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OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAI'I

In the Matter of: ELECTION SYSTEMS & SOFTWARE, INC., Petitioner, vs. KEVIN CRONIN, OFFICE OF ELECTIONS; DESIGNEE OF AARON FUJIOKA, ADMINISTRATOR, STATE PROCUREMENT OFFICE, STATE OF HAWAII, Respondents, and HART INTERCIVIC, Intervenor.	)	PCH-2008-3 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

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

I. INTRODUCTION

On May 29, 2008, Election Systems & Software, Inc. ("Petitioner"), filed a request for administrative review of Respondent Kevin Cronin's May 22, 2008 denial of Petitioner's May 21, 2008 protest. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

I HEREBY CERTIFY THAT THE ATTACHED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THE DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS.

The hearing was held on June 12, 2008, June 24, 2008[1] through June 26, 2008, and was concluded on June 27, 2008. Petitioner was represented by Terry E. Thomason, Esq., Corianne W. Lau, Esq., and Elizabeth Haws Connally, Esq. Respondents Kevin Cronin, Office of Elections, Designee of Aaron Fujioka, Administrator, State Procurement Office, State of Hawaii ("Respondents"), were represented by Russell A. Suzuki, Esq., Patricia T. Ohara, Esq., and Steven K. Chang, Esq. Intervenor Hart Intercivic ("Intervenor") was represented by David J. Minkin, Esq.

At the conclusion of the hearing, the Hearings Officer directed the parties to file written closing arguments and proposed findings of fact and conclusions of law. On July 3, 2008, Petitioner filed its closing argument and on July 9, 2008 Respondent Cronin and Intervenor filed their closing briefs. Memoranda in reply to Respondent Cronin's and Intervenor's closing briefs were filed by Petitioner on July 11, 2008. Proposed findings of fact and conclusions of law were filed by the parties on July 11, 2008.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

II. FINDINGS OF FACT

1. On or about September 3, 2007, Respondent Office of Elections issued Request for Proposals No. RFP-06-047-SW ("RFP") seeking sealed offers for a new leased voting equipment system for the 2008, 2010, 2012, 2014 and 2016 Primary, General and Special Elections. The RFP also provided for an option to extend the contract for an additional twenty-four month period, "if mutually agreed upon in writing".

2. The RFP provided that offers would be received up to and opened on October 11, 2007.

[1] The hearing reconvened on June 24, 2008 after Petitioner and Intervenor requested time to pursue settlement negotiations. Respondents did not object to the delay.

3. Between September 13, 2007 and October 2, 2007, a number of addenda to the RFP were issued. On September 13, 2007, Addendum A was issued; on September 14, 2007, Addendum B was issued; on October 1, 2007, Addendum C was issued; and on October 2, 2007, Addendum D was issued.

4. The procurement officer for Respondent Office of Elections at the time the RFP was issued was Rex Quidilla, the Designated Chief Election Officer.

5. Section 1.020 of the RFP provides in part:

> The State is issuing this Request for Proposals (RFP) seeking proposals from qualified entities (Offerors) to lease a new system (New System) to collect, tabulate and report votes for all Primary, General, and Special Elections held in the State.
>
> Based on the current abilities of the Offerors, the State requires Offerors to submit proposals for the New System that may include all or part of the following:
>
> - Direct recording electronic (DRE) technology to collect, tabulate, and consolidate precinct votes and absentee walk-in votes;
> - Marksense technology to collect, tabulate, and consolidate absentee mail-in votes;
> - Technology that seamlessly combines both DRE and Marksense technology to collect, tabulate, and consolidate precinct votes, absentee walk-in votes, and absentee mail in votes; and
> - A central counter for both DRE and Marksense technology.

* * * *

6. Section 3.010 of the RFP provides in part:

* * * *

The New System must be capable of serving 800,000 to 900,000 registered voters in approximately 355 precincts. To meet the requirements of this RFP, the New System must include:

- Sufficient ballot counters and ballots for each of the 355 precincts together with a sufficient number of vote recorders, plus backup voter recorders for absentee walk-in polling places;

- Absentee mail and walk-in voting equipment and services for 18 sites;

- Central vote count system with sufficient ballot counters to tabulate absentee ballots in each county within a reasonable amount of time on election days (in previous elections, a central vote count system site was set up in each of the four counties);

- 400 Accessible Voting Booths;

- Secure data transmission capability from the polling places in each county to the central vote count system site for that county;

- Secure data transmission capability from [sic] the County of Hawaii, County of Maui, and County of Kauai central vote count system sites to the City & County of Honolulu central vote system site;

- Simultaneous secure data transmission capability of election results to various media organizations from a central vote count system site;

- Any ancillary devices required at each of the 355 precincts and the four (4) county central vote count system sites for election definition programming, data entry, secure data storage, secure data accumulation, secure data transmissions, ballot storage, ballot transport, printing election reports, etc;

- All consumables in sufficient quantities required to support the final configuration of the New System during the term of the contract; and

- Upgrades, patches, and modifications developed by the Offeror to improve the New System during the term of the contract.

* * * *

7. Section Four of the RFP required, among other things, that offerors submit "[c]opies of the Offeror's last two (2) audited annual financial statements."

8. Section Five of the RFP sets forth the terms of the Evaluation Criteria and Contractor Selection. Section 5.010 states in part, "Evaluation of the proposals shall be within the sole judgment and discretion of the Evaluation Committee in accordance with the five (5) Evaluation criteria set forth below."

9. Section 5.020 of the RFP identifies the criteria to be used by the Evaluation Committee to score the proposals. The criteria consisted of Pricing (15 points), Technical Criteria (50 points), Implementation Plan and Schedule (5 points), Understanding of Project as Outlined in the Entire RFP (5 points), and On-Site Demonstration (25 points).

10. The RFP provided that the proposal offering the lowest cost price will be automatically allocated 15 points and the number of points assigned to the other proposals would be determined using the following formula:

$$\frac{\text{Lowest price (\$) x 15 points (maximum)}}{\text{Offeror's Proposal (\$)}}$$

11. According to the RFP, the initial evaluation of all proposals received would be evaluated against the first four criteria only, and thereafter, the offerors "whose proposals are among the top three highest point totals will advance as "Priority-listed Offerors" to the On-Site Evaluation Criterion, criteria (5)."

12. The RFP, at Appendix B: New System-Design, Fabrication, And Performance Requirements, under the heading, "Qualification" in paragraph 7.2.1,

provides that, "The New System shall meet or exceed the Voluntary Voting System Guidelines." The RFP and addenda required that the winning contractor would be obligated to provide current federal Voluntary Voting System Guidelines ("VVSG") certifications for voting machines used in each of the future elections covered by the contract at no further cost to the State.

13. The present iteration of the VVSG is the 2005 VVSG.

14. Addendum A to the RFP provided in part:

> For the 2008 Elections the State will accept voting equipment that has been certified to the 2002 Voluntary Voting System Guidelines. However, for all subsequent elections, the State will require that the voting system will obtain new certifications as they are adopted by the Election Assistance Commission, at no further cost to the State. The intent of the State and its Request for Proposals is to employ a voting system that complies with the most current Voluntary Voting System Guidelines as they are adopted by the Election Assistance Commission.

15. Three proposals were submitted by the October 11, 2007 deadline, including proposals from Petitioner and Intervenor. All three proposals were responsive to the RFP and determined to be qualified proposals and, as such, transmitted to the Evaluation Committee for its consideration.

16. Intervenor did not submit its last two audited financial statements with its proposal. Instead, Intervenor submitted financial *information* in the form of a "Balance Sheet Fiscal Years 2005, 2006, 2007 (Audited)". The financial information submitted by Intervenor did not include any auditor's report, consolidated balance sheets, consolidated statements of income, consolidated statements of stockholder's equity, consolidated statements of cash flows and Notes to consolidated financial statements. There was no indication whether the financial information submitted by Intervenor had been audited by an independent certified public accountant.

17. In November 2007, each offeror provided to the Evaluation Committee an on-site demonstration of the respective offeror's voting equipment.

18. Petitioner's proposal consisted of a firm, fixed-price offer, including pricing breakdowns for each election cycle in which the RFP required renewed federal VVSG certifications at no cost to the State. By so offering, Petitioner promised to provide federal VVSG certified equipment throughout the term of the contract at the price breakdown offered.

19. On or about November 28, 2007, Petitioner and Intervenor submitted their Best and Final Offers ("BAFO") to Respondent Office of Elections together with their responses to various questions which had been raised by Respondent Office of Elections on or about November 21, 2007.

20. On December 6, 2007, Scott Nago, the Counting Center Section Head for Respondent Office of Elections, emailed the three offerors and presented several questions for their response, including the following: "With the Election Assistance Commission (EAC) reviewing the next iteration of the Voluntary Voting System Guidelines, which of your voting equipment would need to be upgraded to meet these requirements? What would the cost be to the State?"

21. By letters dated December 13, 2007, both Petitioner and Intervenor responded to Nago's questions ("Post-BAFO Submission"). Intervenor's Post-BAFO Submission stated in part:

* * * *

> The 2007 Voluntary Voting System Guidelines (VVSG) currently being reviewed by the Election Assistance Commission (EAC) contain many new requirements that will affect the basic structure of both the software and the hardware components of future voting systems. Additionally, pending federal legislation may also impact many of the same facets of voting systems that are being addressed in the 2007 VVSG.
>
> Consequently, Hart anticipates that upgrading and/or replacing the current Hart Voting System (including the JBC's, eSlates, DAU modules, and eScans) will be required

> to satisfy the EAC guidelines. *The cost of providing such an upgrade for the State of Hawaii was discounted in our pricing and will be $2.5 million, which is included in the total cost of our current proposal.*
>
> * * * *
>
> Petitioner's response included the following:
>
> * * * *
>
> *ES&S' pricing for the State of Hawaii already includes all costs for the supply and implementation of voting system equipment proposed in our response.* ES&S will not pass the costs to the State incurred in connection with federal certification to the 2005 VVSG. Should the State request system modifications that are unique to the State of Hawaii, ES&S will perform such modifications at terms and pricing to be mutually agreed upon by the parties.

(Emphasis added).

22. According to its Post-BAFO Submission, Petitioner's offered price was fixed and included all upgrades as required by the RFP; Petitioner would not pass any costs forward for the only iteration in effect, the 2005 VVSG; and Petitioner would exercise its right to negotiate the price for any modifications Respondent Office of Elections might require that are "unique" to Hawaii (not the generally applicable federal VVSG standards).

23. According to its Post-BAFO Submission, Intervenor promised one refresh (upgrade) of its equipment for which it was charging the State $2.5 million.

