed facts over whether service providers are standard for this type of contract and whether the service providers were to have a direct contract and/or relationship with the County.**

11. Finding of Fact No. 49. On October 2, 2013, the County issued a press release announcing its intent to award the PPA to "a group of companies led by Hawaii Pacific Solar LLC of Lahaina, Hawaii submitted the highest scoring Proposal," referred to this group of companies as "Hawaii Pacific," and stated that the County "intends to award the contract to Hawaii Pacific." **Comment: This is ambiguous because "group of companies led by HPS" could mean HPS is the only offeror, supported by other companies, or that HPS is the lead company in a joint venture or partnership.**

12. Finding of Fact No. 50. The press release stated that "Hawaii Pacific" was the "only bidder to offer declining pricing." **Comment: Since "Hawaii Pacific" is defined in the press release as "a group of companies led by" HPS, this remains ambiguous as explained directly above.**

13. Finding of Fact No. 51. On October 2, 2013, the County wrote a letter addressed to HPS, Rockwell Financial Group, and Phoenix Solar, care of HPS, providing formal notice that the County intended to award this contract to "your group." **Comment: This is a statement that the award will be made to a "group" and not to HPS as an individual entity.**

[10] On the second page of the letter, this entity is identified as "RC Energy (Rockwell Financial).

These undisputed facts make it abundantly clear that the HPS* offer was ambiguous and that the true identity of the bidder cannot be determined. The conclusion is the same even when the portions of the above Findings of Fact pertaining to RC Energy are excluded pursuant to the HPS objection that arguments regarding RC Energy were not first submitted to the County. HPS Memorandum #2 at pages 12-14.

Neither the County nor HPS has made a persuasive argument contradicting GPT's assertions.

The County asserts that the cover letter of August 14, 2013 that was submitted with the HPS* Offer Form was sent solely by "Hawaii Pacific Solar LLC" and not some "nameless unidentified entity." County's Response and Motion to Dismiss at page 8. However, the only evidence relied upon by the County for this assertion is discussed above in conjunction with all the other relevant Findings of Fact. This brief argument by the County is not convincing.

In his Affidavit of February 18, 2014, submitted with the County's Response and Motion to Dismiss, one of the County's three evaluators of the proposals states that the "winner of the award (Hawaii Pacific Solar LLC)" was announced in a County press release and formally notified by a County letter of October 2, 2013 of the County's intent to award it the contract. However, even these two documents, discussed above in conjunction with the other relevant Findings of Fact, are ambiguous.

HPS' Memorandum #1 discusses this issue at pages 25-29.

First, it argues about the signature on the offer and about the cover letter of August 14, 2013. See pages 25-26. In light of the Findings of Fact and comments thereto, this discussion is conclusory and unconvincing.

Next, HPS argues that HPS, Rockwell, and Phoenix are "parties to a teaming agreement under which the members agreed Hawaii Pacific would submit a Proposal for the

work solicited under the RFP and, upon award, the members would perform the work." See page 26. This argument is based upon Paragraphs 26 and 27 of the Affidavit of Mr. Robert Johnson that accompanies the HPS Motion.

There is no reference in either the Johnson Affidavit or HPS Memorandum #1 as to where this alleged teaming agreement was mentioned or explained in the HPS* proposal. The references to "team" in the HPS* proposal are in the discussion of the Findings of Fact immediately above. They are ambiguous and do not, especially in the context of the entire proposal, support the HPS position.

Furthermore, because the HPS claim here depends on the intent of the parties to an alleged teaming agreement that is not spelled out or substantiated in the HPS* proposal, it cannot be used now to supplement that proposal in an effort to demonstrates its responsiveness.

This lack of definition of the "team" in the record available to the County at the time of the offers is particularly damaging to the position of HPS. Undercutting its own case, HPS has cited a federal regulation defining a teaming agreement which is heightens the ambiguity—there could either by a lead team member assisted by subcontractors or there could be a joint venture. As stated above:

> [HPS argues that] HPS, Rockwell, and Phoenix are "parties to a teaming agreement under which the members agreed Hawaii Pacific would submit a Proposal for the work solicited under the RFP, and, upon award, the members would perform the contract work." HPS Memorandum #1, pages 26-27. In support of this contention, HPS cites a federal regulation that states:
>
> > Contractor team arrangement ...means an arrangement in which (a) [t]wo or more companies form a partnership or joint venture to act as a potential prime contractor; **or** (b) [a] potential prime contractor agrees with one or more companies to have them act as its subcontractors under a specified Government contract or acquisition program.
>
> HPS Memorandum #1 at page 26, citing 48 C.F.R. §9.601. (Emphasis supplied)

When the federal regulation cited in support of its position by HPS actually underscores that a team arrangement could involve two different types of entities, the federal regulation only succeeds in further demonstrating the ambiguities in HPS' position as well as in the HPS* proposal.

HPS next argues that the County understood HPS to be the offeror. The first evidence it cites is the reference to "HI Pacific" on the County's evaluation sheets. This is of no moment because there is no room on the evaluation sheet to put in the full name of the offeror. GPT's full name does not fit. HPS' full name would not fit, but neither would the name of a joint venture.

