



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of:	)	PDH-2018-001
	)	
ACCESS MEDIA SERVICES, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
vs.	)	AND DECISION
	)	
HAWAII STATE LEGISLATURE,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
'OLELO COMMUNITY TELEVISION	)	
dba 'OLELO COMMUNITY MEDIA,	)	
	)	
Intervenor.	)	
_____	)	

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

I. INTRODUCTION

On January 2, 2018, Access Media Services, Inc. ("Petitioner"), filed a Request for Administrative Review Hearing ("Petition") to contest the Hawaii State Legislature's ("Respondent") denial of Petitioner's protest regarding RFP No. SH-01-17 titled "Competitive Sealed Proposals to Furnish Services to Plan, Execute and Evaluate the Legislative Broadcast Project" ("Project"). On January 12, 2018, Deputy Attorney General Stella M.L. Kam filed a Response to the Petition on behalf of Respondent. The

matter was set for hearing on January 19, 2018 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On January 16, 2018, 'Olelo Community Television dba 'Olelo Community Media ("Intervenor") filed its Motion to Intervene. That same day, at the Pre-Hearing conference, the parties entered into a stipulation allowing Intervenor to intervene in this proceeding.

On January 17, 2018, Petitioner filed its Motion in the Alternative to Permit Evidence Relating to an Existing Protest Issue, or to Include a New Protest Issue, or to Supplement the Amended Protest ("Petitioner's Motion in the Alternative"). That same day, Respondent filed its Motion to Strike Petitioner's New Allegation Raised at Prehearing on January 16, 2018 ("Respondent's Motion to Strike") in which Intervenor joined. Intervenor also filed its Motion to Dismiss Petition for Lack of Jurisdiction ("Intervenor's Motion to Dismiss"). The parties filed their opposition memoranda on January 18, 2018.

On January 19, 2018, the motions came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapters 91, 92 and 103D and Hawaii Administrative Rules ("HAR") Title 16 Chapter 201 and Title 6 Chapter 22. Richard G. Martin, Esq. appeared on behalf of Petitioner with Glenn Booth, Petitioner's representative, present; Stella M.L. Kam, Esq. appeared on behalf of Respondent with Richard Wada, Esq., Respondent's representative, present; and Ted N. Pettit, Esq. and Stephanie M. Segovia, Esq. appeared on behalf of Intervenor with Sanford Inouye, Intervenor's representative, present. The Motions were taken under advisement and the hearing commenced. The

parties stipulated to admit all of each other's exhibits into evidence *except* Petitioner's Exhibits P6, P7, P7A and P8.

Having heard the evidence and arguments of counsel, and having considered the motions and memoranda, along with the declarations and exhibits attached thereto and memoranda in opposition thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision denying Petitioner's Motion in the Alternative; granting Respondent's Motion to Strike; denying Intervenor's Motion to Dismiss; and granting Petitioner's Petition, in part, as to the first enumerated claim only.

## II. FINDINGS OF FACT

1. The Honorable Scott K. Saiki, Speaker, Hawaii State House of Representatives and The Honorable Ronald D. Kouchi, President, Hawaii State Senate are the Chief Procurement Officers ("CPOs") of those agencies, respectively. Collectively, they are the CPOs of Respondent. See Respondent's Exhibit 15 at page 1.

2. On September 15, 2017, Respondent issued a Request for Proposals ("RFP") seeking proposals for the Project. The "Issuing Officers" designated in the RFP are Carol Taniguchi, Chief Clerk of the Senate, and Brian Takeshita, Chief Clerk of the House of Representatives. The "Contract Administrator" designated in the RFP is Virginia Beck. See Respondent's Exhibit 1 at pages 2 and 3.

3. Part 1, Section 4.2 of the RFP states as follows:

### **4.2 Evaluation Organization**

*A committee selected by the Issuing Officers will review and evaluate all proposals submitted by the deadline specified in*

this RFP. *The Evaluation Committee will comprise [of] individuals with experience in, knowledge of, and/or program responsibility for program service and financing.*

See Respondent's Exhibit 1 at page 31 (bold in original) (Emphasis added).

