

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of:)	PDH-2017-001
)	PDH-2017-002
ROBERT'S HAWAII SCHOOL BUS, INC.,)	[Consolidated]
)	
Petitioner,)	HEARINGS OFFICER'S
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
KATHRYN S. MATAYOSHI, in her)	AND DECISION
capacity as Superintendent/Chief)	
Procurement Officer, DEPARTMENT OF)	
EDUCATION, STATE OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
GROUND TRANSPORT, INC.,)	
)	
Intervenor.)	
)	

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

I. INTRODUCTION

On March 3, 2017, Robert's Hawaii School Bus, Inc. ("Petitioner") filed requests for administrative review of Kathryn S. Matayoshi, in her capacity as Superintendent/Chief Procurement Officer for the Department of Education, State of Hawaii's ("Respondent") February 24, 2017 denials of Petitioner's December 23, 2016

protests. These matters were designated as PDH-2017-001 and PDH-2017-002 and set for hearing. Notices of Hearing and Pre-Hearing Conference were duly served on the parties.

On March 8, 2017, Ground Transport Inc. ("Intervenor"), requested leave to intervene in PDH-2017-001. By agreement of the parties, the request was granted, and PDH-2017-001 and PDH-2017-002 were consolidated for hearing.

On March 10, 2017, Petitioner filed motions for partial summary judgment on the issues of separation of technical and pricing evaluations, and evaluation committee documentation; and Respondent filed a motion for summary judgment on all claims. Following oral argument and upon due consideration, Petitioner's motions were denied and Respondent's motion with respect to Petitioner's challenge of Respondent's substantial interest determination as a separate claim, was granted. In all other respects, Respondent's motion was denied. On March 17, 2017, Petitioner moved the Hearings Officer to reconsider his order partially granting Respondent's motion for summary judgment. On March 20, 2017, Petitioner's motion for reconsideration was denied.

On March 15, 2017, these matters came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Craig K. Shikuma, Esq. and Charles D. Hunter, Esq. appeared for Petitioner; Gary S. Sukanuma, Esq. and Anne T. Horiuchi, Esq. appeared for Respondent, and Arsima Muller, Esq. appeared for Intervenor. The hearing continued on March 16 and 20, 2017 and was completed on March 21, 2017.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments. Accordingly, on March 31, 2017, closing briefs were submitted by the parties.

Having reviewed and considered the evidence and arguments presented by the parties, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On or about July 20, 2016, Respondent issued two requests for proposals (“RFPs”) for Student Transportation Services on the Islands of Maui (“RFP D17-001”) and Kauai (“RFP D17-002”). The RFPs were written, in part, to address the Legislature’s concern over the lack of competition in connection with the procurement of student transportation services.

2. The RFPs generally sought proposals to provide school bus transportation services on the Islands of Maui and Kauai for regularly scheduled service to and from school for regular and special education students. The RFPs sought to award contracts for an initial period of 7 years beginning on August 1, 2017. By mutual agreement, the contracts could be extended for up to 3 one-year periods.

3. The RFPs allocated the required transportation services on each island to a number of “clusters” based on geographic, logistical, and volume considerations. On Maui, the 4 clusters were designated as the Makawao, Baldwin, Lahaina, and Maui clusters. On Kauai, the 3 clusters were designated as the Waimea, Kapaa, and Kauai clusters.

4. Pursuant to the terms of the RFPs, an Offeror could win a maximum of 3 clusters on Maui and 2 on Kauai.

5. Section C.2 of the RFPs entitled, “Proposal Evaluation & Vendor Selection Process”, provided in relevant part:

This is a value-based procurement. The successful proponents must have the demonstrable experience and qualification, staffing, and financial resources to deliver the required services for the entire term of the contract. Cost will be a significant factor in the evaluation process. However, cost will become a factor only AFTER the proponent is evaluated on the basis of its qualifications, experiences, wherewithal, and proposed approach to delivering the required services and resources. The evaluation of proposals and vendor selection process will proceed in accordance with the following sequence:

A. Determination of Proposal Qualification

* * * *

B. Technical Evaluation - An evaluation committee will evaluate the proponents' Technical Proposal. The members of the committee will evaluate each proposal individually. The scoring rubric will be applied consistently by all evaluators, to all proponents, and to all proposals.

C. Cost Evaluation - AFTER the technical evaluation is completed, the proponent's cost proposal will be opened and the costs analyzed based on a model that extends the proposed prices against the estimated services volume in each identified category on Attachment B to this RFP (pricing forms). Points will be assigned by formula in accordance with the following criteria:

- The lowest cost proponent in each individual service cluster, as measured by the estimated total aggregated annual cost, will receive the maximum available points.
- Each proposal that has a higher cost factor will receive a proportional share of the points available based on the comparative total aggregated annual cost. The points allocated to all proposals other than the lowest cost proponent will be equal to the lowest cost proponent proposal multiplied by the maximum points available for price, divided by the estimated total aggregated annual cost.
- This process will be applied to both the home to school cost and the proposed supplemental services cost per cluster.

D. Determination of Preferred Vendor(s) - The Technical Proposal score from each evaluator will be averaged to arrive at the final Technical Proposal score for each proponent. This will be combined with the Cost Proposal score for the same proponent and service cluster combination to arrive at the proponent's total score. The proponents will then be ranked within each of the three

service clusters. The top scoring proponent will become the preferred vendor in each cluster. The DOE will then apply any volume restrictions provided by proponents submitting an Option B proposal, elevating the next highest scoring vendor to the preferred vendor category, as required.

E. Mandatory Interviews – After reviewing the result of the evaluation, the preferred and next highest scoring proponent in each cluster will be invited to an interview with the evaluation committee in Honolulu. The purpose of these interviews will be to clarify and expand upon any element of the proponent's submission. *The results of these interviews may be used by any individual evaluator to reassess and adjust their scoring of the Technical Proposal.* The final point totals for the interviewees will be compared again to assess whether the preferred vendor position has changed.

F. Notice of Award - the final results will be shared with the preferred vendors and with the next highest scoring vendor in each service cluster.

The evaluation criteria to be applied and point totals available by section will align with the parameters established in Proposal Submission Requirement section below.

(Emphasis added).

6. Pursuant to the terms of the RFPs, the technical evaluation was to be completed before the scoring of the Pricing Proposals. The Technical Proposal scores from each evaluator would then be averaged to arrive at a final Technical Proposal score for each Offeror. This score was then combined with the Offeror's score of the Pricing Proposal to determine the Offeror's Total Score.

7. The RFPs were administered by the Project Control Section of Respondent. The Section Administrator was Christian Butt.

8. Pursuant to the terms of the RFPs, offers in response to the RFPs were due by October 5, 2016.

9. The RFPs called for an Evaluation Committee to conduct the technical evaluation of each offer submitted in response to the RFPs.

10. James Kauhi, the Student Transportation Services Branch Manager for Respondent, was appointed as the Chair of the Evaluation Committee.

11. As Chair of the Evaluation Committee, Kauhi appointed the other members of the committee which included Pualani Foster, Robert Joseph, and Bruce Ellerman.

12. Memos For Record, approving of the appointments of Kauhi, Foster, Joseph, and Ellerman to serve on the Evaluation Committee for RFP D17-001 and RFP D17-002, were signed by Respondent's Assistant Superintendent, Dann Carlson. The memos were undated.

13. Joseph and Foster are employed by Respondent as the transportation officers on Maui and Kauai, respectively. Their immediate supervisor is Kauhi.

14. Foster has been employed by Respondent since 2011. In 2013, she became the transportation officer for the Island of Kauai. Joseph has been the transportation officer for Maui for approximately 9 years.

15. In their capacity as transportation officers, Joseph and Foster are generally responsible for setting up and maintaining transportation services for public school regular and special education students on Maui and Kauai. Their duties include making sure the bus routes are running efficiently, the bus companies are complying with the contract, and complaints involving the transportation services are addressed.

16. Kauhi is the brother-in-law of Joseph and both are neighbors on Maui. Joseph has known Kauhi for over 40 years.

17. At the time of his appointment to the Evaluation Committee, Ellerman was an employee of Management Partner Services, a private consultant hired by Respondent for assistance in developing the RFPs.

18. None of the members of the Evaluation Committee were compensated specifically for their work on the committee by Respondent. During their evaluation of the Technical Proposals, the members were paid their normal compensation earned as a result of their employment with their respective employers.

19. Section D.1.D of the RFPs provides that "Proposals must be submitted using the instruction in this RFP".

20. Section D.2. of the RFPs explained the method by which the Technical Proposals would be scored by the Evaluation Committee:

* * * *

2. Technical Proposals - 60 Points Available

Each section of the proposal will be evaluated based on the number of points identified for each respective tab described below. The evaluation process will include each proposal being reviewed by an appointed evaluation committee. Those proposals that are determined to be responsive (those that offer all of the basic requirements requested in the RFP and contain all of the required information and forms properly completed) will be further reviewed using the comparative criteria outlined in this section.

The committee will use the comparative criterion for each separate rating area, and based upon these criteria, will assign an overall rating to each tab. Each of the tabs will be rated based on the following guidelines:

- Complete response with no omissions will receive 100% of available points
- Minor omissions will receive 75% of available points
- Many minor omissions or a major omission will receive 50% of available points
- Many major omissions or major deficiency will receive 2% of available points
- Incomplete or missing response will receive 0 points

* * * *

21. The Technical Proposals were evaluated and scored based on a “deductive evaluation” process. Points would be deducted from the maximum number of points available for each of the 11 areas or “Tabs”. The Tabs consisted of the following categories: Transmittal Letter, Executive Summary, Qualifications & Experience, References and Testimonials, Proponent’s Service Approach, Proponent’s Commitment to Safety, Vehicles & Fleet Management, Proponent’s Staff, Transition Plan, Financial Stability, and Appendix.

22. Section D.3. of the RFPs stated:

Cost Proposal - 40 Points Available

A total of 36 points will be applied to the home-to-school service pricing. *A total of 4 points will be applied to the average “Hourly driving rate for supplemental services” rate provided in Attachment B.*

No pricing information is to be included in the proposal. One hard copy of **Attachment B** or an exact replica, in its entirety, with all required information must be included in a separate, marked, sealed envelope as part of the proponent’s submission.

* * * *

(Emphasis added).

23. On or about August 23, 2016, Kristine Kim, Petitioner’s Maui manager, emailed Joseph to determine whether one of Petitioner’s drivers could adjust his route. After an exchange of emails on the subject, Joseph replied:

Kris,
So am I to understand that 43 Puu Kukui Elementary students went out to Waikapu Gardens then approximately 20 or 50% of them had to stay on the bus and return to Iao Intermediate with the driver before finally being taken back out to Waiolani & Waikapu to be dropped off.