HPS next relies upon the County's press release of October 2, 2013, but, as already discussed above (and in conjunction with the County's letter of its notice to intent to award sent the same day) this was ambiguous.[11]

In light of the above, the HPS and County motions for summary judgment on this issue should be denied, and GPT's Motion for summary Judgment that the Bid Submitted by HPS/Rockwell/Phoenix Solar Does Not Identify a Bidding Entity should be granted.

I. HPS* Substitution of "Price to Decrease" for the Required "Price to Rise" Portion of the Offer Form Makes the HPS* Offer Nonresponsive

The RFP's Offer Form required offerors to complete the blanks in the following sentence: "Price to rise by___% per ___." On its Offer Form, HPS* blatantly changed this sentence by crossing out "rise" and inserting "decrease." This change made the HPS* offer nonresponsive.

As extensively discussed above, the terms of the RFP required offers to be responsive. Because the terms of the contract are involved here, as opposed to the issue of

[11] The remainder of the HPS argument concerns the reference to "Energy Production Company" in the Rockwell financing letter. HPS Memorandum #2, page 28. That argument is moot because this Decision does not rely on that reference to reach its conclusions.

the identity of the contractor discussed immediately above, some additional responsiveness considerations are involved in this issue.

First, conditioning an offer upon receiving a contract other than as set forth in the RFP is not acceptable. HAR §3-122-6 provides:

> Any offer which is conditioned upon receiving a contract other than as provided for in the solicitation **shall be deemed nonresponsive and not acceptable.** (Emphasis supplied)

Note that a conditional offer is **deemed nonresponsive and not acceptable** by this regulation without any analysis of whether the nonconformity is "material."

In Bombardier Transportation (Holdings) USA, Inc., v. Director, Department of Budget and Fiscal Services, 128 Haw. 413, 289 P.3d 1049 (Haw. App. 2012), Bombardier's proposal was found by the hearings officer to be both nonresponsive per the terms of the RFP and conditional. Bombardier had conceded at the DCCA hearing that a government agency could not accept a conditional proposal. Instead, Bombardier argued that the procuring agency should have held discussions with Bombardier and allowed it a further opportunity to modify or clarify its proposal. The Intermediate Court of Appeals held that, as decided below, no further discussions needed to be held. The appellate decision affirmed the decision that Bombardier's proposal was properly rejected as conditional without any further discussion of responsiveness. See 128 Haw. at 420-421, 289 P.3d at 1056-1057.

In the Bombardier case, the offeror objected to certain language in the RFP concerning indemnities and stated that its offer was based on an assumption that the language to which it objected would be deleted. In the present case, HPS* crossed out "rise" and inserted "decrease." While, unlike in the Bombardier case, a written explanation of this action was not submitted with the offer, the actual effect of what HPS* did was to say, similar to what was said in Bombardier, "we don't want to offer a price escalation contract, and we assume you will change the contract terms to make it a price de-escalation contract."

HPS attempts to argue that the change in language did not amount to creating a condition in the HPS* proposal:

> Although in the Offer Form Hawaii Pacific did substitute the word "rise" with "decrease" to more accurately reflect its declining price structure, this modification alone does not render Hawaii Pacific's Offer Form conditional. The word substitution was meant for clarity. It would be no different if Hawaii Pacific instead indicated a negative percentage by which the price would "rise."

HPS Memorandum #3, page 15.

This contention is not convincing. The substitution did not "more accurately reflect its declining price structure." Instead, it defined and substituted a new pricing structure for the one required by the RFP. Whether or not it was "meant for clarity" is irrelevant because any motivation known only to HPS* does not affect the interpretation of the HPS* offer.

As noted earlier, the RFP provided a copy of a previous PPA, and Subsection 3 of Section 1 of the RFP's Technical Specifications stated that the terms of this sample PPA had to be accepted "as is" except for changes in exhibits in order to have updated specific site information. Exhibit C to the sample PPA has its pricing structure of a base rate of so much per kilowatt hour and an escalation rate of a certain percentage. That Exhibit C also has sections defining an increase in two types of cost reimbursements by means of a formula. While the prices in Exhibit C did not have to be adopted by offerors for the RFP in question here, Exhibit C shows the County was well aware of the fact that it had contracted for increasing prices before. It shows that the County wanted a similar structure in its new contract with the "price to rise." If it had wanted prices to decrease, contrary to the example it provided to offerors, it could have simply said "price to decrease," or "price to change" (leaving the price to go up or down), but it never said that.

The interpretation of the words "rise" and "decrease" should be based on their plain and ordinary meaning. The word "rise" means to "increase." "Price to rise" means that prices will go up. HPS provides no authority to support its position that "price to rise" is the

same as "price to go down." Its proposition that "price to rise" can, in its plain and ordinary sense, mean prices can go up by a negative percentage is not supported by any authority and defies common understanding. There is nothing in the Offer Form to allow insertion of a mathematical concept (e.g., a negative price rise is the same as a decrease) to replace the unambiguous term "rise."