4. Pursuant to Part 1, Section 4.4 of the RFP, the offers were to be evaluated by the *Evaluation Committee* on the following criteria:<sup>1</sup>

- A. Understanding the Project – 175 Points
- B. Company Background and Experience – 100 Points
- C. Personnel: Project Organization on Staffing – 150 Points
- D. Technical Approach – 175 Points
- E. Project Management and Control – 100 Points
- F. Detailed Work Plan – 200 Points
- G. Offeror's Price – 100 Points

See Respondent's Exhibit 1 at pages 31-36.

5. Pursuant to Part 1, Section 4.5 of the RFP, any substantial clarification or change in the RFP *shall be made by addendum*:

Should there be a need for any substantial clarification or change in the RFP as determined by the Legislature, the *RFP shall be amended by an addendum* to incorporate the clarification or change.

See Respondent's Exhibit 1 at page 36 (Emphasis added).

6. Pursuant to Part 1, Section 4.6 of the RFP the *Evaluation Committee* was to prepare a report summarizing their findings, rankings and recommendation for selection of the Contractor *to the Issuing Officers*:

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<sup>1</sup> The RFP does not specify whether the Evaluation Committee will average, combine or otherwise use their scores in determining which offeror can provide the best value to the State taking into consideration price and the evaluation criteria in the RFP.



The *Evaluation Committee* will prepare a report summarizing findings and rankings and will make the final recommendation for selection of the Contractor *to the Issuing Officers*.

See Respondent's Exhibit 1 at page 36 (Emphasis added).

7. On or about the deadline of October 20, 2017, two (2) proposals were submitted in response to the RFP. One proposal was submitted by Petitioner, who is the incumbent contractor for the Project. The second proposal was submitted by Intervenor, who is the current Public Education and Government ("PEG") contractor for the island of Oahu. Both proposals were timely filed. See Respondent's Exhibit 15 at page 1.

8. By Memorandum dated October 23, 2017, the Issuing Officers asked the CPOs for delegation of procurement authority to evaluate the two proposals received, which was approved by the CPOs. See Respondent's Exhibit 4.

9. The Issuing Officers did not select an evaluation committee.

10. An evaluation committee did not evaluate the two (2) proposals.

11. An evaluation committee did not prepare a report summarizing its findings and rankings and make the final recommendation for selection of the Contractor to the Issuing Officers.

12. The Issuing Officers did not issue/distribute any addendum changing Part 1, Section 4 of the RFP to indicate that an evaluation committee would not be selected, would not be evaluating the proposals and would not be preparing a report summarizing its findings and rankings and make the final recommendation for selection of the Contractor to the Issuing Officers.

13. The Issuing Officers independently evaluated and scored the two proposals. Intervenor received the highest combined score.

14. For the price criteria, Intervenor received a combined score of 200 points having submitted a price of \$190,837.00. Petitioner received a combined score of 172 points having submitted a price of \$220,838.00. See Respondent's Exhibit 5.

15. By memorandum dated October 30, 2017, the Issuing Officers made their recommendation(s) to the CPOs that Intervenor be awarded the contract for the Project, which was approved by the CPOs. See Respondent's Exhibit 6.

16. By letter dated November 3, 2017, the Issuing Officers informed Intervenor that it had been awarded the contract for the Project. See Respondent's Exhibit 7.

17. On November 6, 2017, notice was posted on the Hawaii.gov State Procurement Office website that Intervenor was selected to fulfill the contract pursuant to RFP SH-01-17. See Respondent's Exhibit 8.

18. On November 8, 2017, the Issuing Officers received a letter from Glenn A. Booth, President of Petitioner, which protested the award to Intervenor and requested a debriefing. See Respondent's Exhibit 9.