24. Intervenor offered Respondent Office of Elections a choice between two payment terms. "Payment Term A" required annual payments from 2008 through 2018, totaling $51,469,990.00. "Payment Term B" required payments every other year from 2008 through 2018, totaling $52,875,993.00. Under "Payment Term B", the State was required to make a payment in the sum of $6,599,998.00 for the 2008 elections and the sum of $9,199,999.00 for each subsequent election to and including the 2016 elections, and a final payment of $9,475,999.00 in 2018[2]. Respondent Office of Elections opted for "Payment Term B".

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[2] Intervenor's BAFO stated the Total Amount for 2008 to be $6,599,999.00, rather than $6,599,998.00 which is the actual sum of the 2008 prices provided in Payment Term B for the Optical Scan, DRE and Absentee Mail. The BAFO also stated

25. Petitioner's offered price for the 2008 through the 2018 elections was $18,126,865.00, and consisted of payments of $3,045,091.00 every other year between 2008 and 2016, with a final payment of $2,901,410.00 in 2018.

26. Petitioner's offered price of $18,126,865.00 for the 6 election years (2008 to 2018) averaged $3,021,144.00 per election year. Intervenor's offered price of $52,875,993.00 for the same 6 election years under "Payment Term B" averaged $8,812,666.00 per election year.

27. The Evaluation Committee consisted of the four County Clerks, the Designated Chief Election Officer, and two members from the disabled community.

28. The Evaluation Committee applied and scored each of the three proposals pursuant to the Evaluation Criteria set forth in the RFP. Based on those scores, Intervenor was determined to be the highest-ranked offeror and Petitioner was determined to be the next highest-ranked offeror.

29. Respondent Cronin's term as the Chief Election Officer for Respondent Office of Elections was scheduled to commence on February 1, 2008. Notwithstanding that, Respondent Office of Elections delayed the solicitation in order to provide Respondent Cronin with an opportunity to review the RFP and the qualified offers prior to the commencement of his term.

30. In an email dated January 2, 2008 to Respondent Office of Elections, Casey Jarman, the County Clerk for the County of Hawaii wrote:

> I've been thinking about the decision to defer completing the contract under the RFP until the new Chief Elections Officer begins. First, I'm not sure the benefits outweigh [sic] the negatives of waiting that long. Second, I'm wondering whether under the procurement process, he has any legal authority to influence the outcome, other than to stop the process. He isn't on the selection committee, didn't attend the demonstrations, and didn't participate in the scoring. As such, how can he be the decision-maker? I thought the recommendation had to come from the selection committee based on the scores. Can anyone enlighten me? Casey.

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the Grand Total under Payment Term B to be $52,875,*944*.00, rather than $52,875,*993*.00 which is the actual sum of all of the prices provided in Payment Term B.

31. On January 2, 2008, the Designated Chief Election Officer replied to Jarman's email:

> Pursuant to the pertinent state law Mr. Cronin's term begins on February 1, 2008. However, because the state is in the midst of the procurement of a new election system for the 2008 election season, Mr. Cronin's responsibilities as the chief election officer have begun prior to the official start of his term. This office has held several phone conferences with Mr. Cronin, and have provided him with the RFP, and the offers (and BAFO responses) by the three qualifying vendors. In addition to these materials, this office has apprised Mr. Cronin of the state's elections requirements, obligations, and procedures. Consequently, Mr. Cronin shall be aware of choices available to the state for the upcoming elections.
>
> However, in his review of the RFP documents Mr. Cronin, understands that his authority as the state's CEO extends only to withdrawing the existing RFP altogether, and re-issuing a new RFP. As you correctly note, he cannot participate in the current RFP as a selection committee member, or attempt to score the offers because he did not attend the demonstrations. Mr. Cronin's decision making encompasses only withdrawing the RFP or allowing it to go forward with the vendor selected by the committee. Because of the state's need to have Mr. Cronin make his decision to proceed as soon as possible, hopefully prior to February 1, 2008, it was incumbent upon this office to provide the incoming CEO all of the available documentation.
>
> While this process may create some delay and unease, it is necessary to ensure that the CEO is well-informed and vested in a decision that is critical to the success of the 2008 elections and beyond.

32. On January 25, 2008, Nago sent an email to the Evaluation Committee stating: "Thank you for your patience. We have received approval from Mr. Cronin to move ahead[3]. The contract is at the AG's Office for review and we will be sending out the notice of award next week."

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[3] According to Respondent Cronin, however, he had no legal authority to act as the State's Chief Election Officer prior to February 1, 2008. Respondent Cronin testified that, "Mr. Quidilla as interim chief election officer at the time had the

33. On or about January 31, 2008, Respondent Office of Elections issued a Notice of Award of the contract to Intervenor. On the same date, Respondent Office of Elections notified Petitioner that its offer had not been selected.

34. The Administrator of the State Procurement Office and the State's Chief Procurement Officer, Aaron Fujioka ("CPO"), had previously delegated the authority to award the contract to the Designated Chief Election Officer.

35. Following the Notice of Award to Intervenor, Petitioner requested a debriefing with Respondent Office of Elections. The debriefing was held on February 12, 2008.

36. Respondent Cronin commenced his term as Chief Election Officer on February 1, 2008 with no prior experience or knowledge of the laws governing elections or procurements in Hawaii.

37. On February 20, 2008, Petitioner submitted a protest of the RFP and award to Intervenor. Among other things, the protest alleged that Respondent Office of Elections had failed to perform a cost and price analysis to confirm the reasonableness of Intervenor's offered price. The protest also alleged that Respondent Office of Elections had engaged in bad faith actions against Petitioner on multiple occasions since 2004.

38. On or about February 20, 2008, Respondent Cronin submitted to the CPO, a request for a waiver of the stay that had been imposed on the solicitation pursuant to Hawaii Revised Statutes ("HRS") §103D-701(f). Respondent Cronin subsequently amended his request in March 2008. No action was taken on the request by the CPO apparently "due to mutual agreement."

39. By letter dated March 3, 2008, Respondent Cronin issued a denial of Petitioner's February 20, 2008 protest.

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authority to make whatever decisions he deemed appropriate concerning the RFP through January 31, 2008." Respondent Cronin explained in his testimony that:

* * * *

> I had no official capacity with the Office of Elections and I expressly stated, I'm not competent legally to be acting in this regard because, number one, at the time I was not a resident of the State of Hawaii and a registered voter – two qualifications necessary to be Chief Election Officer. So anything I said was effectively meaningless.

40. On March 7, 2008, Petitioner filed a Request for Hearing with the Office of Administrative Hearing, Department of Commerce and Consumer Affairs, to review Respondent Cronin's March 3, 2008 denial. Petitioner's request for hearing was designated as PCH-2008-3.

41. On March 12, 2008, Intervenor filed a motion to intervene in the proceeding. By Order dated March 14, 2008, the Hearings Officer granted the motion.

42. On March 17, 2008, Petitioner filed a motion for summary judgment. On the same date, Respondent Cronin filed a motion to dismiss the request for hearing or in the alternative for summary judgment.

43. By Order dated March 20, 2008, the Hearings Officer denied Respondent Cronin's motion to dismiss or in the alternative for summary judgment.

44. By Order dated March 20, 2008, the Hearings Officer granted in part and denied in part Petitioner's motion for summary judgment. The Order stated in pertinent part:

> 1. Pursuant to Hawaii Revised Statutes §103D-312 and Hawaii Administrative Rules Chapter 122, Title 3, Subchapter 15, Respondent had a legal duty to perform an analysis of Intervenor's offered price to determine whether the price was reasonable; and the undisputed evidence established that no such analysis was performed by Respondent prior to the awarding of the contract to Intervenor. To this extent, Petitioner's motion for summary judgment is granted.
>
> 2. Petitioner's motion is denied as to all other issues raised in Petitioner's Request for Hearing. All of those issues remain for hearing.

45. On April 4, 2008, Petitioner filed a Motion for Clarification and/or Reconsideration of Order Granting in Part and Denying in Part Petitioner's Motion for Summary Judgment, Filed on March 20, 2008. By Order dated April 10, 2008, the Hearings Officer denied the motion.

46. On April 4, 2008, Respondent Cronin submitted a Second Amended Waiver of Stay Request to the CPO. On April 8, 2008, Respondent Cronin submitted

supplemental information in connection with his Second Amended Waiver of Stay Request. On April 11, 2008, the CPO granted the request.

47. On April 18, 2008, Petitioner submitted a protest of the CPO's decision to grant the waiver of the stay, and on April 30, 2008, filed a request for hearing in connection with the April 18, 2008 protest. Petitioner's request for hearing was designated as PCH-2008-6.

48. On or about May 7, 2008, the parties entered into and the Hearings Officer approved an Agreement among the parties. The Agreement was filed on May 8, 2008. Among other things, the parties agreed to the following:

* * * *

> a. The Award of Contract to Hart is terminated as of the Effective Date of this Agreement.
>
> b. The OE has until **May 14, 2008** to perform its duties pursuant to Hawaii Revised Statutes ("HRS") § 103D-312, Hawaii Administrative Rules ("HAR") Chapter 122, Title 3 and Subchapter 15 to perform a cost and/or price analysis as required by applicable law, of Hart's offered price to determine whether the price was reasonable.
>
> c. The evaluations and ranking of the proposals shall stand undisturbed and are subject only to the required cost and/or price analysis as required by applicable law, to be performed by the OE in accordance with this Agreement.
>
> d. OE shall perform a cost and/or price analysis pursuant to methods and means required by applicable law. Upon completion and notice of award or rejection of the proposal price as "clearly unreasonable," the documentation of the cost and/or price analysis shall be delivered to all Parties, along with contents of contract file on **May 14, 2008**.

* * * *

49. On or about May 8, 2008, the parties entered into and the Hearings Officer approved a Stipulation and Order Governing Confidentiality of Documents; Exhibit "A".

50. Pursuant to the Agreement, Respondent Cronin began work on a cost and/or price analysis of Intervenor's offered price. For that purpose, Respondent Cronin contacted several individuals at various mainland universities. For various reasons, however, none of those individuals was able to assist Respondent Cronin. Respondent Cronin also contacted the State Department of Accounting and General Services ("DAGS") for assistance but was informed that there was no one available to perform the analysis. Although he had no accounting background and had never performed a cost and/or price analysis, Respondent Cronin concluded that he "was on his own," and prepared a Cost or Price Analysis ("COPA") within Respondent Office of Elections.

51. Respondent Cronin acknowledged that he had never performed a cost and/or price analysis and had no idea how to conduct such an analysis. Respondent Cronin did not retain anyone qualified to perform or assist him in performing the cost and/or price analysis.

52. On or about May 7, 2008, Respondent Cronin completed the COPA and concluded that Intervenor's "proposal is reasonable under the RFP and Haw. Rev. Stat. §103D-312 and Haw. Admin. R. §3-122-97(b)(2)." Respondent Cronin did not issue his COPA until May 14, 2008.

53. Nago reviewed parts of the COPA prior to its issuance but did not believe it was his responsibility to make any corrections.

