



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 NOV 16 A 11: 52

HEARINGS OFFICE

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

In the Matter of	)	PCX 2009-3
)	
ACCESS SERVICE CORPORATION,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW AND
Petitioner,	)	DECISION
)	
vs.)	
)	
CITY COUNCIL, CITY AND COUNTY)	
OF HONOLULU,)	
)	
Respondent,)	
)	
and)	
)	
'OLELO COMMUNITY TELEVISION,)	
)	
Intervenor.)	
)	

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

I. INTRODUCTION

On October 5, 2009, Access Service Corporation ("Petitioner") filed its request for hearing to contest the City Council, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the pre-hearing conference held on October 13, 2009, the parties agreed to reschedule the hearing from October 21, 2009 to October 26, 2009. The parties also agreed

to allow 'Olelo Community Television ("Intervenor") to intervene in this case and on October 16, 2009, a Stipulation and Order for Intervention was filed.

On October 16, 2009, Respondent filed a Motion for Partial Summary Judgment and a Motion for Partial Dismissal. Petitioner filed memoranda in opposition to the motions on October 20, 2009. A hearing on the motions was held on October 21, 2009. Petitioner was represented by Daniel T. Kim, Esq. Respondent was represented by Amy R. Kondo, Esq., Nicole R. Chapman, Esq. and Ryan H. Ota, Esq. Intervenor was represented by Jessica Y.K. Wong, Esq. The matters were taken under advisement.

On October 22, 2009, the Hearings Officer issued an order granting Respondent's Motion for Partial Dismissal and notified the parties by a letter dated October 22, 2009 that Respondent's Motion for Partial Summary Judgment was granted as to issue numbers 1, 5, 6 and 7 and denied as to issue numbers 2 and 3 as identified in Petitioner's request for hearing. Respondent was directed to prepare and submit proposed Findings of Fact and Conclusions of Law by November 2, 2009.

The hearing was convened on October 26, 2009. Petitioner was represented by Mr. Kim, Respondent was represented by Ms. Chapman and Mr. Ota and Intervenor was represented by Barbara A. Kreig, Esq. Petitioner requested that the deadline for written closing arguments be extended from October 29, 2009 to November 3, 2009. There was no objection so Petitioner's request was granted. On November 3, 2009, the parties filed their written Closing Arguments.

Respondent filed the requested proposed Findings of Fact, Conclusions of Law and Order on November 2, 2009. The Hearings Officer's Findings of Fact, Conclusions of Law and Decision Granting in Part and Denying in Part Respondent's Motion for Partial Summary Judgment is being issued concurrently with this Decision.

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

II. FINDINGS OF FACT

1. Respondent issued a Request for Proposals ("RFP") for a Council Telecasting Director, RFP No. CN09-01. The deadline for submitting proposals was May 22, 2009.

2. The RFP provides that the contents of the submitted proposal shall contain:
Employment History. This form (No. 1) furnishes information about the offeror's telecasting experience.

3. On May 5, 2009, Respondent issued Addendum No. 1 which provides in part:
Offerors and their Eligibility. Individuals, partnerships, companies, etc. may submit a proposal as an 'offeror' but the proposal must designate a person who will be the 'Council Telecasting Director' in overseeing and managing the project. If the designated person is a partner in a partnership, or an employee in an organization, this does not constitute a disqualification from this RFP.

...

Employment History/Resume. If a resume provides more clear-cut information, it can be submitted to supplement (and not replace) the 'Employment History' form. There will not be a penalty assessed for the inclusion of a resume as an attachment to the 'Employment History' form. Whether it is the 'Employment History' by itself or supplemented by a resume, the maximum number of points to be awarded under this scoring category remains at 350.

4. Proposals were submitted by Petitioner, Intervenor and Peter Planas Video and TV Productions ("PPVTV") on May 22, 2009.

5. The sealed proposals were opened on May 26, 2009. Present were the Evaluation Committee ("Committee"), consisting of Clayton Wong, Respondent's Fiscal Officer, Nanette Saito and Councilmember Nestor Garcia.

6. The Committee determined that Petitioner's offer was "acceptable" and that Intervenor's and PPVTV's offers were "potentially acceptable" and all three were deemed to be "priority-listed offerors". These determinations were not contemporaneously documented in the contract file kept by Respondent for RFP No. CN09-01.