The Hearings Officer finds HPS* offer was a conditional offer when its offer was subject to the acceptance of its "price to decrease" term.

The question of whether the substitution of "price to decrease" for "price to rise" was non-responsive, irrespective of whether that substitution made the HPS* offer conditional, should also be considered.

Despite HPS' assertion at pages 11-12 of its Memorandum #1, strict adherence to the terms of the RFP was required unless those terms left room for variations. It asserts that "there is a built-in leeway by making award to the offeror presenting the most 'advantageous' proposal based on evaluation criteria," and cites HRS §103D-303(g) as support for that proposition.

That statute states in relevant part as follows:

> Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation.

HPS argues as if the determination of "most advantageous" is the only determination that counts. However, that determination must take into account both price and the evaluation factors set forth in the RFP. If a proposal does not meet those evaluation factors, it never reaches the stage where it competes with other proposals for "most advantageous." For the RFP in question here, it has already been determined that responsiveness is an evaluation factor. That determination must be made first, before, and without, considering if the HPS* offer was most advantageous.

HPS then asserts that the HPS* offer was, in any event, responsive. According to HPS, nothing in the RFP required an increasing price structure, and nothing in the RFP explicitly stated that failure to use an escalating price schedule would result in disqualification for nonresponsiveness. This argument is unpersuasive.

First, the RFP did require an increasing price structure. Price was one of the few items left open for variations in proposals because the terms of the PPA were already set in stone. The Offer Form stated how the price was to be proposed, i.e., a base price had to be proposed along with an escalation factor. This is a very specific provision for an increasing pricing structure. The Offer Form was clearly part of the RFP, and a properly completed Offer Form was necessary for a proposal to qualify as a complete bid. See Section 17 of the RFP ("All items in the Offer Form must be filled in to qualify as a complete bid.") and Subsection 8(d) of Section 1 of the RFP's Technical Specifications ("**Proposals** are not complete unless they include an executed one page **Offer Form** specifying the Renewable Energy Services pricing.") (Emphasis in original). The very first paragraph of the Offer Form states that the proposer warrants its proposal is "in strict compliance" with the PPA, specifications, general terms and conditions "and this Offer Form." (Emphasis supplied)

The Offer Form is where offerors identify themselves and physically sign their offer. It is where vital terms of their offer are presented. The Hearings Officer cannot accept the HPS proposition that the terms of the Offer Form were merely used to standardize the format of the pricing offers in order to facilitate comparison of various offers by the County.

HPS argues that deference should be given to the County's "judgment" that a declining price structure would suit its needs and was acceptable. HPS Memorandum #1 at page 13. However, this mistakes the nature of the present proceeding. The scope of review here is *de novo*, so there is no deference to any County decision, in denying the GPT protest, that a declining price structure is more beneficial. See Section III.B, supra, of this Decision.

In addition, the question is not one of evaluating the County's preferences, i.e., whether the County likes the HPS* proposal or finds it "acceptable." The question is whether the HPS* proposal is responsive under the terms of the procurement statutes and procurement regulations as well as the actual terms of the RFP. The County may now have second thoughts about how it wrote the RFP, but hindsight cannot change the terms of the RFP that govern the analysis in this proceeding.

HPS next argues that the alleged lack of compliance was an "enhancement rather than a deviation" and is therefore acceptable. HPS Memorandum #1 at page 13.

It can be debated whether or not a declining price structure is advantageous to the County here. It can be argued that the alleged benefits derived from a declining price structure that are asserted by HPS or that are set forth in the County's press release are illusory because of the dangers that a declining price structure creates.

It is not necessary, however, to decide in this proceeding whether the economics and dynamics of a declining price structure are, on balance, more attractive than those associated with a rising price structure. The County did not ask for a declining price structure. It asked only for a rising price structure. The wisdom, or lack thereof, of that choice is of no concern here. Offers were required to be responsive to the terms of the RFP, and a declining price structure was not responsive to those terms.

HPS cites only one authority that it alleges compels a different conclusion. In a federal government administrative decision, Transact International, Inc., B-241589, 1991 WL 73061 (Comp. Gen. February 12, 1991), the solicitation called for an electric lift, but one party's proposal for a hydraulic lift was accepted by the procuring agency. A protest against the acceptance of a nonconforming proposal was denied. The decision held that the substitution was an "enhancement" because it involved a "characteristic [which] exceeds specified performance or capability in a beneficial way."

The RFP in that case, however, specifically advised offerors that enhancements would be considered, i.e., that the terms of the solicitation could be modified by an offeror's proposal. The RFP stated that offerors were to "highlight any significant enhancements to the requirements of the RFP." There is no such language in the County's RFP authorizing enhancements.

Therefore, even assuming for purposes of argument that the HPS* declining price structure is an undisputed enhancement, the enhancement argument asserted by HPS cannot operate to deny GPT's summary judgment motion on the "price to rise" issue.

HPS also claims that any nonconformity here was not material because any award for this RFP had to be based on the scoring of the proposals by three independent evaluators. Since the scoring for pricing provided a maximum of 30 points out of 100 possible points per evaluator and was based on a statutory formula, HPS asserts that other evaluation factors outweighed pricing in the decision to award to HPS*.