54. The COPA reflected the fact that Intervenor's price for the 2008 elections was $6,599,998.00. Respondent Cronin calculated the State of Hawaii's ("State") share to be approximately $1.3 million, and the counties' share to be $1.3 million, allocated in differing amounts to the individual counties. Respondent Cronin intended to pay the balance with federal Help America Vote Act ("HAVA") funds.

55. To confirm the availability of sufficient funds to pay for the contract with Intervenor, Respondent Cronin asked each of the County Clerks for a "commitment" of the necessary funds to pay the counties' $1.3 million share of Intervenor's 2008 price.

56. On May 9, 2008, two days after signing the Agreement with the other parties and agreeing to do a cost and/or price analysis, Respondent Cronin submitted a

Notice of and Request for Exemption from Chapter 103D to the CPO in connection with the RFP. The exemption request was made without the knowledge of Petitioner and prior to the issuance of the COPA on May 14, 2008. The request stated in part:

> Procurement Officer Kevin Cronin, chief election officer, (PO) respectfully requests the state procurement officer grant exemption to the Hawaii Leased Voting Equipment System, RFP-06-047-SW, under Haw. Admin. R. §3-120 and Haw. Rev. Stat. §103D-102, to enable the procurement officer to execute a one year contract with Hart InterCivic, Inc., (Hart) to provide the state a voting equipment system for the 2008 election at the cost of $8,990,811.06, a loss to Hart of $3,182,487.00 as appears in its confidential proprietary statement shown to the state procurement officer. This cost consists of $6,599,999.00 to be paid in 2008, funds currently appropriated and available and the $2,390,812.06 balance to be waived if the pending appeal arising from the RFP's notice of award to Hart is decided in favor of the PO.

* * * *

57. Respondent Cronin's exemption request sought to have the RFP exempted from the State Procurement Code as set forth in HRS Chapter 103D ("Code") "to enable the procurement officer to execute a one year contract with Hart InterCivic, Inc., (Hart) to provide the state a voting equipment system for the 2008 election at the cost of $8,990,811.06 . . ." At the time he submitted the exemption request, Respondent Cronin had no basis to believe that the $8,990,811.06 price was reasonable and did not have certifications of the availability of funds sufficient to cover the full contract price.

58. On May 14, 2008, Respondent Cronin wrote to Intervenor and said in part:

* * * *

> Based on the cost and price analysis, I conclude that Hart's price for its voting equipment system described in such analysis is reasonable and the best value for the state of Hawaii at this time.

> Accordingly, I inform you that Hart is awarded the contract to provide the state's new voting equipment system for equipment and services for the bid price. The notice of award gives rise to the right to enter into a contract under the terms in Hart's proposed Contract for Goods or Services Based Upon Competitive Sealed Proposals and bond(s) that Hart previously executed and remains in my possession at this time. I anticipate signing the contract very soon.

59. Respondent Cronin signed the Contract with Intervenor on May 14, 2008 ("Contract"), the same day he issued the COPA.

60. At the time he executed the Contract with Intervenor, Respondent Cronin was aware that the City and County of Honolulu ("City") had only appropriated $443,000.00.[4] Respondent Cronin did not believe the lack of certifications prevented him from executing the Contract with Intervenor on May 14, 2008 and allowing Intervenor to begin performance.

61. In May or June 2008, Respondent Cronin realized that the funds certification requirement had not been met by the "commitments" he had requested and that the Contract with Intervenor would not be legally binding under HRS §103D-309 unless he obtained certifications[5].

62. Respondent Office of Elections did not receive the certification of funds from the County of Maui until approximately June 9, 2008.

63. Because the required certifications from all of the counties were not timely received, Respondent Cronin obtained a Contract Certification from DAGS on June 10, 2008[6], certifying that there was an appropriation balance of $6,599,999.00 for the Contract with Intervenor consisting of $1,350,000.00 in the account of Respondent Office of Elections and an additional $5,249,999.00 from federal HAVA funds.

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[4] Petitioner contends that Respondent Cronin violated HRS §103-9 by executing the Contract when the City had appropriated only one-half of its required share. Petitioner's claim, however, is beyond the scope of the Hearings Officer's authority.

[5] According to the evidence, Respondent Cronin was unaware of and had not been informed that certifications of funds from the counties had been requested by Rex Quidilla or Scott Nago prior to February 2008.

[6] Because Respondent Cronin did not secure the Contract Certification from DAGS until June 10, 2008, he acknowledges that the "contract had no force and effect until June 10" and contends that "[w]hatever performance Hart conducted in the interim while no stay was in place, was at its own risk."

64. By May 2008, Respondent Cronin was aware that Intervenor's offered price included eScan voting booths and mail services that Respondent Office of Elections did not need, resulting in a credit balance from 2008 to 2012 of $423,653.00. Intervenor proposed and Respondent Cronin readily agreed to apply the credit balance to "offset future services or products you might want, like SOE ENR, VEO, etc." For the 2008, 2010 and 2012 elections, Intervenor proposed providing the State with SOE Training at a cost of $145,800.00, $156,600.00, and $156,600.00, respectively. Respondent Cronin agreed to apply the credit balance for the additional training rather than seek a reduction in the Contract price for the unnecessary equipment. Intervenor's proposal price already included 168 hours of training for Respondent Office of Elections' and the counties' staff, 160 hours of training for poll worker trainers, and 112 hours of training for poll workers.

65. On May 16, 2008, the CPO disapproved Respondent Cronin's May 9, 2008 exemption request and found:

> OE signed the 5/7/08 Agreement, negating OE's representation in its 4/8/08 request, and containing conditions, dates and timeline that shall be complied with. Any approval of this exemption at *this time would be an act of bad faith by allowing OE to circumvent the signed Agreement.*
>
> Therefore, this request for exemption is denied.

(Emphasis added).

66. On May 21, 2008, Petitioner protested the May 14, 2008 award of Contract to Intervenor alleging, among other things that:

> 1. The procurement officer ignored his affirmative duty to confirm the reasonableness of Hart's proposal price as mandated by applicable procurement rules; and
>
> 2. The procurement officer continued the long-term mishandling of election services through unfair and improper cost and price analysis and other procurement actions calculated to favor Hart.

67. The May 21, 2008 protest also alleged that, "[t]he analysis does not include a certification of availability of funds to show Hart's price was acceptable and contract award could be made."

68. On May 22, 2008, Respondent Cronin denied the May 21, 2008 protest and submitted a Waiver of Stay Request to the CPO.

69. On May 23, 2008, the CPO disapproved of the May 22, 2008 Waiver of Stay Request.

70. On May 29, 2008, Petitioner filed a request for hearing in connection with Respondent Cronin's May 22, 2008 denial of Petitioner's protest.

71. On May 29, 2008, Respondent Cronin submitted an Amended Waiver of Stay Request to the CPO[7]. The request was granted on May 30, 2008.

72. On June 4, 2008, Petitioner filed a request for hearing to contest the CPO's May 30, 2008 decision granting Respondent Cronin's request for a waiver of the stay.

73. The parties subsequently agreed to have Petitioner's June 4, 2008 request for hearing heard and decided first. Consequently, the matter came on for hearing on June 5 and 6, 2008.

74. On June 5, 2008, Petitioner filed a Motion for Partial Summary Judgment as to "Substantial State Interest" Determination ("Motion for Partial Summary Judgment"). The Motion for Partial Summary Judgment sought the reinstatement of the stay because the waiver of the stay would allow work to proceed "without certification of the availability of funds by the Comptroller of the State and/or the Directors of Finance of the various counties in violation of Hawaii Revised Statutes §§103D-309 and 103-9."

75. A response to the Motion for Partial Summary Judgment was filed on June 10, 2008 by Respondents. Respondents argued that Respondent Cronin was new and did not realize he needed "specific pieces of paper certifying the contract amount." Respondent Cronin only learned of his legal obligations to obtain certificates of available funding when advised by his counsel of the requirement on June 4, 2008.

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[7] The Hearings Officer notes that the request did not contain any indication that the certificates of available funds had been obtained.

76. Petitioner had requested in writing that Respondent Office of Elections provide it with the certifications of funds as early as April 2, 2008, and had subpoenaed Respondent Office of Elections on May 30, 2008 to obtain those certifications.

77. In response to the Motion for Partial Summary Judgment and prior requests by Petitioner for copies of the certificates, counsel for Respondents filed an affidavit on June 9, 2008 which stated in part:

* * * *

> 8. When the certificate was raised again by counsel for petitioner, I reminded Elections and was assured it would be taken care of. Ultimately, I assumed that if the certificates still had not been turned over, it would be made available on May 14, 2008 along with the responsive and relevant documents pursuant to the Agreement.
>
> 9. It was not until the pre-hearing conference on June 4, 2008 that we learned the certificate was still outstanding and had not been produced.
>
> 10. As soon as [sic] the pre-hearing conference concluded, I returned to my office and began making inquiries to determine what had and had not been produced. After investigation and review, I learned and concluded that due to miscommunications between our office and the Office of Elections, all of the certificates had in fact not been collected by Elections, and while all of the "certificates" that had been obtained were produced to petitioner, those documents were not all satisfactory certificates.
>
> 11. At about 12:30 p.m. on June 4, 2008, I received by email, documents from the Office of Elections which it believed were the certificates. There were four documents. The certificate from Hawaii County was complete. (Elections Exhibit 1). The certificate from the City and County of Honolulu certified an amount which was 50% of its share of the Hart contract and was endorsed by the County Clerk but not endorsed by either the director of [sic] finance or the chief financial officer (Elections Exhibit 2). The certificate from Maui did not specify an amount and

was endorsed by the Council Chairman. (Elections Exhibit 3). There was no certificate from Kauai County, but a "confirmation of funds." (Elections Exhibit 4). There was no certificate from the DAGS for the State's share of the contract. The documents from Hawaii, Maui, and the City that had been emailed to me had been produced previously to petitioner which included them as its exhibits W, X, and Y respectively.

12. That same afternoon, I contacted Elections and informed Mr. Cronin of the missing and incomplete certificates. I am continuing to work with Mr. Cronin to obtain the remaining certificates. I also contacted the counties and DAGS directly to explain the situation.

13. Later that same afternoon on June 4, 2008, I confirmed with Mary Pat Waterhouse, director of finance of the City and County of Honolulu, that the appropriate signatory for the City's certificate was Barbara Marshall, Chair of the City Council, and was told that Ms. Marshall was out of the office, and not to return until Tuesday, June 10, 2008.

* * * *

15. Later that afternoon on June 4, 2008, I received a certificate from Maui County. (Elections Exhibit 5). I requested confirmation from Maui County that the Council Chairman, while being the Chief Procurement Officer of the legislative branch of the County, was also the chief financial officer of the legislative branch who could endorse the certificate, and that the certificate be for 100% of Maui's share instead of the 50% reflected in its certificate.

