



**DEPARTMENT OF COMMERCIAL
AND CONSUMER AFFAIRS**

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HEARINGS OFFICE

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

**ORDER AWARDING PROTESTOR ITS COSTS
OF PREPARING ITS PROPOSAL, AND AWARDING
PROTESTOR ITS REASONABLE ATTORNEY'S FEES
AND COSTS IN PROSECUTING ITS PROTEST AND APPEAL**

I. CHRONOLOGY

On February 5, 1999, Protestor CARL Corporation ("Protestor") by and through its attorneys Jeffrey S. Harris and Matt A. Tsukazaki, filed its Application in Support of the Reasonableness of its Attorneys' Fees and Costs. The Protestor's Application was set for hearing, and the matter came on for hearing on Monday, March 1, 1999, at 9:00 a.m., before

the undersigned Hearings Officer. Jeffrey S. Harris, Esq., and Matt A. Tsukazaki, Esq., appeared on behalf of Protestor. Deputy Attorney General James J.S. Chang, Esq., appeared on behalf of Respondent State of Hawai'i, Department of Education, Hawai'i State Library System ("Respondent"). Lawrence M. Reifurth, Esq., appeared on behalf of Intervenor Dynix, Inc., dba Ameritech Library Services ("Intervenor").

The parties were given leave to submit additional briefing on the issue of whether interest on the attorney's fees and costs should be awarded.

After considering the matters presented by the parties, the Hearings Officer determined that the Protestor was entitled to an award of reasonable attorney's fees and costs. Additionally, the Hearings Officer was initially inclined to award Protestor interest on its attorney's fees and costs, and requested the Protestor to prepare the appropriate order for the Hearings Officer's review and adoption.

Accordingly, the Hearings Officer finds and concludes that the Protestor is entitled to attorney's fees and costs, as requested. However, after reevaluating and reexamining the presentations and submittals of the parties, and after conducting additional research, the Hearings Officer concludes that the Protestor is not entitled to an award of interest on the award of attorney's fees and costs.

II. DISCUSSION

A. **Proposal Costs and Attorney's Fees and Costs**

The Hawai'i Supreme Court in *Carl Corporation v. State of Hawai'i, Department of Education*, 85 Haw. 431, 946 P.2d 1 (1997), remanded the present matter back to the Hearings Officer and instructed:

We remand to the Hearings Officer for necessary further hearings, followed by entry of an order (1) awarding CARL its costs of preparing its proposal in response to RFP 96-4, and its reasonable attorney's fees in prosecuting its protest and appeal . .

As to the awarding of Protestor's costs of preparing its proposal in response to RFP 96-4, and awarding Protestor's reasonable attorney's fees and cost, the Hearings Officer makes the following determinations based upon the submittals of the parties:

- (1) the costs of preparing Protestor's proposal in RFP 96-4 was \$30,000;
- (2) the standard hourly rates charged by the members of law firm of Torkildson, Katz that provided services in the present case, are reasonable, similar and comparable to the standard hourly rates commonly charged in Honolulu, Hawaii by other law firms for attorneys and legal assistants with similar skills, abilities, and experience;
- (3) the total number of hours for the legal work performed by the attorneys for Protestor are not unreasonable given the totality of the circumstances of this matter;
- (4) the total attorney's fees and costs incurred by the Protestor are not unreasonable, in light of the complexity of the issues, the duration of the protest and appellate proceedings, and the costs associated with prosecuting Protestor's protest and appeal; and
- (5) the Protestor did not seek attorney's fees and costs from Intervenor.

B. Interest on Attorney's Fees and Costs

As to whether Protestor is entitled to *interest* on the award of attorney's fees and costs, the Hawai'i Supreme Court's decision in *Carl, supra*, contains no instructions, discussion, or references as to the addition of interest to the award of attorney's fees and costs.

A review of *Bolander & Sons v. City of Minneapolis*, 438 N.W.2d 735 (Minn. Ct. App. 1989), *affirmed*, 451 N. W. 2d 204 (Minn. 1990)¹, also revealed no instructions, discussion, or references to adding interest onto the award of attorney's fees and costs.