This argument ignores the actual final scores after the County refigured the pricing scores in February of 2014. This was apparently done in response to a claim in GPT's initial bid protest, the letter of October 16, 2013, at page 9, but was apparently done only after the bid protest was denied. The result was that the HPS* proposal outscored the GPT proposal by only four points out of a total possible score of 300 points. Moreover, 3 of the 4 points in that difference are attributable to the scoring for pricing. Each of the three evaluators gave GPT 20 points for pricing and gave HPS* 21 points for pricing. See County Exhibit 5.

Hawaii law does not require the protesting party to prove that it would actually obtain the award due to a successful protest. "HRS §103D-709 does not require a protestor to show that it would have obtained the award in order to have standing to protest the award to another." Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii,

PCX-2011-2 (June 6, 2011) at page 62.[12] The County's press release and its evaluator's comments that HPS* had an "advantage" because of its decreasing price structure (Exhibit A, page 3, to the RFAH) show the importance of this factor to the County. In addition, a nonconformity in the bid's pricing is material per the Southern Foods Group case.

Finally, HPS asserts that GPT only has itself to blame for its "literal adherence to the Offer Form," and its failure to protest the language of the RFP prior to submission of its offers. This is ironic given that "literal adherence" to the terms of the RFP is required and should not be scoffed at. There is no ambiguity in the "price to rise" part of the Offer Form that necessitated a pre-offer protest to clarify its language.

For these reasons, the Hearings Officer concludes that submitting a modified Offer Form with the "price to decrease" rendered the HPS* offer nonresponsive.[13]

The discussion above establishes that there are two reasons for the denial of the County's and HPS' Motions to Dismiss as they pertain to the "price to rise" issue and for granting the GPT Motion for Summary Judgment with respect to the "price to rise" issue.

J. GPT Has Not Demonstrated that the HPS* Offer Contains an Ambiguous Price

The HPS* offer, Exhibit B hereto, lists a cost per kilowatt hour for the first year of the contract and a declining percentage to be used in calculating the cost per kilowatt hour for the next 19 years of the contract. While the prices for each year are not set out in the offer, they can be easily determined. There is nothing ambiguous about the costs per kilowatt hour in the HPS* offer.

[12] It makes no difference that another offeror may have receive higher points for its pricing than HPS* received. This case involves only the second highest point scorer versus the highest point scorer.

[13] In reaching this conclusion, the Hearings Officer gave no weight, one way or another, to the language of the County's press release that actively promoted the "cost to decrease" of the HPS* proposal as being advantageous to the County.

The basis of the GPT motion, however, is the fact that HPS* offer also contains a "levelized cost" for both grid-tied pv and micro-grid pv. This "levelized cost" is one single cost per kilowatt hour for all power sold throughout the 20 year life of the contract.

The County used levelized costs for all of the offers when evaluating the pricing aspects of those offers. The levelized prices for each offer, for both grid-tied pv and micro-grid pv, were entered by the County on its evaluation sheets. Presumably, this was done by the County in order to provide a standard basis for comparing pricing schedules because the offers did not necessarily contain the same pricing schedules—the percent per year the prices were to increase was not fixed in the RFP's Offer Form.

While the County was free to use various reasonable price comparison tools, including levelized costs, it did not require the offerors to provide their levelized costs on their offer forms. The question, therefore, is whether the HPS* offer, by voluntarily adding levelized prices to its offer form, create an ambiguity in pricing.

GPT relies on the description of levelized pricing in "Complex" Consol. Edison Co. v. FERC, 165 F.3d 992, 997 n.8 (D.C. Cir. 1999):

> Levelization refers to a process in which the costs of a one-time capital expenditure or a lump-sum benefit are converted into a constant annual cash flow so as to provide a consistent basis from which to compare average annual costs and benefits. The annual levelized cost refers to that amount which, if collected for each year of the project's life, would yield the same present value of revenue requirements as is yielded under traditional rate-making. (Emphasis supplied)

Typically, the present value of an income stream over time involves a judgment call as to the proper discount rate to be utilized in the calculation. GPT asserts that, in the case of electrical rates, the levelized cost also takes into account other variable factors such as the degradation of the system over time. Thus, according to GPT, levelized costs can be calculated in a variety of ways. GPT's citation of South Cogeneration, Inc. v. Tennessee Valley Authority, 926 F. Supp. 1327, 1331 (E.D. Tenn. 1996), that levelized rates provide "less certainty" than fixed rates certainly supports this argument.

The HPS* offer did in fact employ a selection of variable factors in calculating the alleged net present value of the savings (over MECO costs) to the County. See Affidavit of Robert Johnson, submitted with HPS Memorandum #1, at paragraph 32. However, the net present value of the savings is not the price or cost of the electricity that the County would pay under the HPS* proposal, and GPT does not make any assertions in its Motion that the net present value of the savings creates an ambiguity in the price.

HPS argues, on the other hand, that the levelized cost calculation it used was simply a version of a weighted average. As such, it would not involve the use of variables such as a discount rate that could yield different levelized cost figures for the same kilowatt per hour pricing structure. This assertion is supported by the Affidavit of Robert Johnson, submitted with HPS Memorandum #1, at paragraph 33.

