



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2019 FEB -4 A 8: 52

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

HEARINGS OFFICE

In the Matter of:)	PDH-2019-001
)	
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, 2019, Access Media Services, Inc. ("Petitioner" or "AMSC" or "Access"), filed a Request for Administrative Review Hearing ("Petition") to contest the Hawaii State Legislature's ("Respondent") denial of Petitioner's protest regarding Request for Proposals ("RFP") No. SH-01-18 titled "Competitive Sealed Proposals to Furnish Services to Plan, Execute and Evaluate the Legislative Broadcast Project" ("Project"). On January 14, 2018, Deputy Attorney General Stella M.L. Kam, Esq. filed

a Response to the Petition on behalf of Respondent. The matter was set for hearing on January 22, 2019 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On January 14, 2019, Proposed Intervenor, 'Olelo Community Television dba 'Olelo Community Media ("Intervenor"), filed its Response to the Petition.

On January 15, 2019, a Pre-Hearing conference was held in this matter. Richard G. Martin, Esq. appeared on behalf of Petitioner with Glenn Booth, Petitioner's representative, present; Deputy Attorney General Stella M.L. Kam, Esq. appeared on behalf of Respondent; and Ted N. Pettit, Esq. and Stephanie M. Segovia, Esq. appeared on behalf of Intervenor with Sanford Inouye, Intervenor's representative, present. The parties entered into a stipulation, filed that same day, allowing Intervenor to intervene in this proceeding.

On January 15, 2019, Petitioner filed a *Motion to Reinstate the Mandatory Stay Under HRS 103D-701(f) and HAR 3-126-5* ("Petitioner's Motion to Reinstate Stay").

On January 17, 2018, Intervenor filed a *Joinder* in Respondent's Response to the Petition. On January 17, 2018, Petitioner filed combined exhibits P-1 to P-10.

On January 22, 2019, Respondent filed its Memorandum in Opposition to Petitioner's Motion to Reinstate Stay. That same day, Intervenor filed its Substantive Joinder in Respondent's Memorandum in Opposition to Petitioner's Motion to Reinstate Stay.

On January 22, 2019, Petitioner's Motion to Reinstate Stay and the Petition 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; Deputy Attorney General Stella M.L. Kam, Esq. appeared on behalf of Respondent with Wintehn K.T. Park, Esq., Senate Majority Attorney, present; and Ted N. Pettit, Esq. appeared on behalf of Intervenor with Sanford Inouye, Intervenor's representative, present. The parties stipulated to admit common exhibits Petitioner's 1 through 10 into evidence. The parties also stipulated to admit the Declaration of Brian Takeshita and Declaration of Carol Taniguchi, attached to Respondent's Memorandum in Opposition to Petitioner's Motion to Reinstate Stay, into evidence. Glenn Booth and Brian Takeshita testified.

Having heard the evidence and arguments of counsel, and having considered the motion, memoranda and declarations, together with the exhibits, records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision denying Petitioner's Motion to Reinstate Stay, denying the Petition and affirming Respondent's denial of the Protest.

II. FINDINGS OF FACT

1. The Honorable Ronald D. Kouchi, President, Hawaii State Senate and the Honorable Scott K. Saiki, Speaker, Hawaii State House of Representatives are the Chief Procurement Officers ("CPOs") of those legislative bodies, respectively. Collectively, they are the CPOs of Respondent.

2. By Memorandum dated September 12, 2018, the CPOs designated Carol Taniguchi, Chief Clerk of the Senate, and Brian Takeshita, Chief Clerk of the House of Representatives, as the Procurement Officers for this RFP.

3. On October 1, 2018, Respondent issued RFP No. SH-01-18 requesting proposals for the Project. See Petitioner's Exhibit 1.

4. Part 1, Section 4 of the RFP titled "PROPOSAL EVALUATION" sets forth a four (4) *phase process* for evaluation of the proposals received:

- Phase 1 - **Evaluation of Mandatory Requirements (Pass/No Pass)**
- Phase 2 – Evaluation of Proposals and Selection of Priority-Listed offerors
- Phase 3 – Submittal of Best and Final Offers
- Phase 4 – Recommendation for Award

See Petitioner's Exhibit 1 at Bates Stamp pages 36 to 41 (Emphasis added.)