16. On June 5, 2008, I spoke with Peter Nakamura, County Clerk for the county of Kauai, and on June 6, 2008, I received a certificate from Kauai that was satisfactory. (Elections Exhibit 6).

17. On June 6, 2008, after the hearing, I met with DAGS to discuss the certificate for the State's share of the contract. To date, there still is no certificate from DAGS.

18. On June 6, 2008, I received a voice mail from Diane Kawauchi, Deputy Corporation Counsel of the City and County of Honolulu, confirming that Ms. Marshall was out of town and that Ms. Marshall would execute the certificate.

19. I have a meeting with Ms. Kawauchi and other members of the Corporation Counsel of the City and County of Honolulu on June 9, 2008, and will discuss the remaining issue about its certificate amount being 50% instead of the requisite 100% of the amount due from the City. I also have continued meetings with DAGS.

20. There was never the intent to deceive or evade the issue. Petitioner's announcement on June 4, 2008 that the certificates had not been produced was startling. Equally startling was the discovery that the documents which had been produced were believed by Elections to be the certificates. As soon as the issue was raised at the pre-hearing conference on June 4, every effort has been made to ascertain the nature of the situation and to remedy it.

21. There was always money in the state fisc to cover the contract amount, and an appropriation in excess of the amount of the first year of the Hart contract. At the time of award of the contract, Mr. Cronin knew there were state funds to cover the State's portion of the contract. He also had the commitment of the counties to pay their respective share of the contract, of which, 50% was due at the time of contract execution. I believe he felt these commitments were sufficient. He did not submit the appropriate documents to DAGS, and as a result DAGS did not issue its certificate.

22. I hope to receive certificates from the City and DAGS and clarification from Maui that the Council Chair is the chief financial officer, very shortly and will submit them as soon as possible thereafter[8].

* * * *

[8] On June 10, 2008, Respondents filed their exhibits which included certifications from DAGS, as well as from the counties of Kauai, Maui, and Hawaii.

78. It was not until Respondent Office of Elections served its memorandum in opposition to Petitioner's Motion for Partial Summary Judgment on June 10, 2008, that it produced the "Contract Certification" from DAGS.

79. In its reply memorandum to the Motion for Partial Summary Judgment filed on June 12, 2008, Petitioner requested, among other things, payment of its attorneys' fees and costs incurred in attempting to obtain the certifications of funds for the Contract, commencing from its initial request for the Contract file documents on February 4, 2008, including the filing of its motion for summary judgment on this issue.

80. On June 10, 2008, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision vacating the CPO's May 30, 2008 waiver of the stay.

81. On June 12, 2008, Petitioner's Motion for Partial Summary Judgment as to "Substantial State Interest" Determination came on for hearing. After hearing the argument of counsel, the Hearings Officer denied the motion.[9] Thereafter, the hearing on Petitioner's May 29, 2008 request for hearing commenced. As a result of ongoing settlement discussions among the parties, the hearing was rescheduled and reconvened on June 24, 25, and 26, 2008 and was completed on June 27, 2008.

82. On June 12, 2008, two days after the Hearings Officer had issued his decision vacating the CPO's May 30, 2008 decision granting Respondent Cronin's request for a waiver of the stay, Respondent Cronin submitted another waiver of stay request to the CPO. The request, however, was withdrawn on June 16, 2008.

83. One of Respondents' expert witnesses, Lloyd Unebasami,[10] the former State Chief Procurement Officer, testified, among other things, that HRS §103D-312 and the implementing rules concerning cost and/or price analysis are intended to protect the State from paying unreasonable contract prices and allows the State to avoid any obligation to award a contract at an unreasonable price, even if the offeror's proposal was ranked first. Unebasami acknowledged that a cost and/or price analysis is separate from a proposal evaluation and is conducted after the evaluation process identifies the offeror to be ranked

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[9] The motion was denied as the Hearings Officer's June 10, 2008 decision vacating the CPO's May 30, 2008 decision rendered the waiver issue moot. Petitioner's claim for monetary sanctions was preserved.

[10] Unebasami also testified as Respondents' accounting expert, even though his certified public accounting license has been inactive for over 20 years. The Hearings Officer found his testimony and opinions on the COPA to be largely conclusory, superficial, and contradicted by the overwhelming evidence.

first in the competition and "prior to having a signed contract." Unebasami also testified that under the Code, cost and price analysis are routinely performed on contracts, after award and before contract execution.

84. The prices of Intervenor's proposed goods and services under the Contract add up to only $41,127,415.00, even though Intervenor's proposed price is $52,875,993.00. This difference in prices was not accounted for or otherwise addressed in the COPA.

85. Although the CPO testified that the Evaluation Committee fulfilled the requirement to analyze cost and price data when they applied the mandatory point allocation formula for scoring of price, he also testified that the cost and/or price analysis requirements were separate from the proposal evaluation process and that he did not know if the Evaluation Committee applied or considered any of the factors required by the rules governing the performance of a cost and/or price analysis. The CPO acknowledged that he did not read the COPA and agreed that a proposal price would be unreasonable if it included payment for equipment the State did not need or if the total contract price exceeded the individual pricing of all goods and services.

86. With respect to the COPA, Respondent Cronin believed the standard in government contracting is "whatever the vendors can get, that is what it is."

87. Respondent Cronin's conclusions in the COPA were partly based on his belief that Petitioner's proposal included the iVotronic machines. However, those machines were not included in Petitioner's BAFO.

88. In the COPA, Respondent Cronin indicated that a Direct Recording Electronic ("DRE") device is "required by HAVA". However, Petitioner's AutoMark is HAVA certified and complies with federal law. Nago testified that HAVA does not require DRE devices, did not recall ever saying that HAVA required DRE devices, and believed he would not have told Respondent Cronin that HAVA required DRE devices because it is not true.[11]

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[11] Respondent Cronin also testified before the House Committee on Judiciary on March 25, 2008 and the House Committee on Legislative Management on April 4, 2008, that the "use of an electronic (DRE) voting system is . . . required by federal law."

89. In the COPA, Respondent Cronin stated:

> A cost and price comparison between Hart's and ESS's proposed voting equipment systems generate several points.
>
> First, and foremost, the sufficiency of Hart's provided cost and price data and the insufficiency of ESS's proposal because it refused to provide such financial information in its proposal and best and final offer (BAFO) renders a cost and price comparison impossible to perform. ESS did not respond to the PO's question, "What would the cost be to the State (to upgrade its system to satisfy the next generation of federal voting system guidelines)?" (footnote omitted). ESS did not provide the state with the company's cost and pricing information. Instead as developed further below, ESS declined to reveal the additional costs and contract pricing that were inherently included in its proposal to comply with the federal obligations. The company's failure to provide such cost and price data which then when asked and which now prevents the PO to reasonably perform a reasoned cost and price comparison. (footnote omitted).

* * * *

90. The evidence established that Petitioner's audited financial statements were in fact included in the proposal it submitted in response to the RFP, and that Petitioner *did* respond to Respondent Office of Elections' questions in its BAFO and Post-BAFO Submission. Respondent Cronin admitted during his testimony that he never requested that Petitioner provide cost and pricing data and never caused such a request to be made.

91. In the COPA, Respondent Cronin states that Intervenor would upgrade its equipment to current VVSG standards "at no cost to the State." The evidence established that Intervenor's offered price includes a charge of $2.5 million for a one-time upgrade. According to its Post-BAFO Submission, Petitioner would not pass costs to the State incurred in connection with federal certification and its equipment was being upgraded with both 2005 and 2007 standards.

92. The cost data that was provided by Intervenor to Respondent Cronin for the COPA was not certified as accurate, complete and current.

93. The cost data that was provided by Intervenor to Respondent Cronin for the COPA was insufficient to completely evaluate Intervenor's direct labor and direct material costs. According to the available data, Intervenor's total cost for labor is $1,696,500.00 in contrast to Petitioner's total price of $1,030,394.00 for project management and all related labor for the 2008 elections. Thus, from the available information, Intervenor's cost exceeds Petitioner's price for labor by more than $650,000.00.

94. Intervenor's direct material costs amount to $3,518,174.00 plus third-party hardware of $731,268.00 for a total cost of direct materials of $4,249,442.00 for 2008. The pricing for this direct material for 2008 is $6,332,688.00 plus $889,610.00 for third-party hardware, for a total price of $7,222,298.00 for 2008, indicating that Intervenor is charging a significant premium on equipment it purchases from third-parties for resale to the State.

95. According to the COPA, the basis of the indirect cost allocations is the cost data provided by Intervenor, and Intervenor's combined overhead and General and Administrative ("G&A") costs are approximately 48% of direct costs. The Income Statement information provided by Intervenor contains only 7 line items. The entire amount for all overhead and G&A items are combined into a line item designated, "Operating Spending." There is no separate listing of any overhead or G&A costs in Intervenor's financial information. Thus, it is impossible to determine the percentage of overhead and G&A costs to the total direct costs for Intervenor since the financial information does not provide any details for those costs.

96. In the COPA, Respondent concludes that "Hart's overhead and G&A percentages are consistent with manufacturers in the elections industry", and that the financial statements submitted by Intervenor "reasonably verify the reasonableness of Hart's overhead and general and administrative costs."

97. The cost data that was provided by Intervenor to Respondent Cronin for the COPA does not provide a breakdown of the cost categories that are included in the overhead

and G&A line items. In addition, Intervenor's audited financial information does not provide any breakdown of the line items included in Intervenor's overhead and G&A costs. In fact, Intervenor's audited financial information combines other types of expenses with the overhead and G&A costs, so that the amounts of Intervenor's overhead and G&A costs cannot be determined from the audited financial information. Without this breakdown, it is impossible to determine what items were included in the overhead and G&A costs.

98. In the COPA, Respondent Cronin concludes that Intervenor's profit percentage is 1.9%. Nancy Evans Tudor, Petitioner's expert witness in the area of accounting, opined that due to this very low profit percentage, it was likely that Intervenor's overhead and G&A costs were misallocated and that Intervenor's overhead and G&A costs appeared high.[12]

99. In the COPA, Respondent Cronin reviewed catalog prices for specific pieces of equipment in Intervenor's proposal. However, the catalog prices reviewed were for the purchase rather than the lease of the equipment.

100. In the COPA, Respondent Cronin provided information on contracts that Intervenor had in other jurisdictions including, Sonoma County, Kane County, Orange County and Harris County, as part of a comparison of open market pricing. All of those contracts, however, involved the purchase rather than the lease of the equipment.

101. All of these jurisdictions received a significant discount on their purchases of voting machines. Sonoma County received a discount of about 9.5% while Harris County received a discount of approximately 25%.

102. In comparing the contracts in those jurisdictions to the present one, Respondent Cronin concluded that:

> Hart's prices to the state are approximately 20% higher per unit for the same equipment that Hart sold to Sonoma County, CA in 2006. This appears to be a premium for the voting equipment, but the price is not necessarily unreasonable in this case. The reason is the price increase may and/or could reflect Hart's increased costs to manufacture and obtain such equipment that the company is charging in its public catalog.