Imagine being the parent of one of these students, sitting at the dinner table tonight, and your child tells you about the extra long bus ride they had today and that the bus driver

thinks this is a better way to operate the route because it saves him 20 minutes a day 5 days a week. Yet on the other hand, each of these 20+ kids will have to endure an additional 15 to 20 minutes per days 5 days a week if this bus driver has his way.

Even if I factored in the fact that the 17 to 21 Iao students would get home approximately 10 minutes earlier daily, it still equates to being a benefit for the driver and RHSB at the expense of time sacrificed by the Puu Kukui **ELEMENTARY** Students, not to mention that the Iao Students probably are enjoying the time spent with their friends while waiting for the bus.

Sorry but it just does not make any sense to me.

PLEASE instruct this driver as well as all other drivers, To follow the schedules we have issued to them which are the exact same as those posted at our schools. Remind them that I am always open to suggestions from them on better ways to do routes, **BUT** their suggestions need to be brought to you and me in writing first so we can discuss and agree upon before actually implementing any changes to the already set schedules. No driver has the authority to change anything on their assigned Route Schedule on their own unless imminent danger exist. Please have them follow our protocols.

24. On the same date, August 23, 2016, Kauhi forwarded the emails between Joseph and Kim to Aaron Kimura, Petitioner's vice-president, and said:

Aaron, this is what I've been trying to tell you about Kris and her local practices. It concerns me deeply. Please note that this stuff is going to come up during evaluations of the RFP proposals.

25. Joseph testified that he works closely with Kim on Maui and considers her to be his "right hand." According to Joseph, he has learned a lot from Kim and that Kim was very knowledgeable. Joseph acknowledged that he has had at least 2 disagreements with Kim in the past but described their relationship as "brother-sister".

26. Gayle Sagiao, Petitioner's operations director, testified that Joseph could be harsh and stubborn at times but was always straight with her.

27. On or about September 22, 2016, Respondent issued Addendum 3 to the RFPs. Addendum 3 provides in relevant part:

* * * *

This addendum provides clarification for submission requirements of the RFP related to the need to provide bus aides for special needs services. *This response is hereby incorporated and made a part of the RFP.*

1. Are we required to provide aides for each special education vehicle?

A. Bus contractors should expect to provide bus aides for each bus that is identified as a special needs bus. It should be noted that this requirement may change over time, but for purposes of developing their response vendors should plan to provide a bus aide for all identified special needs buses shown on Attachment B.

* * * *

6. What will the cost per hour for bus aide be used for?

A. The cost of the bus aide will be used in the evaluation of cost provided by each vendor.

(Emphasis added).

28. Addendum 3 also stated that the "cost of the bus aide should be identified on the appropriate line included on the revised Attachment B – Pricing Form included [sic] with this Addendum".

29. Petitioner did not seek clarification on any of the matters addressed by Addendum 3.

30. In response to the RFPs, offers were submitted by the following providers: In RFP D17-001 – Petitioner, Intervenor, Akina Enterprises, LLC ("Akina"), and Iosepa

Transportation (“Iosepa”). In RFP D17-002 – Yamaguchi Bus Service, Inc. (“Yamaguchi”), Petitioner, Iosepa and Akita Enterprises, Limited (“Akita”).

31. The offers for both RFPs were received by the Project Control Section and secured in a safe place until the Evaluation Committee could convene. Pursuant to the instructions in the RFPs, each offer consisted of a Technical Proposal and a Pricing Proposal which were submitted in separate, sealed envelopes.

32. On or about October 7, 2016 the Evaluation Committee received information from the Project Control Section regarding the RFPs. The information included the Technical Proposals that had been submitted in response to the RFPs along with scoring sheet forms the members were to use in determining the scores for each Technical Proposal. The Evaluation Committee was not given information on the Pricing Proposals.

33. Prior to receiving the Technical Proposals, each member of the Evaluation Committee received instructions from staff of the Project Control Section and Kauhi regarding the scoring of the proposals. The members were generally instructed to keep an open mind, to be fair in their scoring of the proposals, and to base their scoring only on the criteria provided in the RFPs rather than on outside information on the Offerors. They were also given a deadline to complete their scoring of the proposals.

34. Prior to receiving the Technical Proposals, each member of the Evaluation Committee was also provided with a form of Declaration which they were required to sign and return to the Project Control Section. The form required each Evaluation Committee member to certify and affirm the following with respect to the RFPs:

- 1) I have no conflict of interest with [the RFP] or I have disclosed any potential conflict of interest with the Chair of the evaluation committee, and they have cleared my participation.
- 2) I will not disclose any information regarding [the RFP] including but not limited to the names of the Respondents, the contents of their proposals, the discussions or information presented, and any other information related to this procurement until the award is posted.
- 3) I will not discuss the information presented, or provide

any input or opinion regarding the RFP respondents, the evaluation, or the award with anyone not permitted access to this information until posting of award.

35. The Declaration forms did not provide a space for the date to be filled in by the declarant.

36. The Declarations were signed by each member of the Evaluation Committee and returned to the Project Control Section. No potential conflicts of interest were disclosed to Kauhi by any of the other members of the committee.

37. Joseph and Foster testified that they probably signed and returned the Declaration to the Project Control Section prior to beginning their scoring of the Technical Proposals. Ellerman and Kauhi testified that they signed and returned the Declarations in October 2016.

38. Only after the scores for the Technical Proposals were completed by the Evaluation Committee were the Pricing Proposals opened and scored. The scoring of the Pricing Proposals was not done by the Evaluation Committee. Rather, the scoring was done by the Project Control Section according to the formula set forth in the RFPs.

39. For RFP D17-001, the Evaluation Committee's individual scores for the Technical Proposals for all clusters were as follows:

	<u>Petitioner</u>	<u>Intervenor</u>	<u>Iosepa</u>	<u>Akina</u>
Foster	51.00	55.50	54.50	48.00
Joseph	51.75	56.25	49.75	49.50
Kauhi	56.25	59.25	51.25	50.00
Ellerman	57.00	57.25	50.00	50.75

40. For each of the 4 clusters in RFP D17-001, Petitioner offered an hourly rate for bus aide of \$33.00 while Intervenor offered an hourly rate of \$22.75.

41. For RFP D17-002, the Evaluation Committee's individual scores for the Technical Proposals for all clusters were as follows:

	<u>Petitioner</u>	<u>Yamaguchi</u>	<u>Akita</u>	<u>Iosepa</u>
Foster	50.25	53.75	49.75	54.50
Joseph	45.00	51.00	52.00	49.75
Kauhi	56.25	59.25	53.50	51.25
Ellerman	55.50	53.00	55.00	52.25

42. For each of the 3 clusters in RFP D17-002, Petitioner offered an hourly rate for bus aide of \$33.00 while Akita's rate was \$21.50, and Yamaguchi's rate was \$26.00.

43. The Offerors' Pricing Proposals were scored using only the supplemental hourly rate provided in the proposals. Two prior solicitations in 2013 involving school bus transportation services for the Islands of Oahu and Hawaii utilized only the aide rate in the scoring of the Pricing Proposals.

44. The supplemental hourly rate required by the RFPs were bus rates relating to charter services for such activities as field trips and athletic events. These rates were not related to any of the services required by the RFPs and, instead, were managed and scheduled by the individual school sites. Supplemental rates were required by the RFPs in order to cap the hourly rate for these charters for the benefit of the individual schools.

45. Following the completion of the scoring of the Technical and Pricing Proposals, the members of the Evaluation Committee and a representative from the Project Control Section met by way of conference call to discuss the results and to tabulate the scores.

46. During the conference call, the members of the committee discussed, among other things, their reasons for certain point deductions from their scoring of the Technical Proposals. That discussion led other members to consider and assess similar deductions in their scoring of some of the Technical Proposals.

47. During the conference call, the scores for the Technical Proposals were announced by each member of the Evaluation Committee and recorded by staff of the Project Control Section.

48. After the scores of the Technical and Pricing Proposals were tabulated, the various offers were ranked according to their Total Score.

49. In accordance with the terms of the RFPs, the 2 highest-ranked Offerors for each RFP were interviewed by the Evaluation Committee.

50. The 2 highest-ranked Offerors for Maui were Intervenor and Petitioner. Yamaguchi and Akita were the 2 highest-ranked Offerors in Kauai.

51. The interviews took place in or around October 19-20, 2016.

52. Prior to the interviews, the members of the Evaluation Committee had the opportunity to submit questions to Kauai to be posed to the Offerors at their interviews in order to clarify and expand upon their offers. The members were not provided with the summary of the scores. Instead, they were provided with their score sheets and a list of the previously submitted questions.

53. The interviews were the first time the identities of the Evaluation Committee members were made known to any of the Offerors.

54. Following the interviews, the members of the Evaluation Committee met by way of conference call with staff from the Project Control Section to tabulate their scores.

55. By letter dated November 1, 2016, Respondent notified Petitioner that Petitioner would be awarded the Makawao cluster and Intervenor would be awarded the Baldwin, Lahaina and Maui clusters in RFP D17-001. By letter of the same date, Respondent notified Petitioner that Yamaguchi would be awarded the Waimea cluster and Akita would be awarded the Kapaa and Kauai clusters in RFP D17-002.

56. The Makawao cluster is the largest of the 4 clusters designated in RFP D17-001.

57. By letters to Respondent, both dated November 2, 2017, Petitioner requested a debriefing in each of the two solicitations.

58. The debriefing was held on November 16, 2016.

59. During the November 16, 2016 debriefing, Butt, the administrator for the Project Control Section, stated in part:

* * * *

First of all, you know, I'm disappointed that you guys didn't do better, and I'm sure not as much as you, but you've been a good vendor for us and I'm sure the outcome, you're disappointed. We appreciate your participation in the process and the effort so . . . you want to get it started Jimmy? You want to talk about the real difference maker? You guys must've looked at it, but in my perspective really the determining factor was price. You can look at all the technical stuff but price really controlled the difference.

* * * *

One thing to that like I said, I was just looking . . . actually price was the determinant. But one of the things, again I don't know if you were aware of part of the process where I asked you to do it separately, so we gave you technical proposal and we gave you price. And we didn't expose the price to the evaluators so they are not influenced by that. So again they were blind to that. So again, we didn't want to say oh well, I'm going to score this guy up because his price was kind of low or whatever. So again we try to remove that barrier. So again you know, that these guys scored it they don't know how it's going to turn out.