5. Part 1, Section 4 of the RFP states that *only those proposals meeting the mandatory requirements ("pass") of Phase 1 shall be considered in Phase 2:*

The evaluation of the mandatory requirements shall be based upon a "pass/no pass" basis. No points shall be assigned for these requirements. The purpose of this phase is to determine whether an Offeror's proposal is sufficiently responsive to the RFP to permit a complete evaluation. Each proposal will be reviewed for responsiveness. **Failure to meet the minimum mandatory requirements ("no pass") shall be grounds for deeming the proposal nonresponsive to the RFP and rejection of the proposal. Only those proposals meeting the mandatory requirements ("pass") of Phase 1 shall be considered in Phase 2.**

See Petitioner's Exhibit 1 at Bates Stamp page 36 (Emphasis added.)

6. Part 1, Section 3 of the RFP titled "PROPOSAL REQUIREMENTS" sets forth the *mandatory requirements* and states that proposals "**shall** include the following subsections:

- Proposal Letter
- Transmittal Letter
- Executive Summary
- Company Background and Experience
- Personnel: Project Organization and Staffing
- Technical Approach
- **Project Management and Control**
- Detailed Work Plan
- Fee Proposal and Summary of Activities
- Trade Secrets and Proprietary Data
- Wage Certificate

See Petitioner's Exhibit 1 at Bates Stamp page 24 (Emphasis added.)

7. Part 1, Section 1.15 of the RFP titled "Disqualification of Proposals" informs offerors that: "The Legislature reserves the right to consider as acceptable only those proposals that are submitted in accordance with **all requirements** set forth in this RFP..." See Petitioner's Exhibit 1 at Bates Stamp page 11 (Emphasis added.)

8. Part 2, Section 5 of the RFP titled "Preparation of Offer" informs offerors that: "proposals submitted in response to request for proposals (RFP) **shall be in the format** prescribed by the RFP." See Petitioner's Exhibit 1 at Bates Stamp page 43 (Emphasis added.)

9. Part 2, Section 13 of the RFP titled “Disqualification of Offerors” informs offerors that: “[a]n offeror **shall be disqualified** and its **offer automatically rejected**” if “[t]he proposal is conditional, **incomplete, or irregular** in such a way as to make the proposal **incomplete**, indefinite, or ambiguous as to its meaning.” See Petitioner’s Exhibit 1 at Bates Stamp page 46 (Emphasis added.)

10. Pursuant to Part 1, Section 4.4 of the RFP titled “Phase 2 – Evaluation of Proposals and Selection of Priority-Listed Offerors,” the offers were to be evaluated by an Evaluation Committee on the following criteria:

- A. Understanding the Project – 175 Points
- B. Company Background and Experience – 100 Points
- C. Personnel: Project Organization and 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 Petitioner’s Exhibit 1 at Bates Stamp pages 37-41.

11. Two (2) proposals were timely submitted in response to the RFP. One proposal was submitted by Petitioner, the incumbent contractor for the Project. The second proposal was submitted by Intervenor, the current Public Education and Government (“PEG”) contractor for the island of Oahu.

12. According to the testimony of Brian Takeshita, the two (2) proposals were given to the five (5) Evaluation Committee members for individual review and then they met as a group on November 5, 2018. After review, all five (5) Evaluation

Committee members came to the same conclusion that Petitioner's proposal did not have the Project Management and Control subsection. The Evaluation Committee members reviewed the RFP and determined that any proposal missing the Project Management and Control subsection must be rejected. The Evaluation Committee members determined that the missing Project Management and Control subsection was not a "mistake" that 11.B¹ would apply to based on the definition² contained in 11.B. According to Mr. Takeshita, they also contacted the State Procurement Office and were advised to follow the RFP and reject Petitioner's Proposal.

13. By letter dated November 15, 2018, the Procurement Officers informed Petitioner that the award (to Intervenor) had been posted and that Petitioner's proposal was deemed *non-responsive* pursuant to Section 4.3 of the RFP and, therefore, *disqualified* from further consideration. The letter further explained that the Evaluation Committee issued a "no pass" determination on Petitioner's proposal because it did not meet the *minimum mandatory requirements*, to wit: it did not contain the required submittal of its "Project Management and Control" subsection. The letter also informed Petitioner that it could request a debriefing within three (3) working days. See Petitioner's Exhibit 2.

14. By letter dated November 15, 2018, Petitioner requested a debriefing. See Petitioner's Exhibit 3.

15. On November 20, 2018, a debriefing was held. At the debriefing, Petitioner presented Respondent with a letter dated November 20, 2018 wherein Petitioner requested that its *bid* be *amended* to include the *inadvertently omitted*

¹ See Petitioner's Exhibit 1 at Bates Stamp page 45-46.

“Project Management and Control” subsection and then *reconsidered*. As authority for their request, Petitioner’s cited to HRS §103D-302(g) and HAR §3-122-31(d) pertaining to correction of *bids*.³ See Petitioner’s Exhibit 4.