7. The Committee met on May 29, 2009 and determined that Intervenor completed the employment history form for its company but did not submit an employment history for Michael Paz, Intervenor's designated Council Telecasting Director ("CTD"). Accordingly, on May 29, 2009, Committee member Clayton Wong sent an e-mail directly to Mr. Paz, requesting that he complete the employment history form and provide a resume by

June 2, 2009. Mr. Wong also inquired about Mr. Paz's availability for an interview on June 4, 2009. Present at the interview would be the Committee, and Respondent's support staff.

8. Mr. Wong testified that it was important for the Committee to have Mr. Paz's background information because as the CTD, Mr. Paz would be dealing with the City Council, its staff and the public.

9. Petitioner and PPVTV submitted employment histories and resumes for its designated CTDs.

10. Intervenor submitted Mr. Paz's employment history and resume by e-mail on June 2, 2009.

11. On June 5, 2009, Respondent issued a memorandum (referred to by Respondent as Addendum No. 2 but not labeled as such) which informed offerors that they could submit their Best and Final Offers ("BAFO") by June 8, 2009.

12. On June 8, 2009, Respondent issued a memorandum (referred to by Respondent as Addendum No. 3 but not labeled as such) which informed offerors that the deadline for BAFOs was being changed from June 8, 2009 to June 12, 2009 so that the offerors can be made aware of the finalized amount in the budget for FY 2009-2010.

13. On June 10, 2009, Respondent issued a memorandum (referred to by Respondent as Addendum No. 4 but not labeled as such) which informed offerors that the budgeted amount for the telecasting project in fiscal year 2009-2010 is \$223,000.00.

14. The scoring criteria and points awarded for each criterion is as follows:

Employment History: 350 maximum points

Budget: 325 maximum points

Total scope of services: 200 maximum points

Completeness of the submitted proposal: 65 maximum points

References: 60 maximum points

The maximum score is 1000.

15. On June 15, 2009, the Committee met to score the proposals. PPVTV received 893.73 of 1000 possible points, Petitioner received 963.28 points, and Intervenor received 975 points.

16. Petitioner received the maximum possible points in all categories except budget, where it received 288.28 of the maximum 325 points.

17. Intervenor received the maximum possible points in the budget, total scope of services, and references categories and 330 of 350 for employment history and 60 of 65 points for completeness of submitted proposal.

18. In a section called “Backup Documentation for Scorecards” the Committee noted under comments for the category “Completeness of the Submitted Proposal” that:

At the proposal opening, a review by the evaluation committee indicated that all three submissions appeared to be ‘acceptable’ or ‘potentially acceptable’. Thus, all were deemed as ‘priority listed’ offerors.

...

The proposal from Michael Paz and Olelo lacked the employment history and resume for Michael Paz but was later submitted. Points were deducted.

19. By a memo dated June 16, 2009, the Committee recommended to Council Chair and Legislative CPO Todd K. Apo that Intervenor be selected as the offeror to be awarded a contract for telecasting services as of July 1, 2009. Council Chair Apo accepted and approved Intervenor as the awarded offeror for furnishing telecasting services per RFP No. CN09-01.

20. On June 16, 2009, Respondent issued a Notice of Procurement Award, stating that Intervenor had been selected to provide telecasting services to Respondent as of July 1, 2009.

21. On June 19, 2009, Petitioner filed a protest of the award to Intervenor, and reiterated their request for a debriefing.

22. On July 13, 2009, Petitioner filed a protest after the debriefing held on July 6, 2009.

23. By a letter dated September 28, 2009, to Petitioner’s attorney, Respondent denied Petitioner’s protest. The letter states in part:

Similar to your client, [Intervenor] submitted a proposal under its company name. [Intervenor] interpreted employment history as being reflective of the entity [Intervenor] itself. Because the CTD would be interacting regularly with Legislative Branch personnel, background information (employment history) of this individual was needed. Since this may not have been clear in the RFP and its Addenda, the

Council clarified its request to [Intervenor] on May 29, 2009, and [Intervenor] complied by submitting its CTD's employment history and resume on June 2, 2009. This was submitted during the Discussion period as permitted under Hawai'i Administrative Rules (HAR) Section 3-122-53.