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[12] The Hearings Officer found the testimony of Tudor to be credible and her conclusions regarding the COPA to be supported by the record and largely undisputed. Intervenor's accounting expert, Mark Hunsaker, did not render any opinions on the COPA or on the reasonableness of Intervenor's offered price.

103. Tudor opined that:

* * * *

The procurement officer has provided as Appendices 6 to 9 of the COPA information on other contracts that Hart has made with other jurisdictions, as part of an analysis of open market pricing. Again, all of these contracts are for the purchase of voting systems, not leases. Also, of course, all of these contracts are several years old. The procurement officer makes the statement that the fact that these contracts are several years old makes a 20% price increase reasonable. I do not agree. In Hart's own contract it makes the assumption of a 3% CPI increase. Appendix 7 is for a Kane County contract in which Kane County purchased 820 e-slate units and 270 DAU (ADA upgrade) units in Oct. 2005 for approximately $3M, or a all-inclusive unit cost of $3,658. At a 3% per year increase for 3 years, the total unit price would be approximately $4,000 per unit. The unit cost quoted to the State is $3,000 per unit plus a $600 additional fee for each ADA upgrade, plus a $3,000 additional fee for the judge's booth controller (JBC), $1,200 for the verifiable ballot option (VBO), and approximately $333 additional hardware costs per unit (totaling $8,133 per unit) plus additional software costs. Hawaii will be obtaining 868 voting machines, ½ ADA & ½ regular for an average cost over the 6 election years of over $5,291 per unit PER ELECTION YEAR. The unit price is calculated as $52,875,993 Hart's total price less non-hardware and non-software costs from Schedule A (attached) of $11,860,487 for the labor, $768,489 for the storage, $10,188,306 for the ballots, $661,271 for the supplies, $124,803 for the insurance, $22,306 for the audio recording and translation, $1,083,910 for the annual licenses, and $612,482 for the spare items with the resulting number divided by 6 elections and 868 machines. This is almost one and a half times the amount paid by Kane County to purchase voting equipment in 2005 for use in as many elections as it chooses. Although this comparison is slightly skewed because Kane County only purchased 270 ADA units and Hart's Hawaii contract included 434 ADA units, the result of this calculation is still true. Kane

> County paid $3,658 to purchase the equipment **one** time, Hawaii would pay $5,291 **SIX** times to lease similar equipment.
>
> In Hart's proposal to Cuyahoga County, Ohio, on May 21, 2008, Hart proposed a total contract price of $5,705,000 for 1350 machines of which 675 were to be ADA e-slate machines with the related hardware and 675 were to be e-scan machines for the rest of the voting public. The machinery and the entire voting system provided is extremely similar to the Hawaii contract, except that the average cost including the purchase of the machines and services for operating the election for the first year is approximately $4226 per unit as opposed to Hawaii's average cost of $5291 per unit PER ELECTION YEAR FOR 6 ELECTION YEARS. In addition, see Schedule G for a comparison of certain unit costs. Note that in both the Cuyahoga County and the Hawaii contracts, the e-slate voting booth caddys are at no charge, but for Hawaii, the wheels for the caddys will be a total cost of $5500.
>
> * * * *

104. Intervenor provided Cuyahoga County a discount of at least 40% on every category of its proprietary machinery and about a 60% discount on its proprietary software as compared to its pricing in Hawaii.

105. According to the evidence, Intervenor's offered price includes contingency costs for unforeseeable expenses.

106. Respondent Cronin states in the COPA that one of the equipment pieces is priced $1,200.00 less than Intervenor's price catalog. This would be a discount of $1,200.00 on 434 machines or $520,800.00 on the total contract of $52,875,993.00 - less than a 1% discount.

107. Respondent Cronin states in the COPA that the in-house estimate of the 2008 election cost was $6 million, based on prior experience. Intervenor did propose less than $7 million for 2008 to meet the State's budget allocation. However, the average cost for

the six election years is approximately $8.8 million per election year or approximately $2.8 million over the in-house budgeted amount.

108. Respondent Cronin states in the COPA that in "sharp contrast to Hart," Petitioner was proposing as its next generation voting equipment, equipment which exists as equipment in a "voting system testing laboratory" whose results "have been filed with the EAC and are currently under review for federal certification." The evidence, however, established that Intervenor has no equipment being reviewed for federal certification and has no "next generation equipment" in the pipeline.

109. On June 27, 2008, counsel for Petitioner informed the parties and the Hearings Officer that Petitioner would no longer seek the termination of the Contract for the 2008 elections in order to allow Respondent Office of Elections and Intervenor to complete their preparations for those elections. According to Petitioner's counsel, Petitioner would continue to pursue all other available remedies.

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.

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).

At issue here[13] is whether Intervenor's proposal should have been rejected pursuant to Hawaii Administrative Rule ("HAR") §3-122-97(b)(2)(C). This rule requires the rejection of a proposal where the proposed price is clearly unreasonable. According to

[13] The Hearings Officer previously determined that (1) Respondent Office of Elections had a legal duty to perform an analysis of Intervenor's offered price to determine whether the price was reasonable and that (2) no such analysis had been performed by Respondent Office of Elections prior to the awarding of the contract to Intervenor. Respondent Cronin subsequently agreed to and did prepare the COPA. Accordingly, any further argument that a cost and/or price analysis is not required is irrelevant to this proceeding.

Respondent Cronin, Intervenor's offered price of $52,875,993.00 was reasonable as evidenced and confirmed by the COPA he completed on May 7, 2008 and the cost and pricing data that he had requested[14] and relied upon in preparing the COPA.

A. Standing.

On December 6, 2007, the offerors were asked, "With the Election Assistance Commission reviewing the next iteration of the Voluntary Voting System Guidelines ("VVSG"), which of your voting equipment would need to be upgraded to meet these requirements? What would the cost be to the State?" In its Post-BAFO Submission, Petitioner responded:

* * * *

> *ES&S' pricing for the State of Hawaii already includes all costs for the supply and implementation of voting system equipment proposed in our response.* ES&S will not pass the costs to the State incurred in connection with federal certification to the 2005 VVSG. Should the State request system modifications that are unique to the State of Hawaii, ES&S will perform such modifications at terms and pricing to be mutually agreed upon by the parties.

(Emphasis added).

Respondent Cronin argues that the foregoing response by Petitioner referenced only the present iteration (2005 VVSG) and did not include the cost or price that Petitioner would charge for compliance with the next iteration of the VVSG as the RFP requires. Respondent Cronin alleges that the omission of this material term reduces the proposal to the status of an illusory and, consequently, a nonresponsive proposal, and denies Petitioner aggrieved-party status. *See e.g., Hawaii School Bus Assn v. DOE; PCH-2003-3 (May 16, 2003)(standing to bring a protest is conferred upon any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract).*

The RFP and addenda obligated the contractor to provide the current federal VVSG certifications for voting machines used in each of the future elections covered by the

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[14] Under the Agreement entered into by the parties on or about May 7, 2008, Intervenor was required to provide Respondent Office of Elections "information within its custody and control containing cost and pricing data", within 72 hours of any such request. The Agreement also provided that within 72 hours of Intervenor's production of documents and data, Respondent Office of Elections "shall determine whether any additional documents and data are required to perform its analysis and the OE will request additional documents and data from Hart." Consequently, Respondent Cronin had full opportunity to obtain the information he deemed necessary to complete his COPA of Intervenor's offered price.

Contract at no further cost to the State. The evidence established that in response to the RFP, Petitioner submitted a firm offer which included pricing breakdowns for each election cycle in which the RFP required renewed federal VVSG certifications at no cost to the State. Thus, by virtue of its offer, Petitioner agreed to provide throughout the term of the Contract, federal VVSG certified equipment at the price breakdown offered at "no further cost to the State."

Moreover, a plain reading of Petitioner's Post-BAFO Submission leads the Hearings Officer to conclude that Petitioner's response adequately established that Petitioner's price was fixed and included all upgrades as the RFP required ("ES&S' pricing for the State of Hawaii already includes all costs for the supply and implementation of voting system equipment proposed in our response"); that Petitioner would not pass any costs forward for the only iteration presently in effect, the 2005 VVSG ("ES&S will not pass the costs to the State incurred in connection with federal certification to the 2005 VVSG"); and that in accordance with the applicable general terms of the RFP, Petitioner would exercise its right to negotiate the price for any modifications Respondent Office of Elections might require that are "unique" to Hawaii (not the generally applicable federal VVSG standards). Based on these considerations, the Hearings Officer concludes that Respondent Cronin's argument lacks merit.[15]

B. Respondent Cronin's Analysis of Intervenor's Offered Price and Underlying Costs.

The consideration by the Evaluation Committee of price as one of the Evaluation Criteria provided by the RFP, was limited to the application of the formula provided in Section 5.020 and HAR §3-122-52(d), and was solely for the purpose of allocating points and ranking the proposals. Application of the formula to the offered prices was not designed to and does not provide any analysis of the reasonableness of the price and underlying costs of the offeror receiving the most points by the Evaluation Committee. That analysis is provided by the preparation of a cost and/or price analysis.[16] The aim of a cost

[15] It is also worth noting that Respondent Cronin's contention that Petitioner's proposal is "illusory" and therefore nonresponsive to the RFP was raised for the first time in his July 9, 2008 written closing argument. The argument was apparently never raised in any of Respondent Cronin's prior filings, including his March 17, 2008 motion to dismiss the request for hearing or his June 3, 2008 response to the May 29, 2008 request for hearing.

[16] Without such an analysis, it would be difficult, if not impossible, to determine with any certainty whether an offer should be rejected as "clearly unreasonable" as required by HAR §3-122-97(b)(2)(C).

and/or price analysis is therefore not to circumvent or otherwise interfere with the Evaluation Committee's evaluation and ranking of offers. Rather, it is to confirm the reasonableness of the offered price and underlying costs of the vendor once the vendor is selected by the Evaluation Committee, and, ultimately, to ensure that tax dollars are spent prudently. Indeed, one of the underlying purposes of the Code is to "foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process." *Standing Committee Report No. S8-93, 1993, Senate Journal at 39.* Thus, the Evaluation Committee's evaluation of the proposals and the price and/or cost analysis together serve to not only enable the government to obtain the best products, but to do so at fair prices.[17]

HAR §3-122-57(a) requires that the award of the contract be made to the responsible offeror "whose proposal is determined . . . to provide the *best value to the State taking into consideration price and the evaluation criteria* in the request for proposals . . ." (emphasis added). HAR §3-122-57(b) directs the procurement officer to refer to "section 103D-312, HRS, and subchapter 15 for cost or pricing data requirements." Thus, in order to determine whether an offered price represents the "best value",[18] the procurement officer must obtain and analyze the offeror's cost or pricing data.[19] Among other things, the purpose of requiring the procurement officer to obtain the cost and pricing data is "to evaluate . . . the *reasonableness of the total cost or price*". HAR §3-122-128(7)(emphasis added). In making this evaluation, HAR §3-122-130 provides as follows:

> Evaluation of cost or pricing data. Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent state price and cost estimates. They

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[17] Even though Respondent Cronin continues to maintain that a cost and/or price analysis was not required, his own expert, Lloyd Unebasami testified:

> If the procurement officer knows that this is the only system available and that the State wants that system, this is why you have that part of the law that says that you should do a cost and price analysis to making sure that the value that you contract with that company is a good and fair price.