16. According to the testimony of Mr. Takeshita, he reviewed the “matrix”⁴ that Petitioner provided at the debriefing and was not persuaded that the information that was supposed to be in the Project Management and Control subsection was contained elsewhere in Petitioner’s proposal.

17. By email dated November 27, 2018, Senate Chief Clerk Carol Taniguchi informed Petitioner that her office needed to get parking stalls 276 and 277 back from Petitioner effective December 1, 2018 *since the contract between Access Media and the Legislature ended several months ago*. See Petitioner’s Exhibit 6 at Bates Stamp page 124 (Emphasis added.)

18. On November 28, 2018, Petitioner filed its *written protest letter* asserting 4 bases for its protest:

1. The AMSC bid was responsive because the information requested in Section 3.8 was contained in the bid.
2. Alternatively, AMSC should have been notified of the mistake and allowed to correct its bid.
3. If the AMSC bid had been fairly evaluated, AMSC’s scores would have been at least equal to Olelo’s, and probably higher, and AMSC would have been the successful bidder.

² See Petitioner’s Exhibit 1 at Bates Stamp page 46, last paragraph starting with “Technical irregularities...”

³ At the 1/15/2019 pre-hearing conference, Petitioner acknowledged that the statutes/rules pertaining to correction of *bids* were *inapplicable* since this was a request for *proposals*. Petitioner also acknowledged that the RFP and statutes/rules pertaining to Competitive Sealed *Proposals* control and that the statutes/rules pertaining to correcting *proposals* do not have comparable provisions to HRS §103D-302(g) and HAR §3-122-31(d) pertaining to correction of *bids*.

⁴ See Petitioner’s Exhibit 4 at Bates Stamp pages 96-99.

4. Olelo's bid should have been rejected because Olelo was a "non-responsible" bidder.⁵

See Petitioner's Exhibit 5 ("Protest Letter").

19. By email dated December 4, 2018, Senate Chief Clerk Taniguchi requested that Petitioner return its parking gate cards asap. See Petitioner's Exhibit 6 at Bates Stamp page 123.

20. By email dated December 7, 2018, Senate Chief Clerk Taniguchi addressed parking stall issues and also requested that a time be scheduled for Petitioner to remove its "company and personal items from the Senate radio room as well as turn in any keys that were issued to you." See Petitioner's Exhibit 6 at Bates Stamp pages 122-123.

21. By email dated December 7, 2018, Petitioner, through its Counsel, referencing and attaching the string of emails mentioned in paragraphs 17, 19 and 20 above, informed Respondent's attorneys Wintehn Park, Esq. and Mark Morita, Esq. of the "mandatory stay" of any further action regarding the award based on the filing of its Protest Letter. Petitioner also noted that *last year* Respondent honored the stay while Petitioner's Protest was pending, thereby allowing Petitioner to continue providing broadcast services. See Petitioner's Exhibit 6 at Bates Stamp page 121.

22. According to the testimony of Glenn Booth, on or about December 12, 2018, Petitioner vacated the Senate Radio Room aka the control room.

23. By email dated December 12, 2018, Petitioner asked Mr. Park and Mr. Morita "[W]hat the legal basis is for the Legislature to ignore the mandatory stay." See Petitioner's Exhibit 6 at Bates Stamp page 120.

⁵ At the 1/15/2019 pre-hearing conference, Petitioner withdrew this basis.

24. By letter dated December 14, 2018, Respondent informed Petitioner that the automatic *stay was lifted* based on a written determination made by the CPOs on December 10, 2018 that the award and execution of the contract without delay is necessary to protect the *substantial interest* of the State. A copy of the December 10, 2018 Memorandum lifting the stay was attached to the letter. See Petitioner's Exhibit 8.

25. By letter dated December 23, 2018, Petitioner requested that Respondent *reconsider* its lifting of the automatic stay and re-impose the stay. Petitioner also requested that its December 23, 2018 letter constitute an *amendment* to the Protest Letter filed on November 28, 2018. See Petitioner's Exhibit 7.

26. By letter dated December 26, 2018, Respondent *denied* Petitioner's Protest asserting, among other things (Respondent's responses, in part, are stated in **bold ink**):

1. The AMSC bid was responsive because the information requested in Section 3.8 was contained in the bid.

Subsection 3.8 specifically lists the required submittal of a subsection of Project Management and Control. * * *Section 4.3 states: "Failure to meet the minimum mandatory requirements ("no pass") shall be grounds for deeming the proposal nonresponsive to the RFP and rejection of the proposal." * * * The process set forth in section 4.3 of the RFP was followed by the evaluation committee. Once it was determined that Access' proposal failed to include the subsection on Project Management and Control, Access' proposal was given a "no pass" determination and deemed non-responsive and rejected.