The clarification described above was within the Discussion period under Hawai'i Administrative Rules section 3-122-53. Under Addenda Nos. 3 and 4 to RFP No. CN09-01, the deadline for Best and Final Offers was June 12, 2009. The request for an individual's employment history (as opposed to the organization's employment history) was a matter of clarification that could be resolved during the Discussion period; it was not a modification to the RFP or the submitted proposal. Thus, submission of the individual's employment history as requested was not a 'late submission' as asserted by [Petitioner].

24. Petitioner filed its request for administrative hearing on October 5, 2009.

III. CONCLUSIONS OF LAW

The issues to be resolved are (1) whether Intervenor's failure to provide Mr. Paz' employment history with their proposal rendered Intervenor's proposal nonresponsive and (2) whether Respondent's request to Intervenor for Mr. Paz's employment history and resume after the May 22, 2009 deadline for submission of proposals was proper. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's determinations were not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Responsiveness of Intervenor's Proposal

It is not disputed that Intervenor was the "offeror" and that it submitted its Employment History with its proposal on May 22, 2009. It is also not disputed that Intervenor designated Mr. Paz as its CTD, and did not submit an employment history form or resume for Mr. Paz with its proposal. Based on the language contained in the RFP, the Hearings Officer finds that Intervenor's submission was consistent with the instructions contained in the RFP, and concludes that Intervenor's proposal was responsive to the RFP.

Respondent's Request for Mr. Paz's Employment History and Resume

Petitioner argued that Respondent's request for Mr. Paz's employment history and resume after May 22, 2009 was improper. Respondent contends that it was allowed to request this information pursuant to Hawai'i Revised Statutes ("HRS") § 103D-303(f) which provides:

103D-303 Competitive sealed proposals.

...

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

Hawai'i Administrative Rules § 3-122-53 provides:

3-122-53 Discussion with offerors. (a) Before conducting discussions, a "priority list" shall be generated by the procurement officer or evaluation committee.

(1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable[.]

...

(b) Discussions will be limited to only "priority-listed offerors" and are held to:

(1) Promote understanding of a state agency's requirements and priority-listed offeror's proposals; and

(2) Facilitate arriving at a contract that will provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals.

The procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the date, place, purpose of meetings, and those attending.

(d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.

(1) Any substantial oral clarification of a proposal shall be reduced to writing by the priority-listed offeror;

(2) If during discussions there is a need for any substantial clarification or change in the request for proposals, the request for proposals shall be amended by an addendum to incorporate the clarification or change.

Respondent and Intervenor argued that Petitioner could not contest Respondent's reliance on HAR § 3-122-53 because it did not raise this issue in its protest. However, Respondent first raised this issue its denial of Petitioner's protest, citing HAR § 3-122-53 as justification for requesting Mr. Paz's employment history and resume and as such, is proper for consideration.

Hawai'i Administrative Rules § 3-122-53 requires that a priority list be generated before conducting discussions. The evidence presented showed that the Committee classified the proposals at proposal opening, but did not generate a priority list. As the Committee did not follow the provisions of HAR § 3-122-53, which required that a priority list be generated and dates, places, purpose of meetings and those attending be documented, the Hearings Officer finds that it was improper for the Committee to conduct discussions with any offeror and could not request that Mr. Paz provide it with his employment history and resume.¹ Accordingly, the Hearings Officer concludes that the contract was awarded to Intervenor was in violation of law.

Remedies

The remedies available to an aggrieved party following the award of the contract are set forth in HRS § 103D-707 and Hawaii Administrative Rules ("HAR") § 3-126-38 and provide in relevant part:

¹ Even if the Committee's classification of the proposals is deemed sufficient to allow discussions, the Hearings Officer would note that requiring the CTD's employment history and resume was a "substantial clarification" or "change" to the RFP and as such, an addendum should have been issued. Respondent's argument that an addendum was not necessary because Petitioner and PPVTV submitted information regarding their CTD is not persuasive.

§ 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 interest of the State; or

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

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

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

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

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

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

- (A) The cost 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.

The Hearings Officer finds that Respondent did not act in bad faith in awarding the contract. Based on the evidence presented, the Hearings Officer finds that the violation cannot be waived without prejudice to the State or the other offerors. Since performance has not begun and the evidence did not establish that there was no time for resoliciting offers, the Hearings Officer concludes that the award of the contract should be terminated.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby orders that the contract awarded to Intervenor be terminated. Intervenor shall be compensated for actual expenses, other than attorney's fees reasonably incurred under the contract plus a reasonable profit, with such expenses and profit calculated to the point of termination. Each party is to bear its own attorney's fees and costs incurred in pursuing this matter.