* * * *

60. During the debriefing, Kauhi explained how the Evaluation Committee arrived at their final scores;

Particularly on Kauai. You saw the difference right? And clearly the Kauai vendors over there had plenty motivation . . . on Kauai that seems to be the big difference. Your technical presentation as it turns out came in well, just under Ground's technical presentation scores on Maui but, same thing right, on Maui obviously your price and everyone's price was much closer because on Kauai, like I said, those two guys over there had plenty motivation.

* * * *

I thought the evaluation team did a terrific job. We did spend two weeks with individuals sort of evaluating each technical presentation on their own, gathered their own thoughts. We did do a one-day collaboration with all four evaluators and got their input on every one of the technical presentations which was key because it was at that point the evaluators were given an opportunity to voice their perspectives, their concerns, their interpretations if you will. And whether it had an influence or whether my interpretation had an influence on another evaluator's interpretation, same thing would be entirely up to each individual right, but that was the time where we weigh in on all of the different components of the technical presentation and then we finalized the scores the very next day and everything was turned over to merry up with the pricing scores and ended up where we are. So that's generally the process of how it worked.

* * * *

61. During the debriefing, a representative of Petitioner commented that Intervenor's offer "contained nebulous information" and that Petitioner lost points for "having an existing infrastructure, but not [Intervenor]". Kauhi responded:

I can tell you that they [Intervenor] weren't nebulous in their interview. I understand where you're going with this and which is why you have an interview. Interview questions were right along the lines of every bullet point you've raised so far. Did we not question you about baseyards? Did we not question you about workforce and the way you utilized between the different components of your highly diversified company? What I'm saying is the technical score sheets that you saw from each individual was to evaluate your presentation on the merit of your presentation. But then we also had an interview and during that interview you were asked questions and they were clarified. Now, whether that's going to make a difference, as I said before, to the individual evaluators as to whether they're going to change their score or not change their

scores, is entirely up to them. The purpose of the interview was to get clarification for questions about components of your presentation.

62. Following the debriefing, Butt became aware that some of the scores of the individual evaluators did not match the scores reflected in the summary and that there were mathematical errors in averaging some of the scores for the Technical Proposals.

63. By letters dated November 18, 2016 to Butt, Petitioner requested that Respondent rescind the awards in both RFPs and reissue the RFPs to allow new proposals to be submitted. Petitioner alleged that the awards had been made in violation of the law:

This letter is being sent to request that the awards related to the above RFP be rescinded, and that the RFP be reissued so that new proposals can be submitted. It is the belief of Roberts Hawaii School Bus, Inc. (RHSB) that the awards under the RFP were issued in violation of law for some of the reasons we have already discussed during our debriefing on November 16, 2016. Because of that fact, rescission of the award and cancellation of the awarded contracts is required.

* * * *

It is clear at this point, based on our conversation and the surrounding facts, that RHSB has sufficient basis for a protest of the award, and that the protest should be upheld. Given the circumstances, there is no way for the Department of Education (DOE) to waive the violations in question without prejudice to the bidders. Performance has not yet begun, and there is certainly adequate time for resoliciting bids.

* * * *

Clearly there is time to resolicit bids. RHSB requests that this action be taken to avoid any further prejudice to the bidders. However, we understand that what you have instead offered to do is rescind the awards and then re-score the existing proposals. Should the DOE choose to re-score the existing RFP responses rather than resolicit

entirely new proposals, RHSB reserves all of its right to protest the result of the re-scoring.

Finally RHSB believes that regardless of whether the DOE reissues a new RFP or re-scores the existing proposals, the DOE should utilize a new scoring panel composed of entirely different members to reduce the possibility of bias in the scoring.

* * * *

64. After consulting with Kauhi, Butt determined that there was no need to cancel the RFPs and resolicit offers. Instead, Butt determined that having the same Evaluation Committee rescore the Technical Proposals would sufficiently address the deficiencies found in the proposals. Among other things, Butt was concerned that resoliciting offers after prices had been exposed might be prejudicial to the Offerors.

65. Following the debriefing, Butt called Kimura and offered to rescind the awards and rescore the Technical Proposals.

66. On November 21, 2016, Petitioner received a Notice of Re-score from Respondent as to both RFPs. The Notice of Re-score acknowledged discrepancies in the solicitations:

You are being notified that the awards for RFP D17-001 and RFP D17-002 are being rescinded. It has been brought to the Department of Education's (DOE) attention that there are discrepancies and mathematical errors with the scoring. Upon review, the DOE concurs and has decided to re-score both RFPs.

* * * *

67. In preparation for the rescoring process, the Evaluation Committee was given their scoring sheets from the initial scoring of the Technical Proposals, their notes from the interviews, and the Technical Proposals.

68. In rescoring the Technical Proposals, the members of the Evaluation Committee reviewed and reread all of the proposals. As a result of this review, some of the

members of the Evaluation Committee became aware of concerns they did not see in their initial review that affected their scoring.

69. For RFP D17-0001, the Evaluation Committee's revised scores for the Technical Proposals for all clusters were as follows:

	<u>Petitioner</u>	<u>Intervenor</u>	<u>Iosepa</u>	<u>Akina</u>
Foster	60.00	60.00	57.25	53.25
Joseph	48.75	57.00	51.50	50.75
Kauhi	54.00	53.25	52.25	50.00
Ellerman	57.75	58.00	49.25	50.75

70. For RFP D17-002, the Evaluation Committee's revised scores for the Technical Proposals for all clusters were as follows:

	<u>Petitioner</u>	<u>Yamaguchi</u>	<u>Akita</u>	<u>Iosepa</u>
Foster	59.25	55.50	59.50	57.25
Joseph	50.25	54.75	54.25	49.75
Kauhi	54.00	54.00	53.50	50.75
Ellerman	56.25	53.00	55.75	52.25

71. The following are the Evaluation Committee members' revised technical scores for Petitioner for Maui:

MAUI	1	2	3	4	5	6	7	8	9	10	11	Total
Max Pts	3.00	3.00	9.00	6.00	9.00	15.00	3.00	3.00	3.00	4.00	2.00	60.00
Kauhi	3.00	3.00	9.00	6.00	6.75	11.25	3.00	3.00	3.00	4.00	2.00	54.68
Joseph	2.25	2.25	6.75	6.00	6.75	11.25	1.50	3.00	3.00	4.00	2.00	48.75
Ellerman	3.00	3.00	9.00	6.00	6.75	15.00	3.00	3.00	3.00	4.00	2.00	57.75
Foster	3.00	3.00	9.00	6.00	9.00	15.00	3.00	3.00	3.00	4.00	2.00	60.00

72. The following are the Evaluation Committee members' revised technical scores for Intervenor for Maui:

MAUI	1	2	3	4	5	6	7	8	9	10	11	Total
Max Pts	3.00	3.00	9.00	6.00	9.00	15.00	3.00	3.00	3.00	4.00	2.00	60.00
Kauhi	3.00	3.00	9.00	6.00	6.75	11.25	3.00	3.00	2.25	4.00	2.00	53.25
Joseph	2.25	3.00	6.75	6.00	9.00	15.00	3.00	3.00	3.00	4.00	2.00	57.00
Ellerman	3.00	3.00	9.00	6.00	9.00	15.00	3.00	3.00	1.50	4.00	1.50	58.00
Foster	3.00	3.00	9.00	6.00	9.00	15.00	3.00	3.00	3.00	4.00	2.00	60.00

73. The following are Petitioner's revised Total Scores for Maui:

Cluster	Technical	Price	Total
Makawao	55.13	39.46	94.58
Baldwin	55.13	36.61	91.74
Lahaina	55.13	36.46	91.59
Maui	55.13	35.72	90.84

74. The following are Intervenor's revised Total Scores for Maui:

Cluster	Technical	Price	Total
Makawao	57.06	40.00	97.06
Baldwin	57.06	40.00	97.06
Lahaina	57.06	40.00	97.06
Maui	57.06	40.00	97.06

75. The following are the Evaluation Committee members' revised technical scores for Petitioner for Kauai:

KAUAI	1	2	3	4	5	6	7	8	9	10	11	Total
Max Pts	3.00	3.00	9.00	6.00	9.00	15.00	3.00	3.00	3.00	4.00	2.00	60.00
Kauhi	3.00	3.00	9.00	6.00	6.75	11.25	3.00	3.00	3.00	4.00	2.00	54.00
Joseph	2.25	2.25	9.00	6.00	6.75	11.25	2.25	3.00	1.50	4.00	2.00	50.25
Ellerman	3.00	3.00	9.00	6.00	6.75	15.00	3.00	2.25	2.25	4.00	2.00	56.25
Foster	3.00	3.00	9.00	6.00	9.00	15.00	3.00	3.00	2.25	4.00	2.00	59.25

76. The following are Petitioner's revised Total Scores for Kauai:

Cluster	Technical	Price	Total
Waimea	54.94	27.25	82.18
Kapaa	54.94	32.10	87.03
Kauai	54.94	32.27	87.21

77. The following are Akita's revised Total Scores for Kauai:

Cluster	Technical	Price	Total	Rank
Waimea	55.75	39.07	94.82	1
Kapaa	55.75	40.00	95.75	1
Kauai	55.75	40.00	95.75	1

78. The following are Yamaguchi's revised Total Scores for Kauai:

Cluster	Technical	Price	Total	Rank
Waimea	54.31	38.26	92.57	2
Kapaa	54.31	33.87	88.18	2
Kauai	54.31	37.09	91.40	2

79. At the time the Technical Proposals were rescored, at least some of the members of the Evaluation Committee had seen the Offeror's Total Scores.

80. Joseph testified that he has never seen the pricing even following the awarding of the contracts and that he had no interest in the pricing information.

81. Ellerman testified that he was sure that he saw the combined technical and price scores although he did not have a specific recollection of it.

82. Kauhi testified that shortly after the conference call to tally the initial scores, he received the lump sum combined technical and price scores by email. The price scores were not provided to the other evaluators at that time because there was no need for them to have that information.

83. Foster testified that she only saw totals of the technical and pricing scores contained in the award letters following the initial scoring.

84. Tab 1 of the RFPs concerned the Transmittal Letter. Petitioner received a score of 2.25 points out of a maximum of 3.00 points from Joseph. Joseph noted in his score sheets for RFP D17-001 that a “list of the 4 clusters that is being proposed for was not provided”, and for RFP D17-002, that Petitioner “had failed to provide a list of the three clusters they are bidding for. Petitioner’s offers, however, stated that, Petitioner “shall pursue Proposal Option A (Multiple clusters, unlimited award) for all four (4) Clusters” in RFP D17-001 and that Petitioner “shall pursue Proposal Option A (Multiple clusters, unlimited award) for all three (3) Clusters” in RFP D17-002. In Tab 1 of its Technical Proposal, Intervenor stated, “We are submitting for Proposal Option A for all Maui service clusters: Cluster 1- Makawao (Haiku, Makawao, Pukalani, Kula, Paia); Cluster 2-Baldwin (Wailuku); Cluster 3- Lahaina; and Cluster 4-Maui (Kahului and Kihei).” Joseph awarded Intervenor a score of 2.25 and apparently deducted .75 points because Intervenor had “exceeded page limit”.