2. Alternatively, AMSC should have been notified of the mistake and allowed to correct its bid.

Failure to include that mandatory subsection required that Access's proposal be deemed non-responsive and therefore rejected. The itemized "mandatory requirements" are an important part of the RFP as this allows for the

evaluators to do a side-by-side comparison of each of the submittals and ensures a more equitable evaluation process.

3. If the AMSC bid had been fairly evaluated, AMSC's scores would have been at least equal to Olelo's, and probably higher, and AMSC would have been the successful bidder.

[D]ue to the failure to submit the required subsection on Project Management and Control, the Access proposal was assigned a grade of "no pass." As it was deemed non-responsive and rejected, Access' proposal was not entitled to further consideration.

4. Olelo's bid should have been rejected because Olelo was a "non-responsible" bidder.

The Legislature has been advised by the State of Hawaii Department of Commerce and Consumer Affairs' Cable Television Division that PEG service providers have been allowed to bid on requests for proposals for legislative access services.

See Petitioner's Exhibit 9 ("Denial Letter").

27. By letter dated December 27, 2018, Respondent denied Petitioner's requests (contained in its letter dated December 23, 2018) to reinstate the stay and amend its Protest Letter. As grounds for its position, Respondent asserted that HAR §3-126-8, cited by Petitioner as authority for its request for reconsideration, *has been repealed*; and the 5-working days deadline *has passed*. See Petitioner's Exhibit 10. Petitioner did not file a protest based on this denial.

28. On January 2, 2019, 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. MOTION TO REINSTATE STAY

On January 15, 2019, Petitioner filed a Motion to Reinstate Stay. Petitioner asserts that the automatic stay, triggered by the filing of its Protest on November 28, 2018, was violated by Respondents and/or not properly lifted, and should be reinstated pending decision on its Protest. Respondent asserts that the stay was not violated and was properly lifted based on a *written determination* made by the CPOs that the award and execution of the contract without delay is necessary to protect the

substantial interests of the State. Intervenor joined in and supports Respondent's position.

The law is clear that once a protest is filed, a stay on the award of the contract goes into effect and *no further action shall be taken on the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State:*

§103D-701 Authority to resolve protested solicitations and awards.

(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. * * *

(f) In the event of a timely protest under subsection (a), **no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.**

HRS §103D-701(f) (Emphasis added.)

The Hawaii Administrative Rule regarding stay of procurement during protest is in accord:

§3-126-5 Stay of procurements during protest.

When a protest has been filed pursuant to section 3-126-5, 3-126-3 or 3-126-4, **no further action shall be taken until the protest has been settled, unless the chief procurement officer makes a written determination**, after consulting with the head of the purchasing agency, **that the award of the contract is necessary to protect the substantial interests of the State.**

HAR §3-126-5 (Emphasis added.)

1. NO JURISDICTION

Petitioner's Protest Letter has four (4) bases. See Petitioner's Exhibit 5. Violation of the automatic stay is *not* one of them. Petitioner is not allowed to raise by motion that which it failed to properly protest.

Petitioner's request to *amend* its Protest Letter to include this claim (that the stay was violated) was denied by Respondent on the grounds that the 5-working days deadline (from the debriefing on November 20, 2018) *has passed*. See Petitioner's Exhibit 10. Petitioner correctly points out that it was *not possible* to include this claim in its November 28, 2018 Protest Letter because the stay was not (allegedly) violated until *after* the Protest Letter (triggering the automatic stay) was filed.

Nevertheless, Petitioner did *not* protest this denial (made on December 27, 2018) within 5 working days.⁶ It is too late to do so. 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 cannot review matters that are raised for the first time at the administrative proceeding and, accordingly, Petitioner is barred from raising them. Accordingly, the Hearings Officer concludes that he does not have jurisdiction to hear Petitioner's Motion to Reinstate Stay or to grant the relief requested therein because the alleged violation of the stay was not timely protested.

2. STAY WAS NOT VIOLATED

Assuming, *arguendo*, that the Hearings Officer has jurisdiction to hear Petitioner's Motion to Reinstate Stay and grant the relief requested, the Hearings Officer concludes that the stay was not violated.

Petitioner asserts that the Protest was filed on November 28, 2018 thereby triggering the automatic stay. All parties agree with this and so does the Hearings Officer. *The automatic stay became effective on November 28, 2018.* Accordingly, **"no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State."** See HRS 103D-701(f) (Emphasis added.) Petitioner asserts that the Memorandum⁷ lifting the stay was *not* valid because there are no dates indicated for the signatures of the CPOs and there is no explanation as to why the award of the contract without delay is necessary to protect the State's substantial interest. Respondent asserts that the stay was properly lifted by Memorandum dated December 10, 2018, which was transmitted to Petitioner on December 14, 2018, and that the *substantial interest determination* was properly made.