If an appeal is filed, the parties are ordered to inform the Office of Administrative Hearings as to the outcome of the appeal so Petitioner's funds can be processed according to Hawai'i Revised Statutes § 103D-709(e).

DATED: Honolulu, Hawaii, **November 16, 2009** _____.

/s/ SHERYL LEE A. NAGATA

SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 NOV 16 A 11: 52

HEARINGS OFFICE

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

In the Matter of	)	PCX 2009-3
)	
ACCESS SERVICE CORPORATION,	)	HEARINGS OFFICER'S FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND DECISION
Petitioner,	)	GRANTING IN PART AND DENYING IN
	)	PART RESPONDENT'S MOTION FOR
vs.	)	PARTIAL SUMMARY JUDGMENT;
	)	APPENDIX "A"
CITY COUNCIL, CITY AND COUNTY OF)	
HONOLULU,)	
)	
Respondent,)	
)	
and)	
)	
'OLELO COMMUNITY TELEVISION,)	
)	
Intervenor.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

On October 5, 2009, Access Service Corporation ("Petitioner") filed its request for hearing to contest the City Council, City and County of Honolulu's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearings and Pre-Hearing Conference was duly served on the parties.

At the pre-hearing conference held on October 13, 2009, the parties agreed to reschedule the hearing from October 21, 2009 to October 26, 2009. The parties also agreed to allow 'Olelo Community Television ("Intervenor") to intervene in this case and on October 16, 2009, a Stipulation and Order for Intervention was filed.

On October 16, 2009, Respondent filed a Motion for Partial Summary Judgment and a Motion for Partial Dismissal. Petitioner filed memoranda in opposition to the motions on October 20, 2009. A hearing on the motions was held on October 21, 2009. Petitioner was represented by Daniel T. Kim, Esq. Respondent was represented by Amy R. Kondo, Esq., Nicole R. Chapman, Esq., and Ryan H. Ota, Esq. Intervenor was represented by Jessica Y.K. Wong, Esq. The matters were taken under advisement.

On October 22, 2009, the Hearings Officer issued an order granting Respondent's Motion for Partial Dismissal and notified the parties by a letter dated October 22, 2009 that Respondent's Motion for Partial Summary Judgment was granted as to issue numbers 1, 5, 6 and 7 and denied as to issue numbers 2 and 3 as identified in Petitioner's request for hearing. Respondent was directed to prepare and submit proposed Findings of Fact and Conclusions of Law by November 2, 2009. On November 2, 2009, Respondent filed the requested proposed findings of fact, conclusions of law and order and it is attached hereto and incorporated herein by reference as Appendix "A".

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

II. FINDINGS OF FACT

The Hearings Officer adopts Findings of Fact numbers 1-13 as provided in Appendix "A".

III. CONCLUSIONS OF LAW

The Hearings Officer adopts the Conclusions of Law as provided in Appendix "A".

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion for Partial Summary Judgment is granted in part as to issue numbers 1, 5, 6 and 7 and denied in part as to issue numbers 2 and 3.

DATED: Honolulu, Hawaii, **November 16, 2009**_____.

/s/ SHERYL LEE A. NAGATA

SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

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DEPT. OF COMMERCE
 AND CONSUMER AFFAIRS
 2009 NOV -2 P 3 31
 HEARINGS OFFICE

Attorneys for Respondent

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

In the Matter of	)	PCX-2009-3
)	
ACCESS SERVICE CORPORATION,	)	RESPONDENT'S PROPOSED FINDINGS
	)	OF FACT, CONCLUSIONS OF LAW AND
Petitioner,	)	ORDER; CERTIFICATE OF SERVICE
)	
vs.)	
)	
CITY COUNCIL, CITY AND COUNTY OF)	
HONOLULU,)	
)	
Respondent,	)	<u>Hearing Date:</u>
	)	Date: October 21, 2009
and	)	Time: 11:00 a.m.
)	
'OLELO COMMUNITY TELEVISION,	)	<u>Administrative Hearings Officer</u>
	)	Sheryl Lee A. Nagata
Proposed Intervenor.)	
)	

APPENDIX "A"

RESPONDENT'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. INTRODUCTION

On October 4, 2009, Access Service Corporation (“Petitioner”) by and through its attorney, Daniel T. Kim, filed a Request for Hearing from September 28, 2009 Denial of Protest by Access Service Corporation (“Administrative Hearing”). The matter was set for hearing, and the Notice of Hearing and Prehearing Conference was duly served on the parties.