19. On November 15, 2017, the requested debriefing was held. See Respondent's Exhibit 10.

20. On November 22, 2017, the Issuing Officers received another letter from Mr. Booth on behalf of Petitioner titled "Amended Letter of Protest" alleging among other things, that:

1. The State inadvertently failed to follow mandatory bid procurement statutes and regulations under Hawaii Revised

Statutes 103D Hawaii Public Procurement Code and Hawaii Administrative Rules 3-122[.]<sup>2</sup>

2. Olelo should have been disqualified as a “non-responsible” bidder under the applicable statutes and regulations[.]

3. The scoring of the bids was based, in part, on evaluation factors that were not in the RFP. The scoring failed to take into account that the Olelo bid price was clearly unreasonable, left out certain overhead costs, was artificially low, and was unlawfully subsidized by public funds[.]

See, Respondent’s Exhibit 11 (“Amended Letter of Protest”).

21. In support of its first enumerated claim, Petitioner asserts, among other things, that multiple “inadvertent” errors were made in the current bid process including: that the evaluation committee did not consist of 3 governmental employees; Ms. Beck, the Contract administrator, was not on the committee and did not serve as the chairperson of the committee, as required by HAR §3-122-45.01(1), (3) and (4) (“*evaluation committee*” element or issue) See, Respondent’s Exhibit 11 at pages 3 and 4.

22. By letter dated December 22, 2017 (“Denial Decision”), Respondent, by the CPOs, denied Petitioner’s protest stating, in relevant part, as follows:

With regard to RFP No. SH-01-17, the CPO’s [sic] for the Legislature determined that they would evaluate the proposals rather than form an evaluation committee to do the evaluation. This is entirely consistent with their authority and obligation under §3-122-45.01 HAR. Since there was no evaluation committee formed, the allegations regarding the number of members or their qualifications are moot and without basis.

Access appears to assume that because the scoring of the proposals was done by the chief clerks that it was in fact done by an evaluation committee. That assumption is incorrect. While the

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<sup>2</sup> In support of this first enumerated claim, Petitioner also alleged that Respondent failed to register the proposals and failed to make the written rankings and evaluations available for public inspection. Petitioner withdrew these “elements” of the first enumerated claim at hearing.

authority to review and score the proposals was delegated to the chief clerks of the House and Senate, the authority to consider the recommendations and make the ultimate decision on the award of the contract remained with the chief procurement officers...

\* \* \* \*

The undersigned CPOs of the Legislature, having reviewed the bid file for RFP SH-01-17 for Competitive Sealed Proposals to Furnish Services to Plan, Execute and Evaluate the Legislative Broadcast Project, and for the reasons set forth, hereinabove, find that Access protest of award lacks merit and is therefore denied. This decision is final and binding.

See Respondent's Exhibit 15.

23. On January 2, 2018, Petitioner filed the instant Petition and posted the requisite bond.

### 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.

#### A. JURISDICTION AND BURDEN OF PROOF

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, and shall order such relief as may be appropriate. See §HRS 103D-709(h).

Petitioner has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of proof shall be a preponderance of the evidence. See §HRS 103D-709(c).

B. MOTIONS

1. Intervenor's Motion to Dismiss Petition for Lack of Jurisdiction.

Intervenor asserts that the Petition should be dismissed because it was not filed within seven (7) calendar days of the Denial Decision as required by HRS §103D-712. Petitioner admits that the Petition was not filed within seven (7) calendar days of the Denial Decision, but asserts that the Denial Decision was defective because it did not comply with HRS §103D-701(c).

The law is clear that Petitioner has 7 calendar days, from *issuance* (not receipt) of the Respondent's written decision denying the protest to file a petition for administrative review with this Office. See, HRS §103D-712(a). "*Issuance*" has been determined to be the date of mailing as evidenced by the *post-marked* date. See *Nehi Lewa, Inc. v C & C of Honolulu*, PCH 99-13 (December 17, 1999). The petition must also be accompanied by a protest bond in the proper amount. The minimum bond amount for contracts less than \$500,000 is \$1,000. See HRS §103D-709(e).