By Memorandum dated December 10, 2018, the CPOs made a *substantial interest determination* and lifted the stay. See Petitioner's Exhibit 8. Although there are no dates indicating *when* the CPOs actually signed the Memorandum, the Memorandum is dated December 10, 2018 and the transmittal letter to Petitioner and Intervenor is dated December 14, 2018. The Hearings Officer makes

⁶ See HRS § 103D-701(a).

⁷ See Petitioner's Exhibit 8.

a reasonable inference and concludes that *the Memorandum was signed by the CPOs sometime between December 10, 2018 and December 14, 2018, at the latest.*

Accordingly, the Hearings Officer concludes that *the automatic stay was in effect from November 28, 2018 through and including December 13, 2018, at most.*

The Hearings Officer is not persuaded by Petitioner's assertion that the stay was *not* valid because there is no explanation as to why the award of the contract without delay is necessary to protect the State's substantial interest. The basis for the *substantial interest determination* was that the 2019 Legislative Session opens on January 16, 2019, and Petitioner needed to have broadcast coverage in place in order to fulfill its *goals of openness and transparency in government. And failure to provide broadcasts of legislative proceedings would deprive the citizenry of a fundamental tool for accessing their government processes.*

'The cornerstone of democracy rests on the foundation of an educated electorate.' **Failure to provide broadcasts for legislative proceedings would deprive the citizenry of a fundamental tool for accessing their government processes.** Thus, broadcasts provided pursuant to the legislative broadcast project are imperative to the State's goals of **openness and transparency in government.** See Haw. Rev. Stat. §§ 92-1, 92F-2. We note that the **opening of the 2019 legislative session is on January 16, 2019, which necessitates award and execution of the contract** for this project as soon as possible.

See Petitioner's Exhibit 8 (Emphasis added.)

Furthermore, because the contract with Petitioner had expired on May 31, 2018, and because Petitioner was deemed to be a non-responsive bidder on the RFP, it was imperative for Respondent to have broadcast coverage in place for the upcoming Legislative session. Petitioner's request to *reconsider* the lifting of the stay was properly denied by Respondent on the grounds that HAR §3-126-8, cited by Petitioner as

authority for its request, *has been repealed*. Notwithstanding, that this issue was *not* timely protested, the Hearings Officer concludes that the *substantial interest determination* was properly made.

Petitioner also asserts that the automatic stay was violated *before* it was lifted. As concluded above, *the automatic stay was in effect from November 28, 2018 through and including December 13, 2018, at most*. On November 27, 2018, one day *before* the automatic stay, Senate Chief Clerk Carol Taniguchi sent an email to Petitioner informing Petitioner that her office needed to get parking stalls 276 and 277 back from Petitioner effective December 1, 2018 *since the contract between Access Media and the Legislature ended several months ago*. See Petitioner's Exhibit 6 at Bates Stamp page 124. Since that *action* was taken *prior* to the automatic stay, the Hearings Officer concludes that it was *not* in violation of the stay.

According to the testimony of Glenn Booth, Petitioner's contract with Respondent *expired* on May 31, 2018, but Petitioner stayed at the Capitol and asked Respondent to extend Petitioner's contract until September. There was no response by Respondent. Mr. Booth further testified that Respondent asked Petitioner to provide services in July and October 2018 for two Judiciary hearings. Petitioner provided the services and received payment. This is consistent with the Declaration of Carol Taniguchi wherein she declares, among other things, that: "The contract between Petitioner and Respondent for legislative broadcast services under RFP No. SH-01-15 was extended until May 31, 2018 and **terminated on May 31, 2018**. Respondent made a small purchase (total price \$1,685.49) from Petitioner for broadcast production services for the Senate Judiciary Committee judicial confirmation hearings during the

special sessions on July 9, 2018 and October 24, 2018.” See Declaration of Carol Taniguchi (Emphasis added.)

Petitioner asserts that *after* the stay went into effect, Senate Chief Clerk Taniguchi sent two (2) more emails to Petitioner and caused Petitioner to vacate the Senate Radio Room on December 12, 2018, all in violation of the stay. Respondent asserts that the emails pertaining to return of parking gate cards, vacating the Senate Radio Room and returning the keys were housekeeping matters because Petitioner had no right to be there since its contract had expired on May 31, 2018. The Hearings Officer agrees with Respondent’s position.