85. Tab 2 concerned the Executive Summary of each RFP. Joseph awarded Petitioner 2.25 out of a maximum 3.00 points in both RFPs and had the following comments on his score sheet for RFP D17-001:

*Conflicting statements pertaining to the number of strategically placed base yards in bullets # 1 & 3.

*Capacity & Functionality of Makawao Baseyard questionable-define the term “baseyard” and explain what the DOE could expect from each of these locations.

*Turn key statement-current fleet would not meet average age requirements if awarded 85% of clusters.

86. Joseph’s comments regarding Tab 2 were based on knowledge he acquired from his work with Petitioner on the current Maui bus contract. From that experience, it was Joseph’s belief that Petitioner did not maintain what he considered to be a “baseyard” in Makawao or Lahaina, and that Petitioner’s current fleet of buses would not meet the age

requirements because he believed from his experience as the Maui transportation officer in charge of the current contracts that Petitioner had outdated buses.

87. Joseph awarded the maximum 3.00 points to Intervenor for Tab 2 despite the fact that Intervenor had no presently existing baseyards on Maui.

88. Tab 3 concerned the Offeror's Qualifications and Experience. Joseph awarded Petitioner 6.75 out of the maximum 9.00 points in RFP D17-001 and included the following comments:

*44 Dispatchers Statewide-Are they school bus department or DOEs it include tour & public transit personnel as well?

*Bullets 3&4 were combined into one statement

89. In its Technical Proposal for both RFPs, Petitioner addressed the requirements for Tab 3, in pertinent part, as follows:

Comparable and Currently Active Service Delivery Contracts

As the largest student transportation services provider in the State of Hawaii, Robert's Hawaii School Bus, Inc. (RHSB) currently (as of the development period for this proposal) has a total of *thirty-nine* (22) active DOE student transportation services contracts throughout four (4) major Hawaiian Islands; Hawaii, Maui, Oahu, and Kauai. Three (3) contracts for the Island of Hawaii, one (1) contract for the Island of Kauai, fourteen (14) contracts for the Island of Maui, and four (4) contracts for Island of Oahu.

(Emphasis added).

90. Petitioner's Technical Proposals displayed a table showing the 22 active contracts it had on each island by clusters.

91. Joseph's comments regarding Tab 3 were based on knowledge he acquired from his work with Petitioner on the current Maui bus contract. From that experience, it was Joseph's belief that Petitioner had only 22 active service delivery contracts rather than the 39 contracts "claimed" in Petitioner's Technical Proposal - even though the proposal accurately represented the total as 22 in other sections of Petitioner's response to Tab 3.

92. Tab 4 of the RFPs concerned Reference and Testimonials. Tab 4 required Offerors to provide not less than one and no more than 3 letters of reference. Intervenor listed 3 references and 12 customer testimonials.

93. Tab 5 of the RFPs concerned the Proponent's Service Approach. Joseph, Kauhi and Ellerman awarded Petitioner 6.75 points out of the maximum of 9.00 points in both RFPs.

94. Joseph testified that his deduction of points for Petitioner's response to Tab 5 was based on the fact that Petitioner's offer did not identify who was responsible for ensuring that drivers were conducting the required pre-trip inspections for safety and cleaning and did not provide steps that Petitioner would take to check route schedule compliance.

95. In his scoring sheet for Petitioner in RFP D17-001, Kauhi entered the following comment for Tab 5:

Response to "Reliability" bullet is insufficient. It fails to include details on policies relating to internal communication protocols for emergencies such as driver no shows and particularly for park-aways.

96. In his scoring sheet for Intervenor, Kauhi commented on Intervenor's response to Tab 5:

The response to the question of "Reliability" is insufficient. No information is provided on internal communication protocols for emergencies, such as driver no shows particularly for park-aways. Described procedures is insufficient.

97. In his scoring sheet for Petitioner in RFP D17-001, Ellerman entered the following comment for Tab 5:

Needed more emphasis on working w/ DOE to identify efficiency opp's that would be beneficial to DOE, esp. in SpEd area

98. Tab 6 of the RFPs concerned the Offerors' Commitment to Safety. Joseph and Kauhi awarded Petitioner 11.25 point of the maximum 15.00 points in both RFPs. In his

scoring sheet for Petitioner in RFP D17-001, Joseph noted, "All responses to bulleted items are generic and does not reflect actual Maui team members performance." In his testimony, Joseph explained that he was looking for actual safety performance and that Petitioner's response lacked specifics.

99. In his scoring sheet for Petitioner in RFP D17-001, Kauhi commented in Tab 6:

Response to how has safety metrics changed is insufficient. The presentation's response to the question of how is safety measured indicated two metrics: Accident/1,000 driving hours, and student injuries/1000 driving hours. Response to how these two metrics changed speaks to partnering with third party experts and enhancing communications instead of pointing to specific metrics that enables the overall effectiveness of the safety program.

100. Tab 7 of the RFPs concerned Vehicle & Fleet Management. Joseph awarded Petitioner 1.5 points of the maximum 3.00 points in RFP D17-001. Joseph noted in his scoring sheet:

*Descriptions of Baseyards referred to in Tab 9 are not accurate.

Define Baseyard, what exactly can we expect from each of these locations operationally?

101. The Offerors' Pricing Proposals were rescored using both the supplemental and aide rate provided in their proposals.

102. By letter dated December 5, 2016 from Respondent, Petitioner was notified that it would be awarded the Makawao cluster and that the remaining clusters would be awarded to Intervenor:

Your response received the second highest score in all four clusters, with Ground Transport Incorporated (GTI) being the top scoring vendor in all four clusters. However, due to the award limit stated in the RFP, GTI was awarded Clusters 2, 3, and 4.

103. By letter dated December 5, 2016 from Respondent, Petitioner was notified that it would not be awarded any of the contracts for the 3 clusters in Kauai. Although Akita had the highest score for all 3 clusters, it was limited to an award of 2 clusters under the terms of RFP D17-002. Accordingly, the Waimea cluster was awarded to Yamaguchi since it was the Offeror with the second highest Total Score for that cluster.

104. No interviews were conducted following or in connection with the rescoring of the offers.

105. Aaron Kimura, Petitioner's vice-president for contracts management, testified that the prices Petitioner included in its Pricing Proposal was based on the understanding that the costs would not be disclosed to the evaluators until after the Technical Proposals had been scored. Kimura testified that because they usually receive high technical scores, they are able to offer moderate prices; however, had they known that the costs would be made known to the evaluators prior to the scoring or rescoring of the technical proposals, they would have adjusted their prices. Kimura also testified that an interview following the rescoring would have provided them with the opportunity to clarify and reiterate the extent of their existing infrastructure on Maui.

106. A second debriefing with Petitioner and Respondent was held on December 16, 2016.

107. By letter dated December 12, 2016, Yamaguchi informed Respondent that, "[s]ome school bus vendors that we are working with have indicated that they still will be able to supply new school buses to Kauai by July 1, 2017 if the order is received by January 13, 2017."

108. By letter dated December 13, 2016, Akita informed Respondent that the "drop dead deadline for ordering buses is January 15, 2017", and explained that, "that is the absolute lead time the manufacturer needs to build the bus and have it shipped to Kauai by July 1, 2017."

109. By letter dated December 14, 2016, Intervenor informed Respondent that because of the lead time required to build and ship the required vehicles to Maui, the deadline for ordering the buses is January 13, 2017.

110. At the December 16, 2016 debriefing, Butt, Kauhi, and Chad Iwamoto and Aaron Kimura of Petitioner had the following exchange on the claim that the rescoring of the Technical Proposals should have been done without the evaluators' knowledge of the results of the Pricing Proposals:

Kimura: . . . the panel now had access to the outcome of the prices . . . the rates. Now that is different from the initial process, right, where it was kept away from them, and all they did was they evaluated proposals, the written part, and then they submitted their scores to you, and then you had done the final scoring because you [Butt] had access to . . . you were the only one who had access to the pricing . . .

Kauhi: Right . . .

* * * *

Iwamoto: Isn't that contrary to the ways that the RFP was put out? That's what you told us on our first debriefing . . . On the first debriefing, you testified that none of the scorers knew what the monetary score was, and that's what kept the integrity, but on the second one, they knew what the outcome was. . .

Butt: OK, that's different, but there's nothing in the procurement code that requires that to be blind . . . we just did that as an extra step. But in any case, yes, they saw it but they did not have access to the score sheet when they rescored. Again, we kept that and they didn't do the price evaluation so, yeah they might have had a peek of the scores. I don't know if they have a photographic memory or not, but again I don't think . . .

* * * *

Iwamoto: Well Jimmy [Kauhi] had the scores with him at the first debriefing . . .

Kauhi: So, let me say this. The evaluators were asked to re-score the technical presentations, and that's all they did. While your point is well taken in the sense that they had general information on who, on what the price

presentations' rankings were at the time that they started the re-evaluation of the technical presentations, the pricing presentations were re-evaluated as well . . . but they were not involved in that process.

Butt: So again . . . yeah Chad . . . they did see it . . . but no, they didn't have it in front of them when they re-evaluated, so . . .

* * * *

111. On December 23, 2016, Petitioner protested the awards made in RFP D17-001 and RFP D17-002.

112. Petitioner currently operates the majority of the school bus routes on Maui.

113. Ellerman testified that during his work as a consultant for Respondent, he never sensed any animosity by Respondent against Petitioner.

114. On January 11, 2017, Respondent made a written determination that the award of the contracts resulting from the RFPs without delay was necessary to protect the substantial interests of the State pursuant to HRS § 103D-701(f) ("Substantial Interest Determination").

115. Contracts were awarded to Intervenor and Petitioner for RFP D17-001 and to Yamaguchi and Akita for RFP D17-002.

116. By letter dated January 20, 2017, Respondent informed Petitioner for the first time of its January 11, 2017 Substantial Interest Determination.