In the instant case, Respondent emailed the Denial Decision to Petitioner's counsel on December 22, 2017. None of the parties have produced a post-marked envelope or certified mail return receipt indicating the date of mailing. Petitioner's counsel, however, acknowledges that he received the emailed Denial Decision on December 22, 2017. If the Denial Decision was mailed/post-marked on December 22, 2017, and/or assuming *arguendo* that proof of email service constitutes

*issuance* of the Denial Decision, the 7-day deadline would have been Friday, December 29, 2017. December 30 and 31, 2017 was the weekend and this Office was closed. Monday, January 1, 2018 was a State holiday and this Office was closed. Petitioner filed its Petition on January 2, 2018, 1 *business* day late or 4 *calendar* days late, along with a \$1,000 cash bond.<sup>3</sup>

Petitioner admits that it filed its Petition late, but argues that the Denial Decision was defective because it did not inform Petitioner of its statutory right to an administrative hearing and/or the 7-day deadline to file a petition for administrative proceeding, thus defeating the finality of the Denial Decision and/or extending the 7-day deadline. Respondent agrees with Petitioner on this issue. Intervenor asserts that the Petition was untimely filed by 4 *calendar* days and, therefore, this Office lacks jurisdiction to hear it.

HRS §103D-701(c) provides as follows:

(c) If the protest is not resolved by mutual agreement, the chief procurement officer or a designee shall promptly issue a decision in writing to uphold or deny the protest. The decision **shall:**

(1) State the reasons for the action taken; **and**

**(2) Inform the protestor of the protestor's right to an administrative proceeding as provided in this part, if applicable.**

HRS §103D-701(c) (emphasis added.)

The court has previously held that where the written decision denying the protest *erroneously* states that the time for appeal is seven days from the date of *receipt* of the decision rather than seven days from the *issuance* of the decision, a protest filed

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<sup>3</sup> All parties agreed that the bond was sufficient since the contract amount was less than \$500,000.

within the time period provided in the decision is nevertheless timely. See, *Matt's Transmission Repair, Inc. v. Dept. of Budget & Fiscal Services, et al.* Civil No. 01-1-3242-11; 01-013309 (Consolidated) (First Circuit Court, 5/28/02) as annotated in the Hawaii Public Procurement Code Desk Reference.

The Hearings Officer concludes that a denial decision that *omits* statutorily mandated information is akin to a denial decision that provides *erroneous* information, if not worse. This conclusion is buttressed by the fact that the administrative review process was intended to be a process to expeditiously resolve protests. As such, the requirement to provide a protestor with accurate information regarding its appeal rights cannot be ignored. Applying the law to the instant case, the Hearings Officer finds and concludes that Respondent's Denial Decision failed to inform Petitioner of its right to an administrative proceeding and hence was defective. The 7-day deadline begins to run from *issuance* of a *proper* denial decision. Thus, the Hearings Officer concludes that the Denial Decision was defective and, therefore, the Petition filed on January 2, 2018 was timely filed. Accordingly, Intervenor's Motion to Dismiss for Lack of Jurisdiction is DENIED.

2. Petitioner's Motion in the Alternative and Respondent's Motion to Strike.

Petitioner requests to admit into evidence and Respondent requests to strike, copies of emails<sup>4</sup> that Petitioner obtained "late in the day on November 20, 2017" in response to an open records request filed on November 8, 2017. In addition, Petitioner seeks to question the Issuing Officers about the emails.

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<sup>4</sup> Petitioner's Exhibits P6, P7, P7A and P8.