[18] HAR §3-122-1 defines "Best value" as the most advantageous offer determined by "evaluating and comparing all relevant criteria *in addition to price* so that the offer meeting the overall combination that best serves the State is selected . . ." (emphasis added).

[19] Pursuant to HAR §3-122-123(1), the procurement officer shall require cost or pricing data or both in support of, among other things, any contract resulting from competitive sealed proposals expected to exceed $100,000.00.

> shall also include consideration of whether the costs are reasonable and allocable under the pertinent [Cost Principles provided in the] provisions of chapter 3-123.

While the Code does not require that the cost and/or price analysis be performed by a certified public accountant, the analysis must nevertheless be fair and reasonable, done in good faith, and consistent with the requirements of the Code and its implementing rules. The law governing the performance of cost and/or price analysis includes, but is not limited to, the following:

> **§ 103D-312. Cost or pricing data.** (a) A contractor, except as provided in subsection (c), shall submit cost or pricing data and shall certify that, to the best of the contractor's knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date prior to the date of:
>
> (1) The pricing of any contract awarded by competitive sealed proposals or pursuant to the sole source procurement authority, where the total contract amount is expected to exceed an amount established by rules adopted by the policy board; or
>
> (2) The pricing of any change order or contract modification that is expected to exceed an amount established by rules adopted by the policy board.
>
> (b) Any contract, change order, or contract modification under which a certificate is required shall contain a provision that the price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the State finds that the price was increased because the contractor furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between the parties.

* * * *

Cost and pricing data are defined in HAR §3-122-122:

Cost or pricing data defined. Cost and pricing data means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of a prospective contractor's judgment about future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all facts that can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include factors as:

(1) Vendor quotations;

(2) Nonrecurring costs;

(3) Information on changes in production methods and in production or purchasing volume;

(4) Data supporting projections of business prospects and objectives and related operations costs;

(5) Unit cost trends as those associated with labor efficiency;

(6) Make or buy decisions;

(7) Labor union contract negotiations; and

(8) Information on management decisions that could have a significant bearing on costs.

In addition, HAR §§3-122-128, 129 and 130 provide:

§3-122-128 Cost analysis techniques. Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

(1) Specific elements of costs which may include direct labor, indirect costs, direct material, other direct costs, subcontract costs, and fixed fee or profit;
(2) The necessity for certain costs;

(3) The reasonableness of amounts estimated for the necessary costs;

(4) The reasonableness of allowances for contingencies;

(5) The basis used for allocation of indirect costs;

(6) The appropriateness of allocations of particular indirect costs to the proposed contract; and

(7) The reasonableness of the total cost or price.

§3-122-129 Price analysis techniques. (a) Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

(1) Price submissions of prospective bidders or offerors in the current procurement;

(2) Prior price quotations and contract prices charged by the bidder, offeror or contractor;

(3) Prices published in catalogues or price lists;

(4) Prices available on the open market; and

(5) In-house estimates of cost.

(b) In making the analysis, consideration must be given to any differing terms and conditions.

§3-122-130 Evaluation of cost or pricing data. Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other

offerors and any independent state price and cost estimates. They shall also include consideration of whether the costs are reasonable and allocable under pertinent provisions of chapter 3-123.[20]

And HAR §3-123-3 defines when costs are appropriate:

§3-123-3 Appropriate costs. A cost is appropriate if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of a competitively similar business. In determining the appropriateness of a given cost, consideration shall be given to:

(1) Requirements imposed by contract terms and conditions;

(2) Whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

(3) The restraints inherent in, and the requirements imposed by factors as generally accepted sound business practices, arms' length bargaining, and federal and state laws and regulations;

(4) The action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the State;
(5) Significant deviations from the contractor's established practices which may unjustifiably increase the contract costs;

(6) The guidelines, policies, and limitations the State establishes for travel related expenses for its employees; and

(7) Any other relevant circumstances.

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[20] Cost Principles are set forth in HAR §3-123-1 et seq. HAR §3-123-1(a) provides in part: "The cost principles and procedures in this chapter may be used as guidance in: (1) The establishment of cost estimates under contracts where the award may not be based on adequate competition as in subchapters 6, 7, and 9, chapter 3-122 . . . (4) Any other situation in which cost analysis is used . . ."

According to the evidence, although Intervenor's price to the State was $52,875,993.00, the prices for Intervenor's proposed goods and services added up to only $41,127,415.00. The COPA neither accounted for nor addressed this significant difference in prices.[21] Even Respondent Cronin's own expert, Lloyd Unebasami, acknowledged that this $11 million discrepancy was "out of the ordinary" and that the procurement officer "should be aware of these things", and "should be addressing it when he's doing his, his contracting."

The evidence also proved that Respondent Cronin's conclusions in the COPA were partly based on his apparent belief that Petitioner's proposal included the iVotronic machines. However, those machines were not included in Petitioner's BAFO. Furthermore, in the COPA, Respondent Cronin stated that Intervenor would upgrade its equipment to current VVSG standards "at no cost to the State." The evidence, however, established that Intervenor's offered price included a charge of $2.5 million for a *one-time* upgrade while, according to its Post-BAFO Submission, Petitioner would not pass costs to the State incurred in connection with federal certification and its equipment was being upgraded with both 2005 and 2007 standards.

Additionally, the Hearings Officer notes that the cost data that was provided by Intervenor to Respondent Cronin for the COPA was not certified as accurate, complete and current, and Intervenor did not provide Respondent Cronin with audited financial *statements* as required by the RFP. Moreover, the cost data provided was insufficient to completely evaluate Intervenor's direct labor and direct material costs. Nevertheless, according to the *available* data, Intervenor's total cost for labor was $1,696,500.00 in contrast to Petitioner's total price of $1,030,394.00 for project management and all related labor for the 2008 elections. Thus, from the available information, Intervenor's *cost* appears to exceed Petitioner's *price* for labor by more than $650,000.00.

With respect to Intervenor's direct material costs, those costs amount to $3,518,174.00 plus third-party hardware of $731,268.00 for a total cost for direct materials of $4,249,442.00 for 2008. The pricing for this direct material for 2008 is $6,332,688.00 plus $889,610.00 for third-party hardware for a total price of $7,222,298.00 for 2008, indicating

[21] Neither was this discrepancy addressed in Respondent Cronin's closing briefs.

that Intervenor is charging a significant premium on equipment it purchases from third-parties for resale to the State.

According to the COPA, the basis of the indirect cost allocations is the cost data provided by Intervenor, and that Intervenor's combined overhead and G&A costs are approximately 48% of direct costs. However, the Income Statement information provided by Intervenor contains only 7 line items. The entire amounts for all overhead and G&A items are combined into a line item designated, "Operating Spending." There is no separate listing of any overhead or G&A costs in Intervenor's financial information. Thus, it is impossible to determine the percentage of overhead and G&A costs to the total direct costs for Intervenor since the financial information does not provide any details for those costs.

Further, Respondent Cronin concludes in the COPA that "Hart's overhead and G&A percentages are consistent with manufacturers in the elections industry", and that the financial statements submitted by Intervenor "reasonably verify the reasonableness of Hart's overhead and general and administrative costs." Despite these representations, there was no evidence that Respondent Cronin undertook any such comparison. Instead, according to Respondent Cronin, he merely calculated Intervenor's overhead and G&A percentages by "just looking at the numbers" and doing a "rough calculation on the calculator."[22]

The cost data that was provided by Intervenor to Respondent Cronin for the COPA does not provide a breakdown of the cost categories that are included in the overhead and G&A line items. In addition, Intervenor's audited financial information does not provide any breakdown of the line items included in Intervenor's overhead and G&A costs. In fact, Intervenor's audited financial information combines other types of expenses with the overhead and G&A costs, so that the amounts of Intervenor's overhead and G&A costs cannot be determined from the audited financial information. Without this breakdown, it is impossible to determine whether Intervenor's overhead or G&A costs are properly allowable or allocable pursuant to HAR §3-123-4 thru §3-123-16.

According to the evidence, Intervenor's price includes contingency costs for unforeseeable expenses. Under HAR §3-123-7, such contingency costs are unallowable.

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[22] When asked what Intervenor's overhead and G&A percentages were, Respondent Cronin replied, "I don't remember."

Respondent Cronin concludes in the COPA that Intervenor's profit percentage is 1.9%. Petitioner's expert, however, opined that due to this very low profit percentage, it was likely that Intervenor's overhead and G&A costs were misallocated and that Intervenor's overhead and G&A costs appeared high.

In the COPA, Respondent Cronin reviewed catalog prices for specific pieces of equipment in Intervenor's proposal. However, the catalog prices reviewed were for the purchase rather than the lease of the equipment.

Respondent Cronin provided information in the COPA on other contracts that Intervenor has in other jurisdictions including, Sonoma County, Kane County, Orange County and Harris County, as part of his comparison of open market pricing. All of those contracts involve the purchase rather than the lease of the equipment. Moreover, in 2005, Kane County paid an average of about $3,658.00[23] per unit to purchase 820 e-slate units and 270 DAU (ADA upgrade) units, while the State, under the Contract awarded to Intervenor, would pay an average of approximately $5,291.00 per unit *per election year* for 868 units, one-half of which are ADA units. Intervenor's proposed price to the State is approximately one and a half times more than the amount paid by Kane County to purchase the equipment. Additionally, in May 2008, Intervenor proposed an entire voting system to Cuyahoga County, Ohio, similar to its proposal to the State. In Intervenor's proposal to Cuyahoga County, Intervenor proposed a total contract price of $5,705,000.00 for 1,350 machines of which 675 were to be ADA e-slate machines with the related hardware and 675 were to be e-scan machines for the rest of the voting public. Cuyahoga County's average cost for the purchase of the machines and services for operating the election for the first year is approximately $4,226.00 per unit as compared to the State's average cost of $5,291.00 per unit per election for six election years. The evidence also showed that Intervenor was charging the following prices for equipment in Cuyahoga County and Hawaii:

a. eSlate with Disabled Access Unit (DAU):
Cuyahoga Co. $1,800.00 per unit; HI $3,000.00 per unit;

[23] At a 3% per year increase for 3 years, the total unit price would be approximately $4,000.00. According to Intervenor's contract, "[c]osts increase 3% CPI annually from 2009 through 2016 on all items except freight."

b. eSlate Verifiable Ballot Option:
Cuyahoga Co. $600.00 per unit; HI $1,200.00 per unit;

c. eScan:
Cuyahoga Co. $3,300.00 per unit; HI $5,400.00 per unit;

d. Judge's Booth Controller:
Cuyahoga Co. $1,700.00 per unit; HI $3,000.00 per unit.