117. On January 25, 2017, Joseph went to Petitioner's Maui baseyard apparently to speak to Kim in her office. Upon leaving the office, Joseph ran into 2 drivers, Jim and Jancene Shields. Jancene Shields inquired "what was happening with DOE". According to Shields, Joseph replied that a new contract had been awarded and that Petitioner's appeal had been denied. Joseph testified that he informed the Shields that the contracts had been awarded but that nothing was set in stone because of the pending protests and that anything could happen. Jancene Shields asked how the new contractor was going to have a new facility up and running by the beginning of the new school year and Joseph,

according to Shields, suggested that they visit Intervenor's facility on Oahu and commented that Intervenor's facility was so clean they could do surgery there.

118. Following their January 25, 2017 conversation with Joseph, the Shields were asked about the conversation by Kim and asked to document the substance of the conversation. Consequently, on January 26, 2017, Jim Shields emailed Kim about his recollections of the conversation. Shield's email was forwarded by Kim to Sagiao with an indication from Kim that the description of the conversation in Shield's email did not exactly match the description the Shield's verbally related to Kim. There was no indication in the record as to what portion of the description had been inconsistent.

119. A few days after their January 25, 2017 conversation at Petitioner's Kahului baseyard, Joseph and Jancene Shields spoke again when they ran into each other at Maui High School. According to Shields, Joseph told her that Petitioner had previously attempted to block Respondent from hiring him because of his relationship to Kauhi. This led to an investigation which resulted in a delay in his hiring.

120. By letter dated February 6, 2017 to Respondent's attorney, Petitioner's attorney stated in relevant part:

This letter is a follow up on our letter dated January 27, 2017 regarding interference with Robert's Maui operations by Mr. Robert Joseph, and also to address the inexcusable delay by the DOE in responding to Robert's Protest, while simultaneously pushing forward on unlawfully awarded contracts.

* * * *

IV. Robert's Disputes the Determination of Substantial State Interests

* * * *

VI. Robert's Is Prepared to Discuss Resolution Prior to Taking Further Action

As you know, HRS §103D-701 allows the chief procurement officer or a designee to settle and resolve a

protest concerning the solicitation or award of a contract, prior to the commencement of an administrative proceeding. There has been no effort on the DOE's part to settle and resolve the Protests; however, Robert's is still willing to engage in those negotiations.

To that end, Robert's is prepared to post a bond for the full \$750,000.00 claimed by the DOE as its "savings" from operational efficiencies during the first year, if the DOE will halt any further action towards pursuing the protested contracts until the Protests have been resolved. Robert's is also willing to stipulate to an extension of its existing contracts so that there will be no interruption to services if a new vendor is not in place by August 7, 2017. These two concessions on Robert's part should allow the DOE to step back and follow the proper procedure contemplated by the Procurement Code. Robert's believes the option of resolving the Protests will not be available once it commences other legal proceedings. Thus, time is of the essence as Robert's will take immediate action following the above stated February 9th deadline.

* * * *

121. By letters dated February 24, 2017, Respondent notified Petitioner that it was denying Petitioner's December 23, 2017 protests in both RFPs.

122. On March 3, 2017, Petitioner filed the instant requests for administrative review and posted the requisite bonds pursuant to HRS §103D-709(e).

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

Hawaii Revised Statutes ("HRS") §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS

§§103D-310, 103D-701 or 103D-702. The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f). And, having initiated this action, Petitioner has the burden of proving each of the alleged violations by a preponderance of the evidence. *103D-709(c)*.

1. Compliance with Evaluation Criteria.

Petitioner alleges that in evaluating the Technical Proposals, the Evaluation Committee failed to follow the criteria set forth in the RFPs. Among other claims, Petitioner alleges that Respondent's decision to have the Technical Proposals rescored by the same Evaluation Committee violated HRS §103D-303. That section provides in relevant part:

(a) Competitive sealed proposals may be used to procure goods, services, or construction that are either not practicable or not advantageous to the State to procure by competitive sealed bidding.

* * * *

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably likely to be selected for a contract award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(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 added).

Similarly, Hawaii Administrative Rule §3-122-52 provides in relevant part:

(a) Evaluation factors shall be set out in the request for proposals and the evaluation shall be based only on the evaluation factors. Evaluation factors not specified in the request for proposals may not be considered.

* * * *

(Emphasis added).

The RFPs at issue here expressly provided that although cost “will be a significant factor in the evaluation process”, “cost will become a factor only AFTER the proponent is evaluated on the basis of its qualifications, experience, wherewithal, and proposed approach . . .” The RFPs also provided:

Cost Evaluation - AFTER the technical evaluation is completed, the proponent’s cost proposal will be opened and the costs analyzed based on a model that extends the proposed prices against the estimated service volume in each identified category on Attachment B to this RFP (pricing forms).

* * * *

Proposals must be submitted using the instructions in this RFP.

* * * *

No pricing information is to be included in the proposal. One hard copy of Attachment B or an exact replica, in its entirety, with all required information must be included in a separate, marked, sealed envelope as part of the proponent’s submission.

* * * *

Contrary to Respondent’s and Intervenor’s assertion that there is nothing in HRS Chapter 103D (“Procurement Code”) that requires the completion of the technical evaluation before the Pricing Proposals are scored, the terms of the RFPs make clear that the

Evaluation Committee's scoring of the Technical Proposals was to have been completed without knowledge of the Pricing Proposals or the results of the scoring of those proposals. Indeed, at the November 16, 2016 debriefing with Petitioner, Respondent acknowledged that knowledge of an Offeror's pricing could influence the scoring of the Technical Proposal. Having included this requirement in the RFPs, Respondent was obligated to comply with that criteria. And because the RFPs did not specifically address the method of scoring in the event that a rescoring of the offers became necessary, it stands to reason that the same criteria applies. Any other conclusion would allow the procuring agency to circumvent the criteria set forth in the RFPs and undermine the integrity of the evaluation process.

There is no dispute here that the same evaluators who performed the initial technical evaluation also did the rescoring of those proposals. The record, however, was not altogether clear as to whether or to what extent the evaluators were exposed to the Pricing Proposals or the scores for those proposals. This was evident from the fact that while Respondent claims that the testimony established that the evaluators were sent only the combined technical and pricing scores, Petitioner argues that the evaluators were actually provided with the total scoring information including the scores for the price/cost portions of the proposals. Nevertheless, it was clear that if the evaluators were exposed to the Offerors' Total Scores, those scores alone would not have been sufficient to reveal which Offeror had submitted the lowest Pricing Proposal. This was because according to the RFPs, the Technical Proposal accounted for 60% of the Total Score and the Pricing Proposal accounted for the remaining 40% of the total. As such, the Offeror with the highest Total Score would not necessarily have the lowest pricing since a high technical score could compensate for a low pricing score. Moreover, even if the evaluators had been exposed to the scores for the Pricing Proposals from the initial evaluation, those scores would only reveal which Offeror had offered the best overall pricing under the original tabulation. Unlike the rescoring of the Pricing Proposals which was based on both the supplemental and the aide rate, the initial tabulation of those proposals was based solely on the supplemental rate for the 4-point component of the overall Pricing Proposal score. Based on this record, the Hearings Officer

concludes that the evidence was insufficient to prove that the rescoring of the Technical Proposals violated the requirement in the RFPs that those proposals be evaluated without knowledge of the Pricing Proposals.

On the other hand, it was made clear from the evidence that one evaluator went beyond the criteria provided in the RFPs by relying on his knowledge of Petitioner's work on the current contract in Maui to rescore Petitioner's proposal. In his rescoring of Petitioner's responses to Tabs 2, 3, and 7, Joseph questioned and apparently deducted points based on his prior knowledge of Petitioner's "baseyards" and his own understanding of what comprised a "baseyard", as well as knowledge of the number of active contracts Petitioner currently had. In going beyond the criteria provided by the RFPs, Joseph placed Petitioner at a disadvantage over the other Offerors, including Intervenor, who had no history of operating school buses in Maui. The record also established that in rescoring the Technical Proposals, the members of the Evaluation Committee reread the proposals which admittedly led to concerns they had overlooked during the initial scoring process. Notwithstanding that, no interviews were scheduled following the rescoring even though such interviews were required by the RFPs as a part of the evaluation process. There was evidence that an interview would have aided Petitioner in clarifying some of the concerns raised by the committee. For these reasons, the Hearings Officer concludes that the rescoring of the Technical Proposals did not comply with HRS §103D-303(g).

Additionally, Petitioner contends that following the completion of the technical evaluation, the members of the Evaluation Committee participated in a conference call during which members discussed their scoring of the Technical Proposals, including the reasons for certain deductions. According to Petitioner, this amounted to an improper attempt to influence the other members of the committee. The record, however, was devoid of any basis for this claim. Rather, the evidence made clear that although the discussion did cause members to consider issues they had not previously considered, the ultimate decision to make any resulting deduction was their decision alone. In *Kiewit Infrastructure West Co. v. Dept. of Transportation, PCX-2009-2 (June 6, 2011)*, the Hearings Officer cited *Bean*

Stuyvesant, LLC v. U.S., 48 Fed Cl. 303 (Ct. Fed. Claims 2000) at 326, with approval.

There, the court recognized that, “[e]valuators may meet to discuss the relative strengths and weaknesses of a proposal, as such discussions can operate to correct mistakes or misperceptions in individual evaluations”. And, in allowing consensus scoring, the Hearings Officer in *Kiewit* said:

Where, as here, the RFP covers a wide range of technical matters, consensus scoring would be desirable, it not preferable, because individual evaluators would not be expected to have extensive experience and insight/expertise on all the technical matters.

* * * *

Kiewit appears to argue that the regulation requires an independent evaluation by each member of the evaluation committee. However, each individual member of the committee can independently come to the conclusion that the consensus score is appropriate. (Averaging, in contract, would not be an independent evaluation.)

Petitioner also complains that in rescoring the Pricing Proposals, Respondent incorrectly applied the supplemental rate in conjunction with the aide rate. According to Petitioner, Addendum 3 clearly established that the aide rate, rather than the supplemental rate, was to be used in the application of the 4 points available for supplemental services. Section D.3. of the RFPs explained how the supplemental services were to be scored:

A total of 36 points will be applied to the home-to-school service pricing. A total of 4 points will be applied to the average “Hourly driving rate for supplemental services” rate provided in Attachment B.

In response to questions received after the RFPs were issued, Respondent issued Addendum 3 to clarify how the Pricing Proposals would be evaluated and to revise Attachment B, the Pricing Form by adding a place for Offerors to include a separate “Hourly Rate for Bus Aide.” Addendum 3 provided in part:

This addendum provides clarification for submission requirements of the RFP related to the need to provide bus aides for special needs services. This response is hereby incorporated and made a part of the RFP.

1. Are we required to provide aides for each special education vehicle?

A. Bus contractors should expect to provide bus aides for each bus that is identified as a special needs bus. It should be noted that this requirement may change over time, but for purposes of developing their response vendors should plan to provide a bus aide for all identified special needs buses shown on Attachment B.