A close evaluation of the evidence reveals that the December 4, 2018 email requests that Petitioner return its *parking gate cards* asap. See Petitioner’s Exhibit 6 at Bates Stamp page 123. The December 7, 2018 email addresses parking stall issues and also requests that a time be scheduled for Petitioner to remove its “company and personal items from the Senate radio room as well as turn in any keys that were issued to you.” See Petitioner’s Exhibit 6 at Bates Stamp pages 122-123. Mr. Booth testified that they vacated the Senate Radio Room on December 12, 2018.

Certainly, an argument can be made that the above actions were taken to facilitate the award of the contract to Intervenor since *physically*, Petitioner had to be out of the Senate Radio Room before Intervenor could come in and set up. The Hearings Officer concludes, however, that the December 4 and 7, 2018 emails were simply in *follow-up* to the November 27, 2018 email *pre-dating the stay* and merely housekeeping matters, *since the contract with Petitioner had already expired*. This is buttressed by the evidence showing that the *emails are all on the same email string* and reference the

previous email(s). See Petitioner's Exhibit 6. The Hearings Officer also concludes that vacating the Senate Radio Room on December 12, 2018, while coincidentally occurring during the time frame of the automatic stay, was *not* a violation thereof because the contract between Petitioner and Respondent had expired on May 31, 2018 and Petitioner should have already been out of the Senate Radio Room.

Based on the foregoing, the Hearings Officer concludes that the automatic stay was not violated. This conclusion is buttressed by the fact that the contract under the RFP was not *executed* by Respondent and Intervenor until December 21, 2018, *after* the stay was lifted. See Declaration of Carol Taniguchi at par. 10. Thus, there was no further action taken *on the award of the contract* until *after* the *substantial interest determination* was made. See HRS 103D-701(f).

3. TECHNICAL VIOLATION WITHOUT REMEDY

Assuming *arguendo* that the December 4 and 7, 2018 emails to Petitioner, and/or causing Petitioner to vacate the Senate Radio Room on December 12, 2018, were in violation of the stay, the issue then becomes what *remedy* is appropriate, if any. Petitioner requests that the stay be reinstated *until the pending Protest is decided*. Petitioner notes that *last year*, Respondent "honored the mandatory stay until the review process was completed." See Petitioner's Exhibit 6 at Bates Stamp page 120. Intervenor argues that it's *moot* because the stay has been lifted, the Legislature is in session and Intervenor is providing broadcast production services pursuant to the award and execution of the contract. The Hearings Officer agrees with Intervenor's position. Furthermore, since the Protest is being *decided* and *denied* by this Decision, the stay cannot be reinstated. Finally, the Hearings Officer concludes that the *arguendo*

violations of the stay are, if anything, *technical in nature* and do not warrant reinstating the stay or sanctions.

First, and unlike last year, Petitioner's Proposal was deemed to be *non-responsive* for omitting a mandatory required subsection. Pursuant to the requirements of the RFP, Petitioner's Proposal was *rejected* and did not make it to Phase 2, the evaluation phase. Second, and unlike last year, a *substantial interest determination* was made within sixteen (16) days, at the latest, after the Protest Letter was filed. Respondent determined that they needed to have Intervenor, *the only responsive bidder*, in place and ready to perform on the contract awarded to Intervenor. Finally, the *contract with Petitioner had already terminated* at the end of May 2018. Based on the *Jas. W. Glover, Ltd. v. Board of Water Supply*, PCH-2001-002 (August 7, 2001) case, even if the Hearings Officer were to find that Petitioner violated the stay, Petitioner has not proven: 1) that the *solicitation* itself was in violation of the code; and 2) that Respondent's award of the contract to Intervenor amounted to *bad faith*. Therefore, the Hearings Officer is *powerless* to impose sanctions:

Violation of Stay; Basis for sanctions; Under the Code as presently written, a violation of the stay does not present an independent basis for the imposition of sanctions. Where the agency violates the stay but the protestor is unable to prove that (1) the solicitation itself was in violation of the code and that (2) the agency's actions in awarding the contract amounted to bad faith, the Hearings Officer is powerless to impose sanctions for the violation and award attorney's fees. *Jas. W. Glover, Ltd. v. Board of Water Supply*, PCH-2001-002 (August 7, 2001).

See Hawaii Public Procurement Code Desk Reference (rev. July 2018) at page 69.

Accordingly, Petitioner's Motion to Reinstate Stay is DENIED.