GPT's Motion had to satisfy its burden of proof in demonstrating that the HPS* levelized cost figures were derived from its kilowatt per hour costs using variables that might lead to different cost figures. It has failed to do so.

GPT's Motion instead relies on the fact that the levelized cost figures in the HSP* offer are different from the levelized cost figures used in the County's evaluation sheets. The figures differed by about 2.8%. The County's calculations used an inflation rate, a discount rate, and a degradation rate. Exhibit B11 to the RFAH. The difference became substantially greater when the County used different levelized cost figures when it revalued the offerors' prices in February of 2014. The County has not explained why the levelized costs on their different evaluation sheets differed so much. However, there is no evidence that HPS* was involved in either County calculation such that either County levelized cost calculation can be attributed to, or blamed on, HPS*.

HPS, at times, does not help its own case when it argues that the County "clearly calculated" the levelized costs, despite the fact that there were two different County

calculations, and that the County properly interpreted the HPS* intended pricing but, at the same time, "disregarded" the HPS* levelized cost calculations. HPS Memorandum #4 at page 12. Nevertheless, strained arguments by HPS do not amount to the evidence necessary for GPT to satisfy its burden of proof.

Accordingly, the GPT motion for summary judgment, insofar as it based on alleged multiple prices, should be denied, and the County's and HPS' motions on this issue should be granted.

The Hearings Officer has discussed this portion of the GPT motion because this claim by GPT was one of the three claims supporting the establishment by GPT of the jurisdictional minimum amount in controversy.[14] The remainder of GPT's Motion concerns whether or not an "allowance" referred to in the HPS* proposal amounts to a prohibited cost contingency. This issue was not considered in the determination that GPT's protest met the minimum amount in controversy requirement. In view of the fact that GPT has prevailed on its two other summary judgment motions, the Hearings Officer finds it unnecessary to decide this portion of GPT's Motion.

K. There is No Need to Determine the Remaining Portions of the County's and HPS' Motions to Dismiss

The County's and HPS' Motions to Dismiss challenged all portions of the GPT's RFAH. GPT's three Motions, on the other hand, did not concern all portions of its RFAH. In view of the fact that two of GPT's Motions are being granted, and that both Motions go to the entirety of the HPS* offer, it is unnecessary to decide the remainder of the County's and HPS' Motions to Dismiss. GPT will prevail in this proceeding no matter what the outcome of the remainder of the County's and HPS' Motions to Dismiss.

[14] It is not necessary to prevail on a claim in order to prove the claim "concerns" a "matter" exceeding the jurisdictional minimum amount.

L. The County Has Not Issued an "Award" of the Contract to HPS*

The County's letter of October 2, 2013, states only that it "intends to award" the contract to the "group of companies led by Hawaii Pacific Solar, LLC." Similarly, the County's press release of October 2, 2013 states that "[t]he County intends to award the contract."

Under HAR §3-122-1, an "award" is defined as "the written notification of the State's acceptance of a bid or proposal, or the presentation of a contract to the selected offeror." In this case, there has not been any presentation of a contract to HPS* and there has not been any notification of acceptance. An "intent to accept" or "intent to award" is not an "acceptance" or an "award." There is a long accepted differentiation between an "intent to award" and an "award" in procurements in Hawaii. See, e.g, GTE Hawaiian Telephone Co., Inc., v. Department of Finance, County of Maui, PCH 98-6 (December 9, 1998) at page 10. In addition, the County has failed to rebut GPT's contentions that no "Notice of Award" has been sent out by the County's Department of Finance as is usual when the County awards contracts and that no award has been posted on the "Current Awards" portion of the County's website.

The Hearings Officer concludes that no award of the contract has been made to HPS*.

K. Remedy

Pre-award remedies are governed by HRS §103D-706, which states:

> If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:
>
> (1) Canceled; or
>
> (2) Revised to comply with the law.

The decision in Arakaki v. State of Hawaii, 87 Haw. 147, 952 P.2d 1210 (1998) interpreted the term "revise" to include remand by the hearings officer to the procuring

agency for reconsideration and an opportunity to correct errors in the bid where appropriate within the context of the legislative objective in the Procurement Code of providing fair and equitable treatment. In addition, by its citation to dicta in the Carl Corp. case, the Arakaki decision included within the term "revise" the ability to order the disqualification or elimination of a proposal resulting upon remand to the procuring agency in a possible award of the contract to another bidder or offeror.

Under the standards of the Arakaki decision, the remand order must be made in a context where the objectives of the Procurement Code can be met. Section 16 of the RFP's specifications states:

> A contract shall be awarded to the responsive bidder that scores the highest under the RFP Evaluation Scoring Worksheet shown as Attachment "B".

In addition, as noted earlier, HRS §103D-303(g) provides, in relevant part:

> (g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals.

The Hearings Officer concludes that in the present situation it would be appropriate to order a "revision" of the solicitation by remanding the matter to the City with a direction to disqualify HPS* and its proposal and consider an award to GPT, which would be, at that point, the highest scoring offeror.