At the pre-hearing conference held on October 13, 2009, the parties agreed to reschedule the hearing from October 21, 2009 to October 26, 2009. The Hearings Officer set deadlines to submit pre-hearing motions to October 16, 2009 and responses to be submitted by October 20, 2009.

The hearing of duly submitted motions was held on October 21, 2009 at 11:00 a.m. Petitioner was represented by Daniel T. Kim, and Respondent was represented by Deputies Corporation Counsel, Amy R. Kondo, Nicole R. Chapman, and Ryan H. Ota. Olelo Community Television (“Intervenor”) was represented by Jessica Y.K. Wong. The matter was taken under advisement. By a letter dated October 22, 2009, the Hearings Officer notified the parties that she intended to grant Respondent’s Motion for Partial Summary Judgment with respect to issues numbered 1, 5, 6, and 7 and deny Respondent’s Motion with respect to issues numbered 2 and 3.

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

II. FINDINGS OF FACT

1. Respondent issued Request for Proposals, No. CN09-01, for Council Telecasting Director (“RFP”) on April 20, 2009. On page 4 of the RFP, the term “offeror” is defined as “The individual submitting a proposal is referred to as an ‘offeror.’ The ‘offeror’ who is selected will be the ‘Council Telecasting Director’ (a.k.a. the ‘CTD’).” See Respondent’s Exhibit A.

2. On May 5, 2009, Respondent issued Addendum No. 1 for the RFP regarding: eligibility of offerors; captioning requirement; resume; references; cost or pricing data. Addendum No. 1 modified the definition of “offeror” to include “individuals, partnerships, companies, etc.” Addendum No. 1 also expressly bifurcated the “offeror” and the “Council Telecasting Director” (“CTD”) positions when it stated, “Individuals, partnerships, companies, etc., may submit a proposal as an ‘offeror’ but the proposal must designate a person who will be the ‘Council Telecasting Director’ in overseeing and managing the project.” See Respondent’s Exhibit A.

3. On May 22, 2009, Intervenor submitted its proposal to the RFP. Intervenor specifically identified Mr. Michael Paz (“Paz”) as the designated CTD in its transmittal letter and in the section entitled, “Total Scope of Services.” See Respondent’s Exhibit B.

4. On May 29, 2009, Respondent requested that Intervenor submit an Employment History form and a resume for Paz, the designated CTD. See Respondent’s Exhibit C.

5. On June 2, 2009, Intervenor submitted an Employment History form and a resume for Paz. See Respondent’s Exhibit C.

6. On June 5, 2009, Respondent issued Addendum No. 2 for RFP regarding the “Best and Final Offer” (“BAFO”) which required each offeror to submit its BAFO by noon, on June 8, 2009. See Respondent’s Exhibit A.

7. On June 8, 2009, Respondent issued Addendum No. 3 for RFP regarding an extension from noon, June 8, 2009 to noon, June 12, 2009 for offerors to submit their BAFO. See Respondent's Exhibit A.

8. On June 10, 2009, Intervenor submitted its BAFO. See Respondent's Exhibit B.

9. On June 15, 2009, the Evaluation Committee convened and scored the submitted proposals. Petitioner and Intervenor received scores of 963.28 and 975, respectively. See Respondent's Exhibit D.

10. On June 16, 2009, Respondent issued a Notice of Procurement Award for RFP No. CN09-01. Intervenor was selected to provide telecasting services. See Respondent's Exhibit E.

11. On July 13, 2009, Petitioner submitted a protest to the award of RFP No. CN09-01 to Intervenor. See Respondent's Exhibit F.

12. On September 28, 2009, Respondent issued the response to Petitioner's protest dated July 13, 2009, and denied Petitioner's protest. See Respondent's Exhibit G.

13. On October 4, 2009, Petitioner filed its Administrative Hearing request with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs. See Respondent's Exhibit H.