In addition, Intervenor provided Cuyahoga County a discount of at least 40% on every category of its proprietary machinery and about 60% discount on its proprietary software as compared to its pricing in Hawaii. All of the jurisdictions Respondent Cronin referred to in his open market analysis received a significant discount on their purchases of voting machines. Sonoma County received a discount of about 9.5% while Harris County received a discount of approximately 25%.

The COPA states that one of the equipment pieces to be provided under the contract with the State, the eSlate with Disable Access Unit, is priced $1,200.00 less than Intervenor's price catalog. This would be a discount of $1,200.00 on 434 machines or $520,800.00 on the total contract of $52,875,993.00, which amounts to a discount of less than 1%.

According to the COPA, Respondent Office of Election's in-house estimate of the 2008 election cost was $6 million, based on prior experience. Intervenor did propose less than $7 million for 2008 to meet the State's budget allocation. However, the average cost for the six election years is approximately $8.8 million per election year or approximately $2.8 million over the in-house budgeted amount.

In his COPA, Respondent Cronin remarks that the "cost or price analysis of voting equipment system for the state of Hawaii, the underlying subject of the appeal, is necessarily broader than a narrow focus only on costs and prices. Such focus completely ignores serious consideration of such a system's purpose and impact on the state's voters which must be reasonably taken into account." Respondent Cronin's remarks indicate that he prepared the COPA and arrived at his conclusions under the misconception that the

COPA must take into account some of the factors that had already been considered by the Evaluation Committee in evaluating the offers. On the contrary, the evaluation of the system's purpose and its impact on voters, as well as the proper ranking of those systems, are left to the Evaluation Committee to determine in accordance with the terms of the RFP while the COPA should be focused on confirming the reasonableness of the offered price and underlying costs.[24]

The evidence also established that by May 2008, Respondent Cronin was aware that Intervenor's offered price included eScan voting booths and mail services that Respondent Office of Elections did not need, resulting in a credit balance from 2008 to 2012 of $423,653.00. However, rather than request a reduction in the Contract price or solicit offers or bids for the additional training, Respondent Cronin readily agreed to apply the credit balance to "offset future services or products you might want, like SOE ENR, VEO, etc." for the unnecessary equipment.

Petitioner also presented evidence that prior to the award of the Contract to Intervenor for $52,875,993.00, the largest contract known to people in the elections industry was in the State of Georgia for $54 million in 2002. Georgia has 2,823 precincts in 159 counties compared to Hawaii's 353 precincts in 4 counties. Georgia had 3,758,717 registered voters at the time of the contract award in contrast to Hawaii's approximately 662,728 registered voters in 2006, according to the RFP.

In addition to the foregoing, it was also evident from the record that the COPA contained several false and misleading statements. In the COPA, Respondent Cronin indicated that a DRE is "required by HAVA". However, Petitioner's AutoMark is HAVA certified and complies with federal law.

Respondent Cronin also stated in the COPA:

> A cost and price comparison between Hart's and ESS's proposed voting equipment systems generate several points.
>
> First, and foremost, the sufficiency of Hart's provided cost and price data and *the insufficiency of ESS's proposal*

[24] For this reason, the Hearings Officer finds Section D of the COPA entitled, "OTHER VOTING EQUIPMENT ISSUES IMPORTANT TO HAWAII", to be of little relevance here.

> *because it refused to provide such financial information in its proposal and best and final offer (BAFO) renders a cost and price comparison impossible to perform. ESS did not respond to the PO's question, "What would the cost be to the State (to upgrade its system to satisfy the next generation of federal voting system guidelines)?" (footnote omitted). ESS did not provide the state with the company's cost and pricing information. Instead as developed further below, ESS declined to reveal the additional costs and contract pricing that were inherently included in its proposal to comply with the federal obligations. The company's failure to provide such cost and price data which then when asked and which now prevents the PO to reasonably perform a reasoned cost and price comparison.* (footnote omitted).
>
> * * * *

(Emphasis added).

The evidence, however, proved that Petitioner had actually provided two years of audited financial statements in its proposal, and that Petitioner did sufficiently respond to Respondent Office of Elections' questions in its BAFO. Moreover, *Respondent Cronin admitted during his testimony that he never requested that Petitioner provide cost and pricing data and never caused such a request to be made.*

Respondent Cronin also criticized Petitioner's commitment and ability to provide equipment upgrades "at no cost" as federal standards evolved. Respondent Cronin's reasoning was apparently that Petitioner's supposed lack of commitment to upgrade created a risk of "state[] liability for the inevitable additional cost." However, the evidence proved that Petitioner would not pass costs to the State incurred in connection with federal certification and its equipment was being upgraded with both 2005 and 2007 standards.

Respondent Cronin testified that Petitioner's proposal was, in his opinion, "bait money" to induce acceptance but hide potential future costs that could not be measured. Respondent Cronin, however, was unable to explain what the basis for this conclusion was or how he arrived at that conclusion despite the fact that the RFP imposed

an obligation on the contractor to upgrade to evolving federal standards throughout the life of the Contract. Respondent Cronin's only response was that that was what he had been told by his staff and that he relied on them even though he did not know how they arrived at that conclusion. In fact, it was clear from his testimony that Respondent Cronin made a number of conclusions in the COPA about Petitioner's alleged inability or unwillingness to upgrade its equipment and that those conclusions were made with little justification:

> Question: However, you made multiple conclusions in your report about ESS's inability or unwillingness to upgrade?
>
> Answer: Ah, yes, that was the information that was provided to me by the staff.
>
> Question: Where did they get that information?
>
> Answer: I don't know where they got that information - I assume they got that information from being active in the RFP process over a period of several months.
>
> Question: Did you ask to confirm that information prior to just including it in your report?
>
> Answer: I relied on what my staff told me in the short period of time that was given to me to prepare the cost and price analysis - that was the best I could do.

On this record, the Hearings Officer concludes that Respondent Cronin was unqualified to perform the COPA[25] and that the COPA and its conclusions are incomplete, inaccurate, unreliable and misleading. The Hearings Officer further concludes from a preponderance of the evidence that Intervenor's offered price is clearly unreasonable.[26]

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[25] Respondent Cronin testified, "Look at [the COPA]; clearly I'm not qualified."

[26] Even Respondent Cronin, in the COPA, indirectly acknowledges that Intervenor's prices in its proposal were significantly higher than one of the other jurisdictions referred to in his COPA: In comparing the contracts in Sonoma County to the present one, Respondent Cronin concluded that:

> Hart's prices to the state are approximately 20% higher per unit for the same equipment that Hart sold to Sonoma County, CA in 2006. *This appears to be a premium for the voting equipment, but the price is not necessarily unreasonable in this case.* The reason is the price increase may and/or could reflect Hart's increased costs to manufacture and obtain such equipment that the company is charging in its public catalog.

Having arrived at this determination, the Hearings Officer also concludes that Respondent Office of Elections' failure to reject Intervenor's proposal constitutes a violation of HAR §3-122-97(b)(2)(C).

Furthermore, it was apparent from the evidence that Respondent Cronin, rather than prepare an objective analysis of the reasonableness of Intervenor's offered price, attempted to manipulate both the data and the facts in order to justify the award of the Contract to Intervenor. Such conduct constitutes a reckless disregard of clearly applicable laws, including HRS §103D-312 and its implementing rules, and HRS §103D-101, which requires all parties to act in good faith. By virtue of his position, Respondent Cronin is chargeable with knowledge of the laws applicable to public procurement. *Carl Corp. v. State Dept. of Educ., 85 Hawaii 431 (1997).* After a careful consideration of the totality of the circumstances presented here[27], including the unfounded conclusions and misleading and false representations in the COPA, the Hearings Officer is compelled to conclude that Respondents Cronin and the Office of Elections demonstrated bad faith in the preparation of the COPA and the awarding of the Contract to Intervenor.[28] Indeed, given the record

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(Emphasis added). Furthermore, Respondent Cronin's explanation of the difference in prices is clearly based on speculation.

[27] While some of the deficiencies in the COPA and in the handling of this solicitation may be attributable to Respondent Cronin's lack of experience and knowledge of the applicable laws and his reliance on others, there is no excuse or justification for manipulating the analysis for the purpose of justifying the award to Intervenor at the expense of taxpayers.

[28] Respondent Cronin's questionable conduct also appeared during the course of this proceeding. For example, on May 9, 2008, 2 days after he signed the Agreement with the other parties and agreed to perform a cost and/or price analysis by May 14, 2008, Respondent Cronin, without the knowledge of Petitioner, submitted a request to the CPO to exempt the solicitation from HRS Chapter 103D "to enable the procurement officer to execute a one year contract with Hart InterCivic, Inc., (Hart) to provide the state a voting equipment system for the 2008 election at the cost of $8,990,811.06, a loss to Hart of $3,182,487.00 as appears in its confidential proprietary statement shown to the state procurement officer". On May 16, 2008, the CPO disapproved Respondent Cronin's exemption request, apparently recognizing that the approval of the request "*would be an act of bad faith by allowing OE to circumvent the signed Agreement*" (emphasis added). Furthermore, there was no evidence that Respondent Cronin had secured the required certificates of available funds or had otherwise obtained an appropriation for the $8,990,811.06 he had represented in the exemption request as the cost for the contemplated one-year contract with Intervenor.

Additionally, Respondent Cronin, fully aware that both Intervenor and Petitioner had an interest in protecting their confidential financial information from unnecessary disclosure, submitted an affidavit to the Hearings Officer on or about June 9, 2008 representing that:

* * * *

> 2. On May 14, 2008, Affiant issued a Cost or Price Analysis regarding RFP 06-047-SW;
>
> 3. Prior to the issuance of the Cost Price Analysis Affiant reviewed the financial data submitted by ESS in its proposal;

presented here, any other conclusion would fly directly in the face of the Code's underlying purposes to provide fair and equitable treatment of all persons dealing with the government procurement system, foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency, and increase public confidence in the integrity of the procurement system. Respondent Cronin argues that he did not act in bad faith and that it has been his "misfortune to be the subject of a protest and appeal that takes advantage of an obscure statute that is not clear and equally obtuse rules." It is not "obscure" statutes and "obtuse" rules that form the basis for this determination. Rather, Respondent Cronin's bad faith stems from his failure to undertake the preparation of the COPA in a good faith effort to ensure that State funds were being properly spent.