Petitioner asserts that the “newly discovered evidence” consisting of the aforementioned emails, should be admitted into evidence “...either because it is relevant to an existing issue included in Petitioner’s Amended Protest, or because it will be relevant to an added issue of fairness, or because it will be relevant to a new issue of fairness in a Supplemental Amended Protest.” See Petitioner’s Motion in the Alternative at page 2. Respondent asserts that Petitioner’s claim that the Issuing Officers “acted improperly and gave preferential treatment” to Intervenor is a “new allegation” and therefore, Petitioner should be barred from “introducing any documentary evidence concerning this allegation” and also prohibited “from eliciting testimony concerning this allegation from the witnesses at the administrative hearing.” See Respondent’s Motion to Strike at page 2. Intervenor has joined in Respondent’s Motion to Strike.

HRS §103D-709(h) states that “[t]he hearings officer shall decide whether the **determinations** of the chief procurement officer or the chief procurement officer’s designee were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.” (Emphasis added.) It is axiomatic that a CPO cannot make a **determination** on a claim, allegation or issue that is not raised in the protest letter and, therefore, a hearings officer cannot review that **determination**. The Hearings Officer agrees with this Office’s decisions cited by Respondent in its Motion to Strike. The Hearings Officer cannot review matters that are raised for the first time at the administrative proceeding and, accordingly, Petitioner is barred from raising



them.<sup>5</sup> Accordingly, Petitioner's Motion in the Alternative is DENIED and Respondent's Motion to Strike is GRANTED. Petitioner's Exhibits P6, P7, P7A and P8 will not be received in evidence.

C. RESPONDENT DID NOT FOLLOW THE EVALUATION PROCESS AS STATED IN THE RFP IN VIOLATION OF HAR §3-122-45.01(1), (3) and (4).

Petitioner's Amended Letter of Protest alleges, among other things, that:

1. The State inadvertently failed to follow mandatory bid procurement statutes and regulations under Hawaii Revised Statutes 103D Hawaii Public Procurement Code and Hawaii Administrative Rules 3-122[.]
2. Olelo should have been disqualified as a "non-responsible" bidder under the applicable statutes and regulations[.]
3. The scoring of the bids was based, in part, on evaluation factors that were not in the RFP. The scoring failed to take into account that the Olelo bid price was clearly unreasonable, left out certain overhead costs, was artificially low, and was unlawfully subsidized by public funds[.]

In support of its first enumerated claim, Petitioner asserts, among other things, that multiple "inadvertent" errors were made in the current bid process including: that the evaluation committee did not consist of 3 governmental employees; Ms. Beck, the Contract Administrator, was not on the evaluation committee and did not serve as the chairperson of the committee, as required by HAR 3-122-45.01(1), (3) and (4). See, Respondent's Exhibit 11 at pages 3 and 4. Respondent asserts that the CPOs determined that they would evaluate the proposals themselves, as opposed to selecting/forming an evaluation committee, and delegated the authority to review and

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<sup>5</sup> It should be noted that Petitioner had the emails **before** it filed its Amended Letter of Protest and could have either added a claim that the Issuing Officers "acted improperly and gave preferential treatment" to Intervenor, or filed yet another amended protest letter with the new allegation(s).

score the proposals (and make recommendations) to their chief clerks. See Exhibit 15 at page 3.

HAR §3-122-45.01 provides as follows:

**§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) 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.

Consistent therewith, the subject RFP provides that a *committee* selected *by the Issuing Officers* will evaluate the proposals:

**4.2 Evaluation Organization**

*A committee selected by the Issuing Officers* will review and evaluate all proposals submitted by the deadline specified in this RFP. The *Evaluation Committee* will comprise [of] individuals with experience in, knowledge of, and/or program responsibility for program service and financing.

See Respondent's Exhibit 1 at page 31 (bold in original, emphasis added).

Furthermore, the *committee* was supposed to prepare a report summarizing their findings, rankings and recommendation for selection of the Contractor to the Issuing Officers:<sup>6</sup>

#### **4.6 Phase 4 – Recommendation for award**

The *Evaluation Committee* will prepare a report summarizing findings and rankings and will make the final recommendation for selection of the Contractor to the Issuing Officers.