However, while GPT would now be the highest scoring offeror, that does not automatically mean that GPT is both responsible and responsive. It is unclear from the records whether the County made these final determinations. This is especially the case for a determination of responsibility which typically may be finalized at any time up until the time of actual award. The Hearings Officer is not himself able to make those determinations in this proceeding.

Applying HRS §103D-706 to these proceedings, the Hearings Officer therefore finds and concludes that the remedy of a remand to the County for consideration of an award to

GPT is the appropriate course of action. The Hearings Officer declines to order that the County automatically award the contract to GPT.

IV. DECISION

1. The Motion of GreenPath Technologies, Inc., for Summary Judgment that the Bid submitted by HPS/Rockwell/Phoenix Solar does Not Identify a Bidding Entity, filed February 18, 2014, is granted.

2. The Motion of GreenPath Technologies, Inc., for Summary Judgment on "Price to Rise" Requirement, filed February 18, 2014 is granted.

3. The Motion of GreenPath Technologies, Inc., for Summary Judgment on Ambiguous Price, filed February 18, 2014, is denied insofar as said Motion asserts that the HPS* offer contains multiple prices and must be rejected as ambiguous and nonresponsive. That portion of said Motion asserting that the HPS* offer contains a prohibited cost contingency (i.e., an allowance for the cost of interconnection reliability studies) is dismissed as moot.

4. The Motion of Hawaii Pacific Solar, LLC, for Summary Judgment, filed February 18, 2014, and the Motion of the County of Maui to Dismiss, filed with its Response on February 18, 2014, are denied with respect to the following claims wherein summary judgment has been granted to GreenPath Technologies, Inc.: (a) GreenPath Technologies, Inc.'s claim that the HPS* offer does not identify a bidding entity; and (b) GreenPath Technologies, Inc.'s claim that the HPS* offer violated the RFP's "price to rise" provision. Said Motions are granted with respect to that portion of GreenPath Technologies, Inc.'s claim that the HPS* offer contains multiple prices and must be rejected as ambiguous and nonresponsive. All other portions of the Hawaii Pacific Solar, LLC, and County of Maui Motions are dismissed as moot.

5. The County of Maui's denial of GreenPath Technologies, Inc.'s procurement protest, in the County of Maui's letter of January 28, 2014, is vacated. GreenPath Technologies, Inc.'s procurement protest is sustained as set forth above.

6. The matter is remanded to the County of Maui for rescission of the intended award to Hawaii Pacific Solar LLC, to disqualify HPS*, and to cancel its proposal, and for consideration of an award to GreenPath Technologies, Inc. as the highest scoring bidder.

7. All parties are to bear their own attorney's fees and costs incurred in pursuing this matter.

8. GreenPath Technologies, Inc.'s $10,000.00 bond shall be returned to GreenPath Technologies, Inc. upon the filing and service of a declaration by GreenPath Technologies, Inc., attesting that the time to appeal to Circuit Court has lapsed and that no appeal has been timely filed. In the event of a timely application for judicial review of the Decision herein, the disposition of the bond shall be subject to determination by the Circuit Court.

DATED: Honolulu, Hawaii, March 20, 2014.

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

OFFER FORM

RFP#12-13/P-103

Director of Finance
County of Maui
Wailuku, Maui, Hawaii

Dear Sir:

The undersigned has carefully reviewed the RFP documents and hereby proposes to **FURNISH, DELIVER, INSTALL, OPERATE, MAINTAIN, and OWN SOLAR PHOTOVOLTAIC SYSTEMS SELLING RENEWABLE ENERGY SERVICES TO THE COUNTY UNDER A POWER PURCHASE AGREEMENT (PPA),** all in strict compliance with the PPA, Minimum Specifications, General Terms & Conditions and this Offer Form.

****

PROPOSAL SCHEDULE

(A) BASE BID:

Sell Renewable Energy to the County for _____cents per kilowatt hour for grid tied pv, and _____ cents per kilowatt hour for microgrid pv systems. Price to rise beginning _____. Price to rise by __% per_____.

FIRST YEAR PRICE per kwh from grid tied pv: $ 0._____

****

Please check the more accurate statement

Our proposal does not require us to secure financing from others and we are prepared to sign the PPA immediately..... _____

Our proposal assumes third party financing can be obtained..... _____

It is understood and agreed that if a contract is awarded, the undersigned shall enter into and execute the PPA for the work described herein.

The undersigned shall acknowledge receipt of any addendum issued by the Department of Finance by recording in the spaces below the date of receipt.