C. Remedies.

1. Contract Modification.

HRS §103D-707 sets forth the remedies available following the award of the contract. That section provides:

> **§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 faith:
>
> (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

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4. Affiant will be submitting the ESS confidential data in its proposal to the Office of Administrative Hearings on June 9, 2008; and

5. Other than the confidential data noted above Affiant has submitted all of the documentation he considered in drafting the May 14, 2008 cost price analysis.

* * * *

The submission of the affidavit was in direct response to the Hearings Officer's instruction to Respondent Cronin, through his attorneys, to confirm his *reliance* on Petitioner's financial information in preparing the COPA as a precondition to the disclosure of that information to Intervenor, Petitioner's business competitor. However, during his testimony, Respondent Cronin admitted that while he reviewed Petitioner's financial information, he neither considered nor relied upon that information in preparing the COPA. Although cleverly worded, the affidavit was clearly intended to imply that Respondent Cronin had reviewed Petitioner's financial data and had considered it in performing the COPA, and as such, make Petitioner's financial information accessible to Intervenor, for no justifiable reason.

(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;

* * * *

HAR §3-126-38 provides:

§3-126-38 Remedies after an award. (a) When there is no fraud or bad faith by a contractor:[29]

(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

[29] There has been no allegation that Intervenor engaged in any fraud or bad faith in this solicitation.

> 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. If the contract is terminated, the State shall, where possible and by agreement with the supplier, return the goods delivered for a refund at no cost to the State or at a minimum restocking charge. If a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination, other than attorney's fees. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance was completed. Anticipated profits are not allowed.
>
> * * * *

(Emphasis added).

Respondent Cronin argues that the best interests of the State would be served by ratification of the Contract with Intervenor because "[p]roviding accommodations that allow individuals with disabilities to vote with the assurance of privacy and the secrecy of the

ballot hold a preferred position in our hierarchy of values." The Hearings Officer agrees that such accommodations are appropriate and necessary and in the public interest. However, the public interest also demands that procuring agencies take steps to ensure that public funds are spent prudently and that goods and services are obtained at reasonable prices.[30] On balance, the Hearings Officer finds and concludes that ratification and affirmation of the Contract with Intervenor would be prejudicial to both the State and Petitioner. Ratification would effectively bind the State and its taxpayers to fund a clearly unreasonable Contract price for the 2008, 2010, 2012, 2014 and 2016 elections, as well as the 2018 elections, should the Intervenor and Respondent Office of Elections agree to exercise the option to extend the contract for an additional 24-month period, and deprive Petitioner of any meaningful relief. Moreover, ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the procurement system and, in the long run, discourage competition. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998).* For these reasons, the Hearings Officer concludes that ratification of the contract would not be in the State's best interests.

The evidence also established that performance of the Contract has already commenced and that there is no time to resolicit the contract. Consequently, the Hearings Officer further concludes that termination of the Contract would be equally inappropriate and contrary to the best interests of the State.

Under these circumstances, the Hearings Officer must determine whether a modification of the Contract would be in the State's best interest. In making that determination, the Hearings Officer must consider the underlying purposes of the Code in addition to the other factors identified in HAR §3-126-38(a)(4). *See generally, Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998) citing Carl Corp. v. Dept. of Educ., 85 Hawaii 431(1997).*

Petitioner essentially asks that the Contract be modified to a one-year contract to expire at the end of the 2008 elections or by the end of 2008. Such a modification of the Contract would allow the preparations for the 2008 elections to continue and would protect

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[30] HRS §103D-303(g) provides that 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." (emphasis added).

the rights of Petitioner and the interests of the public. For these reasons, the Hearings Officer concludes that such a modification would be in the State's best interests. Intervenor argues that any modification of the Contract by the Hearings Officer requires the mutual assent of the parties and must be supported by valid consideration. Unlike the Pennsylvania statute cited and relied upon by Intervenor, however, nothing in HRS §103D-707 imposes such a condition on the Hearings Officer's ability to modify the Contract. On the contrary, in amending HRS §103D-707 in 1999, the Legislature stated, among other things, that the "measure . . . expands the scope of post-award remedies . . ." Standing Committee Report No. 651, SB 1101 (1999).

Intervenor alternatively argues that in the event the term of the Contract is modified to a one-year contract, the Contract price should also be modified to reflect a price of $8,990,811.06, or that the Hearings Officer order an "equitable adjustment to the contract price" so as to "fairly, fully and equitably compensate Hart for the performance related to the first-election cycle. . ." Intervenor's request that the Contract price be modified to $8,990,811.06 is based on the fact that Respondent Cronin had previously sought to have this solicitation exempted from the Code in order to enable him to enter into a contract with Intervenor for the 2008 elections for an $8,990,811.06 contract price. Notwithstanding Respondent Cronin's prior acceptance of this price, there was never any evidence presented that that price was reasonable. Moreover, nothing in the Code provides the Hearings Officer with the authority to "equitably adjust" the contract price as requested by Intervenor.

2. Bid Preparation Costs.

Petitioner also requests an award of its bid preparation costs. HRS §103D-701 provides in part:

* * * *

> (g) In addition to any other relief, when a protest is sustained and the protestor should have been awarded the contract under the solicitation but is not, then the protestor shall be entitled to the actual costs reasonably incurred in

> connection with the solicitation, including bid or proposal preparation costs but not attorney's fees.

The foregoing provision has been previously construed by the Hawaii Supreme Court. In *Carl, supra*, the Hawaii Supreme Court held that where the contract has been awarded before the resolution of a protest, HRS §103D-701(g) entitles the protestor to recover its bid preparation costs provided (1) the protest is sustained; (2) the protestor should have been awarded the contract; and (3) the protestor is not awarded the contract.

Here, the first and third elements have already been satisfied. As to the second element, a determination that Petitioner should have been awarded the contract was never made by Respondent Office of Elections. Nor can such a determination be made at this point because the Hearings Officer lacks the technical qualifications to perform an *independent* cost and/or price analysis of Petitioner's offered price and is without statutory authority to remand this matter to Respondent Office of Elections for an evaluation of Petitioner's proposal.[31] *Carl,* however, recognized that requiring a determination that the protestor should have been awarded the contract where the evaluation was so fundamentally flawed that the results are invalid and the required determination cannot be made unfairly punishes the successful protestor. As a result, the court held that where the evaluation is so fundamentally flawed that the determination of who should have been awarded the contract was not, and cannot be made, and the contract has already been awarded in bad faith and in violation of HRS §103D-701(f), a successful protestor who was not awarded the contract is entitled to recover its bid preparation costs pursuant to HRS §103D-701(g). Moreover, although the evidence does not support a finding that HRS §103D-701(f) was violated by Respondents, it does not appear that the *Carl* court intended to limit its holding to cases involving such a violation. The holding in *Carl* was based on the court's recognition that the successful protestor would be unfairly punished if it was required to prove that it should have been awarded the contract even though the evaluation was so flawed that such a determination could not be made. In *Paul Sardella Construction Company, Inc. v. Braintree*

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[31] Even if the Hearings Officer had the authority to remand the matter to Respondent Office of Elections for the purpose of determining Petitioner's entitlement to bid preparation costs, such a remand would be futile given the facts and circumstances of this case.

Housing Authority, 3 Mass.App.Ct. 326, 329 N.E.2d 762 (1975), aff'd, 371 Mass. 235, 356 N.E.2d 249 (1976), a case cited and relied upon by the *Carl* court, the Massachusetts Appeals Court explained:

> The "honest and open procedure for competition" among the various bidders that is one of the fundamental objectives of the competitive bidding statute must necessarily entail fair consideration of all the submitted bids in accordance with the applicable sections of the statute. *We hold that where such consideration has not been given by public contracting authorities, in violation of statutory provisions, the proper measure of recovery is the reasonable cost of preparing the bid.*
>
> * * * *
>
> *The award of reasonable bid preparation costs for the failure to give fair consideration to a bidder in accordance with the statutory procedure will best effectuate the legislative objectives underlying the statute by insuring the widest competition among responsible bidders.* Notwithstanding possible short-term benefit to an awarding authority in a particular case through violation of the statute, over the longer term harm to the public interest would ensue if awarding authorities are not to be held accountable for their violations. The number of bidders, and thus the range of choice available to an awarding authority, may well be reduced if it were to be assumed by prospective bidders that such authority would not abide by the applicable statutes in making awards.

(Emphasis added).

Thus, while *Carl* involved a bad faith violation of HRS §103D-701(f), the foregoing considerations lead the Hearings Officer to construe the *Carl* holding as applicable in cases where the protestor's bid was not given fair consideration as a result of the procuring agency's bad faith violation of the Code, including but not limited to, HRS §103D-701(f).[32]

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[32] This should be distinguished from the *Carl* court's award of attorneys' fees to the successful protestor. The *Carl* court based its award of attorney's fees on the procuring agency's unilateral bad-faith decision to award the contract to Ameritech in violation of HRS §103D-701(f), and the recognition that once the contract is awarded, "there is no 'remedy' for the protestor who later proves that the process was in violation of the Code." Specifically, the court found that "Carl's lack of remedy stems from Kane's unilateral bad-faith decision to award the contract to Ameritech *in violation of HRS §103D-701(f)*". (emphasis added). Therefore, under *Carl*, a successful protestor is entitled to the recovery of its attorneys' fees only where the contract has been awarded in bad faith violation of HRS §103D-701(f).

The Hearings Officer has previously determined that the preparation of the COPA and the award of the Contract to Intervenor were made in bad faith and in violation of the Code. Any fair consideration of Petitioner's proposal was precluded by these actions. On this record, the Hearings Officer finds and concludes that the COPA and the evaluation of the proposals by Respondent Office of Elections were so fundamentally flawed such that the results are invalid and the required determination can no longer be made. Accordingly, the Hearings Officer concludes that Petitioner is entitled to recover its bid preparation costs.

3. Attorneys' Fees and Sanctions.

In *Carl*, the court held that a protestor is entitled to recover its attorney's fees incurred in prosecuting its protest if (1) the protestor has proven that the solicitation was in violation of the Code; (2) the contract was awarded in violation of HRS §103D-701(f); and (3) the award of the contract was in bad faith. Having already concluded that the record does not support a finding that Respondents violated HRS §103D-701(f), the Hearings Officer further concludes that Petitioner is not entitled to recover its attorneys' fees. Furthermore, upon due consideration, Petitioner's request for monetary sanctions as a result of Respondent Office of Elections' alleged discovery abuses is denied.

IV. DECISION

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

1. The Contract awarded to Intervenor is hereby modified to be made applicable to the 2008 elections only, shall expire after December 31, 2008, and the option to extend as provided in the RFP shall be deleted;

2. Petitioner is awarded its bid preparations costs; and

3. Each party shall bear its own attorney's fees.

Dated at Honolulu, Hawaii: AUG 7 2008

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