See Respondent's Exhibit 1 at page 36 (bold in original, emphasis added).

The Rule (HAR §3-122-45.01) makes it mandatory (shall) that the procurement officers determine how the proposals will be evaluated, either by the procurement officers themselves or an evaluation committee, before the RFP is prepared. That makes sense because then the evaluation process can be included in the RFP.

In the instant case, the Hearings Officer makes a reasonable inference that at some time *prior to* the preparation of the RFP, the CPOs (or previous CPOs<sup>7</sup>) determined that an *evaluation committee* would evaluate the proposals. This determination was memorialized in the RFP at Part I, Special Conditions, Proposal Evaluation, Section 4.2. Had the CPOs determined that they would evaluate the proposals themselves<sup>8</sup> *prior to* the preparation of the RFP, then the RFP should have been modified to reflect that determination, it was not. Had the CPOs determined that

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<sup>6</sup> This special condition of the RFP suggests to the Hearings Officer that the Issuing Officers should not have even been involved in the scoring of the proposals.

<sup>7</sup> Issuing Officer Taniguchi testified that the RFP used in this solicitation was “substantially similar” to RFPs used in the past. It’s possible, perhaps even likely, that previous CPOs determined that an evaluation committee would be used to evaluate the proposals, that that determination was included in the RFP at that time and that the same RFP form was simply recycled over the years until the instant matter.

they would evaluate the proposals themselves *after* the preparation of the RFP, then they could have issued an addendum modifying that special condition, they did not.

It is undisputed that the Issuing Officers did not select an evaluation committee as required by Section 4.2 of the RFP and instead, evaluated the two proposals themselves albeit by way of delegation of authority from the CPOs. The Hearings Officer concludes that that delegation of authority was defective because it had been previously determined that an *evaluation committee* would evaluate the proposals *as specified in the RFP itself*. The Hearings Officer also concludes that Petitioner is correct in that the evaluation committee (because none was formed) did not consist of 3 governmental employees; Ms. Beck, the Contract Administrator, was not on the evaluation committee (because none was formed); and Ms. Beck did not serve as the chairperson of the evaluation committee (because none was formed), in violation of HAR §3-122-45.01(1), (3) and (4). The Hearings Officer concludes that Respondent did not follow the terms and conditions stated in the solicitation.

The Hearings Officer concludes that it is unfair to solicit offerors with an RFP that specifies that an evaluation committee will be selected to evaluate the proposals and then not even form the committee. Certainly, the offerors have a right to reasonably rely on the representations made by Respondent in the RFP. Respondent did not issue/distribute any addendum modifying the evaluation process specified in Section 4.2 of their RFP as required by Section 4.5 of their RFP.

As stated in HAR §3-122-52(a):

Evaluation of Proposals.

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<sup>8</sup> It should be noted that there was no documentary evidence introduced establishing that *prior* to the preparation of the instant RFP, that the CPOs decided to evaluate the proposals themselves.

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 RFP may not be considered. (Emphasis added.)

By way of analogy, just as Respondent may not consider an evaluation *factor* not specified in the RFP, they may not use an evaluation *process* not specified in *and contrary to* the RFP.

The Hearings Officer concludes that Petitioner has proven by a preponderance of the evidence that the determination(s) of the CPOs in denying the protest on the *evaluation committee* issue were *not* in accordance with the terms and conditions of the solicitation and HAR §3-122-45.01(1), (3) and (4).

Having sustained Petitioner's protest in part, as to the first enumerated claim, the Hearings Officer need not address Petitioner's second and third enumerated claims that Intervenor should be disqualified as a non-responsible bidder and that the scoring of the bids was based, in part, on evaluation factors that were not in the RFP.