* * * *

6. What will the cost per hour for bus aide be used for?

A. The cost of the bus aide will be used in the evaluation of cost provided by each vendor.

A plain reading of Section D.3 of the RFPs together with Addendum 3, however, does not support the argument that Addendum 3 replaced the supplemental rate with the aide rate. On the contrary, those provisions, read together, unambiguously establish that the bus aide rate was to be used in conjunction with the supplemental services rate to determine a rate for the application of the 4 points in the scoring of the Pricing Proposals. Nowhere in Addendum 3 does it provide that the bus aide rate is to be used in place of the supplemental services rate. Moreover, even if the aide rate was used alone in the rescoring, Petitioner's position would not have changed. In RFP D17-001, Petitioner's aide rate was \$33.00/hour for all clusters while Intervenor's aide rate was \$22.75/hour. In RFP D17-002, Petitioner's aide rate was \$33.00/hour while Akita's aide rate was \$21.50/hour and Yamaguchi's rate was \$26.00/hour for the same clusters.¹

¹ Because Petitioner's pricing for its supplemental services was more competitive than its aide rate, the initial score for Petitioner's Pricing Proposal was higher than after the rescoring which was based on the supplemental and aide rate. Use of the aide rate alone would actually lower Petitioner's Total Score.

2. Evaluation Committee's Bias and Conflicts of Interest.

Petitioner next asserts that the rescoring of the Technical Proposals was tainted by the biases and conflicts of some members of the Evaluation Committee. In particular, Petitioner contends that Kauhi and Joseph had a conflict of interest and were biased against Petitioner because Kauhi is Joseph's brother-in-law, supervisor and neighbor, and both have known each other for over 40 years. Petitioner, however, does not point to, and the Hearings Officer cannot find, any authority precluding Kauhi or Joseph from serving on the committee under these circumstances alone. Generally, the selection of an evaluation committee member is a matter falling primarily within the discretion of the procuring agency and will not be questioned absent evidence of actual bias or other improprieties. Petitioner also argues that because Foster had only about 3 years of experience as a transportation officer, she was, in all likelihood, unduly influenced by Kauhi and Joseph. The evidence, however, was insufficient to prove that any such influence actually occurred.

In support of their claim of bias, Petitioner points primarily to the relationship between Kim, their Maui manager, and Joseph. Although Kim did not testify, there was evidence that Joseph and Kim had periodic disagreements over the Maui school bus operations. Sagiao, Petitioner's operations director, described Joseph as harsh and stubborn at times, although she acknowledged that he was straight with her. The Hearings Officer credits her testimony. Joseph, who was equally credible, testified that he works closely with Kim on Maui on the current bus contract and considers her to be his "right hand" and that he has learned a lot from her. While it was clear from the testimonies that there was an occasional personality conflict between the two, nothing in the record sufficiently established that the relationship resulted in any bias against Petitioner in these solicitations.

Evidence was also presented that Joseph believed that Petitioner had attempted to block his rehiring as the Maui transportation officer in or after 2010 and may have still been upset about that. Jancene Shields, one of Petitioner's drivers, testified that she had a conversation with Joseph in 2017 during which he expressed anger at Petitioner's attempt to block his hire. Shields also recalled an earlier conversation she had with Joseph

when Joseph told her that Petitioner had lost the contract and that she should visit Intervenor's baseyard on Oahu. According to Petitioner, these conversations exhibit Joseph's animosity toward and bias against Petitioner. The evidence, however, indicated that Joseph had been on Petitioner's baseyard to meet with Kim in the office and only ran into the Shields when he was leaving. Moreover, many of Joseph's statements to Shields during this conversation were made in response to questions initiated by Shields. Placed in this context, it appears less likely that Joseph was deliberately trying to sabotage Petitioner's operation. Joseph, for his part, testified that he was not upset at Petitioner's questioning of his rehire as he was already employed and Petitioner's inquiry only resulted in a short delay of his hiring.² Thus, while there was a possibility that Joseph might have been upset at Petitioner's earlier attempt to interfere with his employment with Respondent, no objective evidence was presented to establish that any such animosity actually led Joseph to improperly rescore Petitioner's Technical Proposal.

Additionally, Petitioner asserts that the scores it received from the rescoring of its Technical Proposals by certain members of the Evaluation Committee was unjustified and further demonstrates bias against Petitioner. In that regard, the Hearings Officer is mindful that the evaluation of technical factors requires the exercise of discretion and judgment which is necessarily subjective. Thus, the determination of the relative technical merits of offers is a matter primarily left to the procuring agency and is entitled to great weight. The agency is in the best position to determine which technical proposal best meets its needs and must bear the burden for any difficulties incurred by a defective evaluation. The role of the Hearings Officer is therefore not to substitute his judgment for that of the agency. Rather, the Hearings Officer will determine whether a reasonable basis exists for the conclusions reached or whether the conclusions are instead shown to be unreasonable, arbitrary, capricious, or contrary to law. Mere disagreement with the decision of the evaluators is insufficient to show that the evaluation of proposals is unreasonable or the result of bias.

For Tab 1 of the RFPs, Petitioner received a score of 2.25 points out of a maximum of 3.00 points from Joseph. Joseph noted in his score sheets for RFP D17-001 that

² Petitioner also presented an unsworn statement from another bus driver, Vicki Perreira, who wrote, among other things, that Joseph told her that he scored Petitioner the way he did because "Roberts got sloppy and cheap." The Hearings Officer finds this evidence to be largely irrelevant and, given the fact that Perreira, who was an employee of Petitioner, did not testify and her statement was unsworn, assigns little weight to her statement.

a “list of the 4 clusters that is being proposed for was not provided”, and for RFP D17-002, that Petitioner “had failed to provide a list of the three clusters they are bidding for.

Petitioner’s offers, however, stated that, Petitioner “shall pursue Proposal Option A (Multiple clusters, unlimited award) for all four (4) Clusters” in RFP D17-001 and that Petitioner “shall pursue Proposal Option A (Multiple clusters, unlimited award) for all three (3) Clusters” in RFP D17-002. In contrast, Intervenor stated in its response, “We are submitting for Proposal Option A for all Maui service clusters: Cluster 1-Makawao (Haiku, Makawao, Pukalani, Kula, Paia); Cluster 2-Baldwin (Wailuku); Cluster 3-Lahaina; and Cluster 4-Maui (Kahului and Kihei).” Joseph awarded Intervenor a score of 2.25 but apparently deducted .75 points only because Intervenor had “exceeded page limit”. While Joseph’s deduction of points from Petitioner’s response to Tab 1 for failing to provide a list of the clusters that was being proposed for was extremely technical in nature, it was nevertheless consistent with the Evaluation Description provided for Tab 1 which required Offerors to “[i]nclude a definitive statement as to the Proposal Option being submitted and a list of the clusters on which you are proposing”.

Tab 4 of the RFPs was entitled, References and Testimonials and required Offerors to provide not less than 1 and no more than 3 letters of reference. Petitioner alleges that Intervenor exceeded the maximum 3 references by including 12 quoted testimonials. In fact, Intervenor listed 3 references and 12 customer testimonials. Given the title of Tab 4, the inclusion of the testimonials along with the required references was not unreasonable.

Tab 5 of the RFPs concerned the Proponent’s Service Approach. Joseph, Kauhi and Ellerman each awarded Petitioner 6.75 points out of the maximum of 9.00 points in both RFPs. Joseph testified that his deduction of points for Petitioner’s response was based on the fact that Petitioner’s offer did not identify who was responsible for ensuring that drivers were conducting the required pre-trip inspections for safety and cleaning and did not provide the steps that Petitioner would take to check route schedule compliance.

In his scoring sheet for Petitioner in RFP D17-001, Kauhi commented:
Response to “Reliability” bullet is insufficient. It fails to include details on policies relating to internal communication protocols for emergencies such as driver no shows and particularly for park-aways.

And in his scoring sheet for Intervenor, Kauhi similarly commented on Intervenor’s response to Tab 5:

The response to the question of “Reliability” is insufficient. No information is provided on internal communication protocols for emergencies, such as driver no shows particularly for park-aways. Described procedures is insufficient.

Evaluation Committee member Ellerman entered the following comment in his scoring of Petitioner’s response to Tab 5 in RFP D17-001:

Needed more emphasis on working w/ DOE to identify efficiency opp’s that would be beneficial to DOE, esp. in SpEd area

Tab 6 of the RFPs addressed the Offerors’ Commitment to Safety. Joseph and Kauhi awarded Petitioner 11.25 point of the maximum 15.00 points in both RFPs. In his scoring sheet for Petitioner in RFP D17-001, Joseph noted, “All responses to bulleted items are generic and does not reflect actual Maui team members’ performance.” In his testimony, Joseph explained that he was looking for actual safety performance and that Petitioner’s response lacked specifics.

In his scoring sheet for Petitioner in RFP D17-001, Kauhi commented in Tab 6:

Response to how has safety metrics changed is insufficient. The presentation’s response to the question of how is safety measured indicated two metrics: Accident/1,000 driving hours, and student injuries/1000 driving hours. Response to how these two metrics changed speaks to partnering with third party experts and enhancing communications instead of pointing to specific metrics that enables the overall effectiveness of the safety program.

A careful review of the foregoing, the testimonies of the members of the Evaluation Committee, and an assessment of their credibility, leads the Hearings Officer to conclude that these scores were reasonably justified and not the result of actual bias³. Bias will not be attributed to the members of the Evaluation Committee based on inference, speculation, or supposition but rather, must be demonstrated to exist by substantive hard facts or evidence.

On the other hand, for Tabs 2, 3 and 7 in RFP D17-001, Joseph apparently deducted points from Petitioner's Technical Proposal based primarily on knowledge he acquired from his work with Petitioner on the current contracts on Maui. As discussed above, the application of that knowledge to the scoring of Petitioner's Technical Proposal, exceeded the criteria provided in the RFPs and should not have been used as a basis for scoring the proposal. Joseph's application of this knowledge despite having been instructed to keep an open mind and to base his scoring only on the criteria provided in the RFPs rather than on outside information on the Offerors, resulted in preconceived beliefs by Joseph as to the subject matters covered by these tabs. These preconceived beliefs are tantamount to bias in the scoring of these 3 tabs.

3. Documentation Regarding the Evaluation Committee.

Petitioner contends that, contrary to HAR §3-122-45.01, certain required documents were not contained in the contract file prior to the issuance of the RFPs, and that Ellerman did not sign the requisite affidavit. That rule provides:

§3-122-45.01 Evaluation committee. Prior to the preparation of the request for proposals, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals. A copy of the document identifying any committee members and any subsequent changes thereto shall be placed in the contract file.