C. PROTEST LETTER

There are three (3) remaining bases contained in Petitioner's Protest

Letter:

1. The AMSC bid was responsive because the information requested in Section 3.8 was contained in the bid;
2. Alternatively, AMSC should have been notified of the mistake and allowed to correct its bid; and
3. If the AMSC bid had been fairly evaluated, AMSC's scores would have been at least equal to Olelo's, and probably higher, and AMSC would have been the successful bidder.

For the reasons stated below, the Hearings Officer is not persuaded by Petitioner's assertions and denies the Petition.

1. PETITIONER'S PROPOSAL WAS NOT RESONSIVE TO THE RFP

Petitioner asserts that the determinations of "no pass" and "non-responsive" for Petitioner's bid were *incorrect* because the responses to the requests contained in RFP Section 3.8 were already present in Petitioner's bid, although in various locations.

Respondent asserts that the Evaluation Committee followed the requirements of the RFP in rejecting Petitioner's proposal and awarding the contract to Intervenor.

Part 1, Section 4 of the RFP titled "PROPOSAL EVALUATION" sets forth a four (4) *phase process* for evaluation of the proposals received:

- Phase 1 - **Evaluation of Mandatory Requirements (Pass/No Pass)**
- Phase 2 – Evaluation of Proposals and Selection of Priority-Listed offerors

- Phase 3 – Submittal of Best and Final Offers
- Phase 4 – Recommendation for Award

See Petitioner's Exhibit 1 at Bates Stamp pages 36 to 41 (Emphasis added.)

Part 1, Section 4 of the RFP states that *only those proposals meeting the mandatory requirements ("pass") of Phase 1 shall be considered in Phase 2:*

The evaluation of the mandatory requirements shall be based upon a "pass/no pass" basis. No points shall be assigned for these requirements. The purpose of this phase is to determine whether an Offeror's proposal is sufficiently responsive to the RFP to permit a complete evaluation. Each proposal will be reviewed for responsiveness. Failure to meet the minimum mandatory requirements ("no pass") shall be grounds for deeming the proposal nonresponsive to the RFP and rejection of the proposal. **Only those proposals meeting the mandatory requirements ("pass") of Phase 1 shall be considered in Phase 2.**

See Petitioner's Exhibit 1 at Bates Stamp page 36 (Emphasis added.)

Part 1, Section 3 of the RFP titled "PROPOSAL REQUIREMENTS" sets forth the *mandatory requirements* and states that proposals "**shall** include the following subsections:

- Proposal Letter
- Transmittal Letter
- Executive Summary
- Company Background and Experience
- Personnel: Project Organization and Staffing
- Technical Approach
- **Project Management and Control**
- Detailed Work Plan
- Fee Proposal and Summary of Activities

- Trade Secrets and Proprietary Data
- Wage Certificate

See Petitioner's Exhibit 1 at Bates Stamp page 24 (Emphasis added.)

Part 1, Section 1.15 of the RFP titled "Disqualification of Proposals" informs offerors that: "The Legislature reserves the right to consider as acceptable only those proposals that are submitted in accordance with **all requirements** set forth in this RFP..." See Petitioner's Exhibit 1 at Bates Stamp page 11 (Emphasis added.)

Part 2, Section 5 of the RFP titled "Preparation of Offer" informs offerors that: "proposals submitted in response to request for proposals (RFP) **shall be in the format** prescribed by the RFP." See Petitioner's Exhibit 1 at Bates Stamp page 43 (Emphasis added.)

Part 2, Section 13 of the RFP titled "Disqualification of Offerors" informs offerors that: "[a]n offeror **shall be disqualified** and its **offer automatically rejected**" if "[t]he proposal is conditional, **incomplete, or irregular** in such a way as to make the proposal **incomplete**, indefinite, or ambiguous as to its meaning." See Petitioner's Exhibit 1 at Bates Stamp page 46 (Emphasis added.)

The Hearings Officer concludes that Petitioner omitted a *mandatory required* subsection – Project Management and Control – in its proposal, albeit inadvertently. Petitioner's proposal was *incomplete*. Respondent has the right to prescribe the *format* for proposals submitted in response to the RFP. That *format* required that the information requested in the Project Management and Control subsection be contained in that subsection, not scattered throughout the proposal. Otherwise, a side-by-side comparison cannot be made. Petitioner has not cited to any

authority, nor is the Hearings Officer aware of any, that stands for the proposition that an agency is obligated to look in other sections of a proposal where a mandatory required subsection is missing. Finally, the Hearings Officer credits the testimony of Mr. Takeshita that he reviewed the “matrix”⁸ that Petitioner provided at the debriefing and was not persuaded that the information that was supposed to be in the Project Management and Control Section was contained elsewhere in the Petitioner’s proposal.