#### D. REMEDIES.

Having sustained Petitioner's protest in part, the Hearings Officer has two options after an award has been made where the person awarded the contract has not acted fraudulently or in bad faith:<sup>9</sup>

1) ratify and affirm the contract to Intervenor, provided it is determined that doing so is in the best interest of the State; or

2) terminate the contract and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred

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<sup>9</sup> No one has introduced evidence, nor does the Hearings Officer find, that Intervenor acted fraudulently or in bad faith.

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.

See HRS §103D-707(1).

Petitioner argues that the contract awarded to Intervenor should be terminated because Respondent did not follow the RFP and law regarding the use and composition of an evaluation committee. Intervenor argues that the violation is “technical” in nature and that it is in the best interest of the State to ratify and affirm the contract to Intervenor based on their high scores and vast experience.

The Hearings Officer is persuaded by Petitioner’s argument. Insofar as experience is concerned, Petitioner is the incumbent provider of services and has been for the past 22 years. Insofar as scoring is concerned, as noted by the Issuing Officers, *both* Petitioner and Intervenor presented *solid proposals* and the *scoring was very close*:

Our evaluation showed that **both offerors presented solid proposals**, for the most part differing only slightly in each of the evaluated categories. As a result, our **scoring was very close**.

See Respondent’s Exhibit 6 at page 3 (emphasis added.)

Given the solid proposals and very close scoring, the Hearings Officer cannot speculate as to whether the result would have been the same had Respondent followed the RFP and law regarding the use and composition of an evaluation committee to evaluate the proposals instead of the Issuing Officers. The Hearings Officer concludes that ratification of a contract where the soliciting agency did not follow the evaluation process as set forth in the RFP in violation of administrative rule *is not* in the State’s best interest because it “can only undermine the public’s confidence in the

integrity of the system and, in the long run, discourage competition.” The Hearings Officer also concludes that Petitioner should be given the opportunity to have its proposal properly evaluated by Respondent.

As annotated in the Hawaii Public Procurement Code Desk Reference (2015 Edition):

Ratification of an illegally awarded contract *can only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition.* Any concerns Respondent may have had in avoiding the additional expenses and inconvenience that may result in having to engage in a second solicitation must give way to the State's interest in promoting and achieving the purposes of the Code. As such, ratification of the KTW contract would not be in the best interest of the State. *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998). (Emphasis added.)

Moreover, unless the contract is terminated, *Petitioner would be denied the opportunity to have its bid properly evaluated by Respondent.* Termination would also be consistent with HAR §3-126-38(a)(3), which requires termination of the contract where, among other things, performance has not begun and there is time for resoliciting bids, as well as HAR §3-126-38(a)(4) which provides that even where performance has begun, termination is the preferred remedy. *Kiewit Pacific Co. v. Dept. of Land and Natural Resources et al.*, PCH-2008-20 (February 20, 2009); *Access Service Corp. v. City and County of Honolulu, et al.*, PCX-2009-3 (November 16, 2009). (Emphasis added.)

For all of these reasons, the Hearings Officer concludes that termination of the award to Intervenor is the only reasonable remedy.

#### IV. DECISION

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

1. Intervenor's Motion to Dismiss is DENIED;

2. Petitioner's Motion in the Alternative is DENIED;

3. Respondent's Motion to Strike is GRANTED;

4. Respondent's denial of Petitioner's protest is vacated;

5. The contract awarded to Intervenor is terminated and Intervenor 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;

6. Each party shall bear its own attorneys' fees and costs; and

7. Petitioner's cash bond shall be returned upon the filing of a declaration by Petitioner attesting that the time to appeal to Circuit Court has lapsed and that no appeal has been timely filed. In the event of a timely application for judicial review of the decision herein, the disposition of the bond shall be subject to determination by the Circuit Court.

Dated at Honolulu, Hawaii: FEB 13 2018



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RODNEY K.F. CHING  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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*Hearings Officer's Findings of Fact, Conclusions of Law, and Decision;  
In Re Access Media Services, Inc. v. Hawaii State Legislature and 'Olelo Community Television  
dba 'Olelo Community Media, PDH-2018-001.*