(1) The evaluation committee shall consist of at least three governmental employees with sufficient qualifications in the area of the goods, services, or construction to be procured;

³ Joseph and Kauhi also served on the evaluation committee in connection with an RFP for similar services on the Big Island. In that solicitation, Petitioner was the top scoring offeror and had no issue with Joseph's or Kauhi's participation on the committee.

(2) Private consultants may also serve on the committee and shall:

- (A) Have sufficient knowledge to serve on the committee;
- (B) Serve without compensation, unless justified and determined in writing by the head of the purchasing agency that compensation is justified; and
- (C) Sign an affidavit:

- (i) Attesting to having no personal, business, or any other relationship that will influence their decision in the evaluation process;
- (ii) Agreeing not to disclose any information on the evaluation process to other than an employee of a governmental body; and
- (iii) Agreeing that their names will become public information upon award of the contract;

(3) The contract administrator shall serve as a member of the committee;

(4) The contract administrator or a designee shall serve as chairperson, and the procurement officer or a designee shall serve as advisor.

Petitioner argues that the rule required that the Declarations signed by the members of the Evaluation Committee and the Memoranda for Record evidencing Respondent's approval of the appointments of the members of the Evaluation Committee, must be placed in the contract file prior to the preparation of the RFPs. Respondent, on the other hand, asserts that the rule only requires that a determination be made by the chief procurement officer that the chief procurement officer or an evaluation committee will evaluate the proposals prior to the preparation of the request for proposals⁴. Even assuming that the rule also required "a copy of the document identifying any committee members" to be placed in the contract file *prior to the preparation of the RFPs*, there was no evidence proving that the Memoranda of Record was *not* placed in the file prior to the preparation of the RFPs. The rule simply requires that a "copy of the document identifying any committee

⁴ Respondent points out that the RFPs themselves state that the technical proposals will be evaluated by a committee.

members” be placed in the file. There is no additional requirement that *all* such documents be included in the contract file.

Petitioner further contends that Ellerman, as a private consultant, was required by HAR §3-122-45.01(2) to sign an affidavit agreeing that his name will become public information upon award of the contract, but failed to do so. Petitioner also complains that Ellerman received compensation while serving as a member of the Evaluation Committee but no written justification for his compensation was prepared by the head of the procuring agency as required by the rule.

At the outset, the Hearings Officer considers a declaration as a substantial equivalent of an affidavit for purposes of HAR §3-122-45.01. *See generally, Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014)(holding that declarations are the substantial equivalent of affidavits for administrative hearings as they are in Circuit Court litigation).* Petitioner has not pointed to, and the Hearings Officer, can find no authority, identifying any meaningful distinction between an affidavit and a declaration justifying a different conclusion here. Contrary to the rule, however, Ellerman’s Declaration did not include an agreement that his name will become public information upon the award of the contracts, and that he had no personal, business, or any other relationship that will influence his decision in the evaluation process. With respect to the latter requirement, Ellerman’s Declaration certified, among other things, that “I have no conflict of interest . . . or I have disclosed any potential conflict of interest with the Chair of the evaluation committee, and they have cleared my participation.” The Hearings Officer finds that Ellerman’s representation substantially complied with this requirement. Furthermore, construing HAR §3-122-45.01(2)(C) as a whole, the Hearings Officer determines that the requirement that Ellerman agree in his Declaration that his name will become public information upon the award of the contracts is directory rather than mandatory. While the word “shall” is generally regarded as mandatory, in certain situations, it may be given a directory meaning. In analogous situations, courts look to the essence of the particular requirement and, where no substantial rights depend on strict compliance, have

considered the requirement to be directory in nature. *Big Island Recycling & Rubbish v. County of Hawaii*, PCH 99-12 (December 17, 1999); *Jas. W. Glover, Ltd. v. Board of Water Supply*, PCH-2001-002 (August 7, 2001). Here, there is nothing in the record or the rule to show that a substantial right of the Offerors depended on a declaration by Ellerman that he agreed to the public disclosure of his name following the award of the contract. See e.g., *Big Island Recycling & Rubbish*, *supra* (the requirement in HAR § 3-126-3(c) which states that protests shall include supporting exhibits, evidence, or documents appears to be one which was promulgated with a view to the proper and orderly conduct of business concerning convenience rather than substance and therefore can be regarded as directory).

Finally, a plain reading of HAR §3-122-45.01 leads the Hearings Officer to conclude that the rule requiring a written determination that compensation for a consultant is justified, is only applicable where the consultant is specifically compensated by the procuring agency for his service on an evaluation committee. The Hearings Officer can find no reason why a private consultant should be forced to forego the compensation he normally receives from his employer, particularly when the rule does not preclude government employees from continuing to receive their normal compensation while they serve on such committees.⁵ Petitioner's interpretation of HAR §3-122-45.01(2)(B) would lead to an absurd result and diminish the State's ability to recruit well-qualified consultants to serve on technical evaluation committees.

Petitioner has also suggested that Evaluation Committee member Foster was unqualified to serve as a member of the committee. HAR §3-122-45.01 merely requires that government employee-members have "sufficient qualifications in the area of the goods, services, or construction to be procured". The evidence did establish that Foster had been the transportation officer on Kauai for several years and, in that capacity, was responsible for the overall school bus operations on that island. Moreover, as discussed above, the selection of an evaluation committee member is a matter falling primarily within the discretion of the procuring agency and will not be questioned absent evidence of actual bias or other

⁵ Of course, the consultant would still be required to disclose any potential conflict of interest.

improprieties⁶. Based on all of these considerations, the Hearings Officer concludes that Petitioner has not proven any violation of HAR §3-122-45.01.

4. Fair and Equal Standard.

In its protests, Petitioner included a claim that during the November 16, 2016 interviews, Intervenor allegedly made substantial oral clarifications that were never reduced to writing or were the subject of an addendum to the RFPs as required by HAR §3-122-53(d). Therefore, according to this theory, Petitioner was not accorded fair and equal treatment as required by the rule. This claim is apparently based on Petitioner's assertion that Ellerman noted in his scoring that Intervenor's offer gave no indication of how staffing and driver/aides would be recruited, and when the issue was raised during the interview, Kauhi commented that Intervenor made representations to him that convinced Respondent that Intervenor would be able to set up its operations on Maui despite the fact that Intervenor had no infrastructure or experience there. Yet, according to Petitioner, there is nothing in the RFP documents that supports Intervenor's "nebulous" claims. These allegations, even if accurate, are speculative and insufficient to prove any violation of HAR §3-122-53(d). There was little direct evidence to establish what representations were actually made by Intervenor during its interview with Respondent that may have amounted to a "substantial" clarification, or the context in which they were made that may have prevented Petitioner from receiving fair and equal treatment. The Hearings Officer finds this claim to be based on speculation and is without merit.

5. Substantial Interest Determination.

On March 15, 2017, the Hearings Officer granted Respondent's motion for summary judgment as to Petitioner's challenge of Respondent's January 11, 2017 substantial interest determination, and subsequently denied Petitioner's motion for reconsideration of that ruling on March 20, 2017.

HRS §103D-701(a) authorizes an offeror who is aggrieved in connection with a solicitation or award of a contract to file a protest "within five working days after the aggrieved person knows or should have known of the facts giving rise" to the protest. Under

⁶ Contrary to Petitioner's contention, there is no specific requirement that the members of an evaluation committee have prior experience in procurements or in serving on an evaluation committee.

HRS §103D-701(b), once a protest is filed and prior to the commencement of an administrative proceeding, the chief procurement officer has an opportunity to settle and resolve the protest. Otherwise, the chief procurement officer “shall promptly issue a decision in writing to uphold or deny the protest.” HRS §103D-701(c). Thereafter, upon the filing of a timely appeal to the Office of Administrative Hearings by an aggrieved offeror, HRS §103D-709 authorizes the Hearings Officer to review the agency’s determinations of the matters raised in the protest and to issue a decision within 45 days. This process underscores the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998).*

In this case, it was undisputed that Petitioner learned of the substantial interest determination by January 20, 2017. Pursuant to HRS §103D-701(a), Petitioner had 5 working days to protest that determination. It did not do so. And although Petitioner wrote to Petitioner on January 23, 2017 and, again on February 6, 2017, to dispute the substantial interest determination, the letters were clearly not intended as “Protests” under HRS §103D-701. Rather, the January 23, 2017 letter merely pointed out that “moving forward with this procurement will create substantial liability for the State of Hawaii”, that the bus orders “will involve placements of deposits, shipping expenses, and other significant expenses for which these entities must be compensated if the particular contract is terminated”, and that Petitioner will “seek damages if Respondent proceeds with the awards despite the protests.” Nor was the February 6, 2017 letter intended as a protest. Instead, it was a follow-up to a prior letter:

This letter is a follow up on our letter dated January 27, 2017 regarding interference with Robert’s Maui operations by Mr. Robert Joseph, and also to address the inexcusable delay by the DOE in responding to Robert’s Protests, while simultaneously pushing forward on unlawfully awarded contracts.

Robert's requires immediate action by the Department of Education ("DOE"), or it will be forced to initiate further legal proceedings as outlined below.

* * * *

At this point in time, Robert's has submitted its Protests and has had no response from the DOE for over a month.

* * * *

"The overall framework of the Hawai'i Public Procurement Code indicates that the Legislature intended to create an expeditious process for resolving disputes over the awarding of contracts. See *CARL Corp. v. State*, 85 Hawai'i 431, 453, 946 P.2d 1, 24 (1997)(emphasis added)("the [Procurement] Code both shortens deadlines for filing protests and applications for review and expedites the administrative hearings process"). By delaying any response to Robert's Protests while moving simultaneously forward with the unlawfully awarded contracts, DOE is working in direct contravention to the legislative intent of the Procurement Code. It does not seem consistent with this intent that Robert's should be forced to submit its Protests within five working days of its debriefings, so that the DOE can delay any response for nearly two months.

* * * *

Indeed, in opposing Respondent's motion for summary judgment, Petitioner stopped short of claiming that the January 23, 2017 or the February 6, 2017⁷ letters were intended as protests.