Addendum No. 1 _____ Addendum No. 3

Addendum No. 2 _____ Addendum No. 4

EXHIBIT "A"

RESPECTFULLY SUBMITTED,

NAME OF BIDDER**	SIGNATURE OF BIDDER**
ADDRESS OF FIRM	PRINT OR TYPE NAME OF BIDDER
TELEPHONE & FACSIMILE NUMBER	PRINT OR TYPE TITLE OF BIDDER
DATE SIGNED	E-MAIL ADDRESS

FEDERAL TAX ID/SOCIAL SECURITY NO.: _____

HAWAII STATE GENERAL EXCISE TAX LICENSE NUMBER: _____

PLEASE SPECIFY TYPE OF ORGANIZATION:

INDIVIDUAL _____ PARTNERSHIP _____ CORPORATION _____

STATE OF INCORPORATION: HAWAII _____
OTHER _____ PLEASE SPECIFY _____

** If Corporation, please affix to this page your corporate seal where indicated, if available, otherwise indicate "not available"; also evidence of the authority of this officer to submit a bid on behalf of the corporation. Such authority must be in the form of a corporate resolution. Give also the names and addresses of the officers of the corporation.

(SEAL)

HAWAII PACIFIC SOLAR

COUNTY OF MAUI

THE OFFICE OF ECONOMIC DEVELOPMENT

RFP No. 12-13/P-103

Prepared by:

Hawaii Pacific Solar LLC
Phoenix Solar
Rockwell Financial Group

Contact:

Bob Johnston
2010 Honoapiilani Highway, Suite C1
Lahaina, Maui, Hawaii 96761
(808) 661-1166
bob@hawaiipacificsolar.com

Rockwell Financial Group
A Cornerstone for your Financial Requirements

phoenix SOLAR

Electrical Engineering Consultants

EXHIBIT "B"

OFFER FORM

RFP#12-13/P-103

Director of Finance
County of Maui
Wailuku, Maui, Hawaii

Dear Sir:

The undersigned has carefully reviewed the RFP documents and hereby proposes to **FURNISH, DELIVER, INSTALL, OPERATE, MAINTAIN, and OWN SOLAR PHOTOVOLTAIC SYSTEMS SELLING RENEWABLE ENERGY SERVICES TO THE COUNTY UNDER A POWER PURCHASE AGREEMENT (PPA)**, all in strict compliance with the PPA, Minimum Specifications, General Terms & Conditions and this Offer Form.

****

PROPOSAL SCHEDULE

(A) BASE BID:

Sell Renewable Energy to the County for ____ **cents (levelized cost)** per kilowatt hour for grid tied PV and ____ **cents (levelized cost)** per kilowatt hour for microgrid pv systems. Price to ~~rise~~ **decrease beginning first anniversary of system commissioning. Price to ~~rise~~ decrease by** ____ **per year**

FIRST YEAR PRICE per kwh from grid tied pv $. ____ **(Year 20 price per kWh $.** ____ **)**

****

Please check the more accurate statement.

Our proposal does not require us to secure financing from others and we are prepared to sign the PPA immediately..... XXX

Our proposal assumes third party financing can be obtained..... _____

It is understood and agreed that if a contract is awarded, the undersigned shall enter into and execute the PPA for the work described herein.

The undersigned shall acknowledge receipt of any addendum issued by the Department of Finance by recording in the spaces below the date of receipt.

Addendum No. 1 6/21/13 Addendum No. 3 7/19/13

Addendum No. 2 7/12/13 Addendum No. 4 N/A

RESPECTFULLY SUBMITTED,

Hawaii Pacific Solar, LLC Rockwell Financial Group/Phoenix Solar NAME OF BIDDER**	SIGNATURE OF BIDDER**
2010 Honoapiilani Hwy., Bldg C1 Lahaina HI ADDRESS OF FIRM	Hawaii Pacific Solar, LLC et al PRINT OR TYPE NAME OF BIDDER
Phone: (808) 661-1166/ fax: (808) 661-1921 TELEPHONE & FACSIMILE NUMBER	President PRINT OR TYPE TITLE OF BIDDER
August 14, 2013 DATE SIGNED	bob@hawaiipacificsolar E-MAIL ADDRESS

FEDERAL TAX ID/SOCIAL SECURITY NO.:

HAWAII STATE GENERAL EXCISE TAX LICENSE NUMBER:

PLEASE SPECIFY TYPE OF ORGANIZATION:

INDIVIDUAL_____ PARTNERHSIP_____ CORPORATION _____

STATE OF INCORPORATION: HAWAII_____

OTHER___XX___PLEASE SPECIFY LLC

** If Corporation, please affix to this page your corporate seal where indicated, if available, otherwise indicate "not available"; also evidence of the authority of this officer to submit a bid on behalf of the corporation. Such authority must be in the form of a corporate resolution. Give also the names and addresses of the officers of the corporation.

(SEAL)

HAWAII PACIFIC SOLAR

August 14, 2013

Division of Purchasing
Department of Finance
County of Maui
2145 Wells Street, Suite 104
Wailuku, HI 96793

RE: County of Maui Solar Photovoltaic Project RFP No. 12-13/P-103

To Whom It May Concern:

The undersigned has carefully read and understands the terms and conditions specified in the RFP for Project No. 12-13/P-103 and submits the following offer to perform work as specified.