III. CONCLUSIONS OF LAW

“A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party.” Nan, Inc. v. Department of Accounting and General Services, State of Hawaii, PCH-2007-2 citing Brewer Environmental Industries v. County of Kauai, PCH-9609 (November 20, 1996).

Respondent's Motion is based on the assertion that Petitioner has failed to state issues that involve material factual controversies and Respondent is entitled to judgment as a matter of law.

1. As to issue number 1, Petitioner alleges that Intervenor's proposal identifies either a "group of, or a committee of department heads, and other unnamed Olelo employees" to serve as the CTD. However, as stated in Findings of Fact No. 3, Intervenor did identify Paz as the CTD and thus did comply with the requirements of the RFP. There are no genuine issues of material fact that dispute that Intervenor did identify Paz as the CTD in its proposal submitted on May 22, 2009. Therefore, Respondent is entitled to judgment as a matter of law as to issue number 1.

2. As to issue number 2, Petitioner asserts that although Intervenor identifies Paz as the CTD in its proposal, it "failed to provide the required 'Employment History' data to be completed [Form No. 1 in the RFP attachments] in their proposal submitted on May 22, 2009." Respondent did not show that there are not any genuine issues as to any material fact.

3. As to issue number 3, Petitioner asserts that Intervenor "submitted Mr. Paz's 'Employment History' form and a resume on or about May 27, 2009, after the deadline of 4:30 p.m., Friday, May 22, 2009 and after the bids have been time stamped and opened." (Emphasis in the original request for hearing by Petitioner.) Respondent did not show that there are not any genuine issues as to any material fact.

4. As to issue number 5, Petitioner asserts that Intervenor's proposal "alludes to vital crew positions but fails to include any names of potential crewmembers to fill those positions, their qualifications, their experience, their background or any information at all that can be verified by City Council proposal evaluators." The RFP, submitted as Respondent's Exhibit A,

does not expressly require that crew positions or crewmembers be identified other than the designation of the CTD. Therefore, Respondent is entitled to judgment as a matter of law as to issue number 5.

5. As to issue number 6, Petitioner states, “Olelo’s CEO, Kealii Lopez signed a required Certification Statement on May 22, 2009 that accompanied the proposal . . . “ but does not actually allege a cause of action or any violation of the procurement code or the RFP. This appears to be a statement that confirms that the Intervenor signed the required Certification Statement and submitted it along with its proposal as required. There being no genuine issue of material fact in dispute on this issue, Respondent is entitled to judgment as a matter of law as to issue number 6.

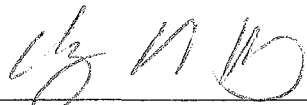
6. As to issue number 7, Petitioner states, “ASC’s proposal by contrast is complete and includes substantial, provable details and facts about its projects, clients, activities and personnel. In ASC’s ‘References’ section are verifiable names, telephone numbers, addresses, e-mail addresses, and in nine cases, letters of praise from some of Hawaii’s most distinguished leaders who will attest to ASC’s Delivery of excellent gavel-to-gavel broadcast services over the past fifteen years.” This also appears to be a statement regarding the completeness of Petitioner’s submitted proposal, but there is no cause of action identified nor any violation of the procurement code or RFP identified. There being no genuine issue of material fact in dispute on this issue, Respondent is entitled to judgment as a matter of law as to issue number 7.

IV. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby orders that Respondent's Motion for Partial Summary Judgment is granted in part as to issues number 1, 5, 6, and 7, and denied in part as to issues number 2 and 3.

DATED: Honolulu, Hawaii, November 2, 2009.

CARRIE K.S. OKINAGA
Corporation Counsel

By 

NICOLE R. CHAPMAN
RYAN H. OTA
AMY R. KONDO
Deputies Corporation Counsel
Attorneys for Respondent

APPROVED AND SO ORDERED:

SHERYL LEE A. NAGATA
Administrative Hearing Officer

OFFICE OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

STATE OF HAWAII

In the Matter of) PCX-2009-3
)
ACCESS SERVICE CORPORATION,) CERTIFICATE OF SERVICE
)
Petitioner,)
)
vs.)
)
CITY COUNCIL, CITY AND COUNTY OF)
HONOLULU,)
)
Respondent,)
)
and)
)
'OLELO COMMUNITY TELEVISION,)
)
Proposed Intervenor.)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was served upon the following by mailing the same, postage prepaid, on November 2, 2009:

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