By failing to timely protest the substantial interest determination, Petitioner effectively denied Respondent the opportunity to expeditiously address and, possibly "settle and resolve", any alleged defects in that determination earlier on in the process so that any delays in the solicitations could be minimized or avoided altogether. The failure to protest essentially allowed the very situation Petitioner warned Respondent of in its January 23, 2017 letter: "placements of deposits [for bus orders], shipping expenses, and other significant expenses for which these entities must be compensated if the particular contract is

⁷ Of course, if the February 6, 2017 letter was deemed to be a protest of the substantial interest determination, it would have been untimely under HRS §103D-701(a).

terminated". Having failed to protest the issue, Petitioner is not entitled to pursue this claim in this proceeding.⁸ See, *Cushnie Construction v. Dept. of Finance, County of Kauai, PCH-2008-18 (December 11, 2008)*(because Petitioner's letter to Respondent was a request for clarification and not a protest, HRS §103D-701 does not apply and the Hearings Officer lacks jurisdiction under HRS §103D-709). See also, *Maui Master Builders, Inc. v. Dept. of Public Works, County of Maui, et al., PDH-2014-014 (December 9, 2014)*, citing *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014)*(because issue of the protestor's lack of standing due to alleged defects in the protestor's own proposal was not raised in a timely protest and therefore not the subject of a determination by the chief procurement officer, the Hearings Officer does not have jurisdiction to address the issue).

6. Post-Award Remedies.

Having concluded that that the rescoring of the Technical Proposals violated HRS §103D-303 and that one evaluator's scoring of Tabs 2, 3, and 7 of Petitioner's Technical Proposal was the subject of bias, the Hearings Officer must now determine an appropriate remedy. The parties acknowledge that because the contracts have been awarded in both solicitations, HRS §103D-707 controls. That provision provides in relevant part:

§103D-707 Remedies after an award. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith⁹:

(A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination;

⁸ Petitioner also seems to suggest that it was not required to file a separate protest in connection with Respondent's substantial interest determination and, instead, was allowed to immediately seek administrative review of that determination directly with the Office of Administrative Hearings. Even if true, Petitioner would have been required to request an administrative review within 7 calendar days under HRS §103D-712(a). Petitioner's appeals, however, were not filed until March 3, 2017.

⁹ There has been no allegation made, or evidence presented, of any bad faith by Intervenor, Akita or Yamaguchi.

Furthermore, the rule implementing the foregoing provision provides:

§3-126-38 Remedies after an award. (a) When there is no fraud or bad faith by a contractor:

(1) Upon finding after award that a state or county employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the chief procurement officer or designee may ratify and affirm, modify, or terminate the contract in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.

(2) If the violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.

(3) If the violation cannot be waived without prejudice to the State or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is no time for resoliciting bids or offers, the contract may be amended appropriately, ratified, and affirmed.

(4) If the violation cannot be waived without prejudice to the State or other bidders or offerors and if performance has begun, the chief procurement officer or designee shall determine in writing whether it is in the best interest of the State to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the State's best interest:

(A) The costs to the State in terminating and resoliciting;

(B) The possibility of returning goods delivered under the contract and thus decreasing the costs of termination;

(C) The progress made toward performing the whole contract; and

(D) The possibility of obtaining a more advantageous contract by resoliciting.

(5) Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State, if possible, unless the determination required under paragraphs (2) through (4) is made.

* * * *

Petitioner argues that the violations require termination of the contracts “to give meaning to the underlying principles of the Procurement Code”. In support of its position, Petitioner cites to *Carl Corp. v. DOE*, 85 Hawaii 431 (1997) for the proposition that the integrity of the Procurement Code cannot be ignored - an economical and efficient system of procurement directly benefits taxpayers and it is in the public interest that the state abide by the procurement rules it has set for itself. *Id.* at 455-56. Petitioner also points out that performance has not yet begun and the current bus contracts on both Maui and Kauai can be extended for up to 180 days. *See also, Access Service Corp. v. City and County*, PCX-2009-3 (11/16/2009).

On the other hand, Respondent urges the Hearings Officer to ratify the contracts already awarded in both RFPs as such action will be in the State’s best interest given the additional cost and time Respondent would incur in resoliciting and the time required for the acquisition of buses. Respondent also points out that the Offerors’ pricing information has already been made public and would therefore unfairly provide Petitioner with an opportunity to submit a new offer based on its competitors’ pricing.

Additionally, Respondent contends that Petitioner did not suffer any prejudice because any error that may have occurred in the rescoring of the Technical Proposals had no effect on Petitioner’s chances of obtaining any of the contracts. In support of this argument, Respondent cites *PGBA, LLC v. United States*, 60 Fed. Cl. 196, 203 (2004) where the court held that in order to prevail in a bid protest, a disappointed offeror must show both significant error in the procurement process and prejudice to its posture in the process - in effect, the plaintiff must show that there is a substantial chance that it would have received the award but for the faulty evaluation. And, in *Advanced Data Concepts, Incorporated v. United States*, 216 F.3d 1054, the court concluded that in order to prevail on appeal, a protestor must show not only that significant errors occurred in the procurement process, but also that the errors were prejudicial – in other words, that had the procuring agency made no errors, there was a reasonable likelihood that the protestor would have been awarded the contract. Respondent’s argument finds support in HAR §3-126-38(a)(2) which provides that “[i]f a

violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.” The rule recognizes that not all violations of the Procurement Code should result in termination of the contract. Rather, in order to justify termination, the protestor must have suffered or will suffer some prejudice or have had a reasonable chance of receiving the contract had the agency made no errors. This conclusion is consistent with the intent underlying the Procurement Code to allow flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State.” *The Systemcenter, Inc. v. State Dept. of Transportation, PCH 98-9 (December 10, 1998)*. It is also consistent with HRS §103D-701 which limits standing to bring a protest to any actual or prospective offeror who is *aggrieved* in connection with the solicitation or award of a contract. *See, Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et al, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999)*(because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an “aggrieved” party when the contract was subsequently awarded to RFD. *See also Construction Material Agents and Supply LLC, et al. v. State Dept. of Accounting & General Services, et al., PCH-2000-11 (September 17, 2001); Ohana Flooring v. Dep’t of Transportation, PCH-2011-12 (Nov. 18, 2011)*.

In this case, the undisputed evidence established that even if Petitioner had received the maximum number of points (60) on its Technical Proposals, the results would have been the same because Petitioner’s pricing was too high. In RFP D17-001, Petitioner’s Total Score would still have been lower than Intervenor’s score for the Baldwin, Lahaina and Maui clusters¹⁰. For the Baldwin cluster, a perfect score would have given Petitioner a Total Score of 96.61. Intervenor’s Total Score was higher at 97.06. For the Lahaina cluster, Petitioner would have had a Total Score of 96.46 which would still have been less than Intervenor’s total of 97.06. And for the Maui cluster, Petitioner’s Total Score would have been 95.72 as compared to Intervenor’s score of 97.06. Similarly, in RFP D17-002, for the

¹⁰ If Petitioner received the maximum Total Score of 60 for the Makawao cluster, it would have been the highest-ranked Offeror for that cluster. Petitioner was nevertheless awarded the contract for the Makawao cluster because Intervenor had been awarded the maximum 3 clusters under RFP D17-001. Therefore, Petitioner would have been and was awarded the Makawao contract notwithstanding the errors found in the technical evaluation.

Waimea cluster, a perfect technical score for Petitioner would have resulted in a Total Score of 87.25 which would have been less than Akita's Total Score of 94.82 and Yamaguchi's Total Score of 92.57. For the Kapaa cluster, Petitioner would have had a Total Score of 92.10 which would have been less than Akita's Total Score of 95.75. And for the Kauai cluster, a perfect technical score would have given Petitioner a Total Score of 92.27 which would have been less than Akita's Total Score of 95.75. The record is clear that Petitioner would not have been the highest-ranked Offeror for any additional clusters on Maui and Kauai regardless of the rescoring errors found in the technical evaluation¹¹.

To the extent that Petitioner alleges that Intervenor's, Akita's or Yamaguchi's technical evaluation rescores were improperly inflated as a result of biases by the Evaluation Committee, the Hearings Officer finds such a claim to purely speculative and unsupported by the credible and objective evidence. For instance, Petitioner complained that Joseph awarded the maximum 3.00 points to Intervenor for Tab 2 (Executive Summary) despite the fact that Intervenor had no presently existing baseyards on Maui. The Evaluation Description for Tab 2, however, only required the Offeror to address three specific questions under separate headings in 5 pages or less: "What makes your company, and your proposal, uniquely well suited to the State's requirements?"; "What specific elements of your proposal do you believe will exceed the State's service requirements?"; and, "What factors differentiate your company's approach to service delivery from that of your competitors?" Petitioner did not allege, let alone prove, that Intervenor's response did not fulfill the requirements of Tab 2.

Based on all of these considerations, the Hearings Officer concludes that, despite Respondent's violation¹² of HRS §103D-303 and Joseph's tainted scoring of Petitioner's responses to Tabs 2, 3, and 7 in RFP D17-001, Petitioner suffered no prejudice as it would not have been the highest-ranked Offeror for any additional clusters on Maui and Kauai¹³ even without those errors. That, along with the additional cost and time Respondent

¹¹ Nor would Petitioner have become the second highest-ranked Offeror for the cluster awarded to Yamaguchi (Waimea) after Akita was awarded the maximum 2 clusters in RFP D17-002. A Total Score of 60 on Petitioner's Technical Proposal for the Waimea cluster would still have been less than the Total Scores of both Akita and Yamaguchi.

¹² These violations were based solely on errors in the rescoring of the Technical Proposals and did not affect the scoring of the Pricing Proposals.

¹³ Additionally, Joseph's improper use of his prior knowledge of Petitioner's operations in Maui in his technical evaluation of Tabs 2, 3 and 7, was limited to RFP D17-001. And, even though Respondent failed to conduct interviews in conjunction with the rescoring of the Technical Proposals, Petitioner, as the third-ranked Offeror in RFP D17-002, would not been entitled to an interview.


would incur in resoliciting, the time required for the acquisition of buses, the commitments made by the contractors in preparing to perform the contracts¹⁴, and the fact that the Offerors' pricing information has already been made public, leads the Hearings Officer to conclude that ratification of the contracts is preferable to termination and would be in the State's best interest.

V. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. The contracts awarded in RFP D17-001 and RFP D17-002 are hereby ratified and affirmed pursuant to HRS §103D-707(1)(A);
2. Respondent's Appeals of Denials of Protests in these consolidated matters are hereby dismissed;
3. Each party shall bear its own attorneys' fees and costs; and
4. Petitioner's cash protest bonds posted in PDH-2017-001 and PDH-2017-002 shall be deposited into the general fund pursuant to HRS §103D-709(e).

Dated at Honolulu, Hawaii: APR 13 2017



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

¹⁴ These commitments were made after Respondent determined that the award of the contracts without delay was necessary to protect substantial interests of the State and Petitioner failed to file a timely challenge to that determination.