Simply put, Petitioner’s proposal failed to meet all of the mandatory *requirements* of the RFP. It was properly deemed “non-responsive” and automatically rejected. It was properly deemed “no pass” and did not make it past Phase 1.

2. RESPONDENT HAD NO OBLIGATION TO INFORM
PETITIONER OF THE MISSING SUBSECTION OR ALLOW
PETITIONER TO CORRECT ITS PROPOSAL

Petitioner asserts that Respondent should have informed Petitioner of the missing subsection and it should have been allowed to correct its obvious mistake.

Respondent asserts that allowing an offeror to cure its defective proposal is inherently unfair to other offerors and defeats the spirit and purpose of the Procurement Code.

Part 2, Section 11 of the RFP addresses “Mistakes in Proposals.” See Petitioner’s Exhibit 1 at Bates Stamp pages 45-46. As asserted by Respondent, reading the subsections together, it would appear that they address a phase of the evaluation process *beyond* the Phase 1 “pass/no pass” stage. The Hearings Officer agrees with this analysis. Here, Petitioner did not pass Phase 1. It does not matter that there were mistakes in its proposal because it was not entitled to be evaluated.

⁸ See Petitioner’s Exhibit 4 at Bates Stamp pages 96-99.

Furthermore, Subsection A states: "Mistakes shall not be corrected after award of contract." The award of contract to Intervenor was made on November 15, 2018. Petitioner attempted to correct its "mistake" at the debriefing held on November 20, 2018. It was too late.

Petitioner's reliance on Part 2, Section 11, subsection B of the RFP is misguided. That subsection presumes that a proposal was responsive and in Phase 2 – the evaluation phase. If, for example, a price is too low, the agency should ask the offeror to *confirm*. It wouldn't make sense for an agency to ask an offeror to *confirm* that it meant to omit a mandatory required subsection in its proposal.

Finally, the Hearings Officer credits the testimony of Mr. Takeshita that the Evaluation Committee members determined that the missing Project Management and Control subsection was not a "mistake" that 11.B⁹ would apply to based on the definition contained in 11.B:

Technical irregularities are matters of form rather than substance evident from the proposed document, or **insignificant mistakes that can be waived or corrected without prejudice to other offerors**; that is, when there is no effect on price, quality, or quantity. * * * **Examples include** the failure of an offeror to: return the number of signed proposals required...; sign the proposal;...or to acknowledge receipt of an amendment...

See Petitioner's Exhibit 1 at Bates Stamp page 46 (Emphasis added.)

The Hearings Officer concludes that omitting a mandatory required subsection from a proposal is not an *insignificant mistake*. According to Mr. Takeshita, they also contacted the State Procurement Office and were advised to *follow the RFP*

⁹ See Petitioner's Exhibit 1 at Bates Stamp page 45.

and reject Petitioner's Proposal. The Hearings Officer affirms this determination by the Procurement Officers.

3. PETITIONER HAS NOT PROVEN THAT ITS PROPOSAL
WOULD HAVE BEEN SCORED EQUAL TO OR HIGHER
THAN INTERVENOR'S

Petitioner asserts that had its proposal been fairly evaluated, it would have scored at least equal to and probably higher than Intervenor because Petitioner is the long-time successful incumbent contractor.

Respondent asserts that Petitioner's assertion is *pure speculation*. The Hearings Officer agrees with Respondent's position. Petitioner's assertion is also *moot*. As concluded above, Petitioner's proposal was deemed non-responsive and rejected for failure to follow the RFP and, therefore, not entitled to further consideration. Petitioner's proposal was not scored. An incumbent contractor does not score higher simply because it is the incumbent.¹⁰

For all of these reasons, the Hearings Officer concludes that Petitioner has not met its burden of proof by a preponderance of the evidence.

IV. DECISION

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

1. Petitioner's Motion to Reinstate Stay is DENIED;
2. Petitioner's Petition for Administrative Review and Hearing Relief is
DENIED and DISMISSED with prejudice;

¹⁰ Last year, Petitioner's (the incumbent) proposal did *not* score higher than Intervenors, but because *Respondent* did not follow the RFP requiring the use of an *evaluation committee* to score the proposals, the protest was granted. See, *Access Media Services, Inc. v. Hawaii State Legislature and 'Olelo Community Television dba 'Olelo Community Media*, PDH 2018-001.

3. Respondent's denial of Petitioner's protest is AFFIRMED;
4. Each party shall bear its own attorneys' fees and costs; and
5. The protest bond posted by Petitioner shall be deposited into the general fund.

Dated at Honolulu, Hawaii: FEB - 4 2019

Rodney K.F. Ching

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

*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-2019-001.*