The undersigned represents that Hawaii Pacific Solar LLC (HPS) is a Hawaii business incorporated and organized under the laws of the State of Hawaii as a Limited Liability Company and authorized to do business in the State of Hawaii. The co-proposers with Hawaii Pacific Solar are Phoenix Solar and Rockwell Financial Group(RC Energy). Phoenix Solar is a global leader in renewable energy. Hawaii Pacific Solar has teamed previously with Rockwell and was successfully awarded contracts with the State of Hawaii Department of Education and the Navy Facility Command (NAVFAC) in Pearl Harbor.

HPS's Federal ID No.: ; Hawaii General Excise Tax License I.D. No.

Business Address is: 2010 Honoapiilani Highway, Suite C1, Lahaina, Hawaii 96761

Phone 808-661-1166

Email contact bob@hawaiipacificsolar.com

Hawaii Pacific Solar holds a Hawaii C-13 license No. C31250
Phoenix Solar holds a Hawaii General Contractors license No. AC 32115

The individual(s) signing this proposal have the authority to bind the partnership and the venture.

The proposers understand and will comply with all terms and conditions set forth in the RFP.

Rockwell Financial Group
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phoenix SOLAR

HAWAII PACIFIC SOLAR

Assumptions:

1) The County of Maui shall provide reasonable access to facilities during construction, testing and operation.
2) All wages are Davis-Bacon prevailing wage.
3) System sizes for each site were based upon MECO bills as provided by COM, when not available best estimates were made. Final system size will be subject to current usage data. In some cases a standard interconnection may be desirable. In these cases interval data must be collected to determine the optimal size.
4) Many of the sites identified in this RFP are in areas with high renewable energy penetration. These may require an Interconnection Reliability Study (IRS). An allowance was included in this proposal for IRS costs.
5) This offer is NOT conditional upon third party financing. All financing has been secured and committed as evidenced by the attached offering letter from RC Energy a division of Rockwell Financial Group and member of the HPS Team.

Constraints: None

Deviations: None

Hawaii Pacific Solar, RC Energy (Rockwell Financial), Phoenix Solar and its partners and affiliates do hereby affirm that they do not discriminate in employment practices in regard to race, color, religion, age, sex, marital status, political affiliation, national origin, handicap or disability. HPS will follow all wage guidelines set forth under the Davis-Bacon Act and the corresponding HRS Chapter 104.

Offer:

1. Photovoltaic System - Rate structure is a reverse inflator or deflator.

The initial PPA rate is /kWh (year 1)
/kWh (year 20)

Levelized Cost: $. /kWh

Annual DESCALATION rate is:

The Net Present Value is: $:

Total Annual Kilowatt production is:

Rockwell Financial Group
A Cornerstone for your Financial Requirements

phoenix SOLAR

HAWAII PACIFIC SOLAR

2. PV with Micro Grid Technology - Rate structure is a reverse inflator or deflator PV system tied to a micro grid system allowing for islanding and continued system operation in the event of a power outage.

The initial PPA rate is: ____ /kWh (year 1)
____ /kWh (year 20)

Levelized Cost: $.215/kWh

Annual DESCALATION rate is:

The Net Present Value is: $

Total Annual Kilowatt production is:

Respectfully submitted:
HAWAII PACIFIC SOLAR LLC

G. Robert Johnston
President & CEO
Telephone: (808) 661-1166
Facsimile: (808) 661-1921
E-mail: bob@hawaiipacificsolar.com

Rockwell Financial Group
A Cornerstone for your Financial Requirements

phoenixix SOLAR

Rockwell Financial Group
A Cornerstone for your Financial Requirements

August 13, 2013

TO: County of Maui, Hawaii
FROM: Rockwell Financial Group
SUBJECT: Financing Submissions for RFP #:12-13/P-103

Rockwell Financial Group, together with its partners is pleased to present the following financing proposal to operate solar facilities totaling approximately kW DC. Rockwell has agreed to provide funding for the projects based on the award to Hawaii Pacific Solar.

The key highlight of the proposal is as follows:

- Power Purchase Agreement electricity price of cents decreasing by per year.

We appreciate the opportunity to work with you and your organization. Should you have any questions, please do not hesitate to call me at (720) 257-7970.

Sincerely,

Evan Christenson
Director of Finance

Offerer's Proposal

Service Provider:	Energy Production Company supported by Rockwell Financial Group, Phoenix Solar USA, and Hawaii Pacific Solar
Host:	County of Maui, Hawaii
Price:	Deflating PPA, with an initial price of [illegible] cents decreasing by [illegible] per year (ending at [illegible] cents in year 20)
Solar Incentives:	The Service Provider shall be entitled to all Solar Incentives (including Hawaiian state tax credits) applicable for the project.
Contract Term:	20 Years, payable monthly in arrears by the Host.
System Maintenance:	Service Provider shall provide all other maintenance on the system.
Documentation:	The documents will include the documentation as provided for in the RFP.
Special Provisions:	Your acceptance of this Proposal allows us to move forward on the transaction on a sole and exclusive basis in good faith with the mutual intention of finalizing the projects final viability for both parties. Upon acceptance, the parties will work together to maintain an installation and development schedule that meets each party's objective of an efficient installation. It is understood that in the course of providing the financing the parties have assumed industry standard installation requirements and parameters. Final commitment will be subject to the terms and conditions agreed to by the parties in the documentation.