An examination of *Telephone Associates v. St. Louis County Bd.*, 364 N.W. 2d 378 (Minn. 1985), which was cited by the court in *Bolander & Sons v. City of Minneapolis, supra*, reflects that the Minnesota Supreme Court did not address the addition of interest to an award of attorney's fees and costs.

After additional extended efforts to locate persuasive legal authorities from any other jurisdictions regarding the awarding of interest on attorney's fees and costs for procurement cases, the Hearings Officer was unable to find support for such a practice.

¹ *Bolander & Sons v. City of Minneapolis, supra*, was cited by the Hawai'i Supreme Court in *Carl, supra*, in support of the Court's decision to award attorney's fees and costs in cases involving certain kinds of violations of the Hawai'i procurement code.

Accordingly, while the Hearings Officer is mandated by the Hawai'i Supreme Court's decision in *Carl, supra*, to award the Protestor its reasonable attorney's fees and costs, the Hearings Officer must conclude that the awarding of interest, in addition to the awarding of attorney's fees and costs, was not contemplated by the Hawai'i Supreme Court.

III. ORDER

IT IS HEREBY ORDERED that pursuant to the Hawai'i Supreme Court's decision in *Carl, supra*, and based upon the entire record of these proceedings, Protestor is awarded its costs of preparing Protestor's proposal, and awarded attorney's fees and costs against Respondent, without the addition of interest, as follows:

- a) The costs of preparing Protestor's proposal in the amount of \$30,000;
- b) Attorney's fees in the amount of \$461,166.58 (including tax) incurred in the protest hearings of RFP 96-004;
- c) Attorney's fees in the amount of \$74,834.42 (including tax) incurred in the appeal of the August 15, 1996 Findings of Fact, Conclusions of Law, and Final Order;
- d) Hearing costs in the amount of \$61,760.81 for the protests of RFP 96-004 and the appeal; and
- e) Attorney's fees in the amount of \$26,647.48 (including tax) for preparation and hearing on Protestor's Application in Support of the Reasonableness of its Attorneys' Fees and Costs.

DATED: Honolulu, Hawai'i, June 24, 1999.



RODNEY A. MAILE
Senior Hearings Officer
Department of Commerce
and Consumer Affairs

IN THE SUPREME COURT OF THE STATE OF HAWAII

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In the Matter of CARL CORPORATION, Petitioner-Appellant, v.
STATE OF HAWAII DEPARTMENT OF EDUCATION, HAWAII STATE
LIBRARY SYSTEM, Respondent-Appellee, and DYNIX, INC.
dba Ameritech Library Services, Intervenor

NO. 20049

APPEAL FROM THE OFFICE OF ADMINISTRATIVE HEARINGS,
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

(DOCKET NO. PCH-96-4)

August 22, 1997

MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

OPINION OF THE COURT BY MOON, C.J.

CARL Corporation (CARL), the unsuccessful competitor for the contract to provide automation and other services to the Hawai'i State Public Library System (HSPLS or the Library), appeals from the decision of the Department of Commerce and Consumer Affairs (DCCA) Hearings Officer. The Hearings Officer essentially rejected CARL's contention that Intervenor Dynix, Inc., dba Ameritech Library Services (Ameritech, Dynix, or ALS), who was awarded the contract, was afforded an unfair advantage in responding to the Library's request for proposals, but concluded

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that the process by which the proposals were evaluated was in violation of the State Procurement Code, Hawai'i Revised Statutes (HRS) Chapter 103D (1993) (the procurement code or the Code). In his "Findings of Fact, Conclusions of Law and Final Order," filed on August 15, 1996 (FOF, COL, and Order), the Hearings Officer remanded the matter back to the Library to reevaluate the competing proposals, "after which [the Library] shall ratify and affirm the contract, or terminate the contract as provided for in HRS §[§] 103D-707(1)(A) and (B)." CARL timely appealed.

For the reasons stated below, we vacate the Hearings Officer's Order remanding to the Library for (1) a reevaluation of the proposals and (2) a determination whether to ratify or terminate the disputed contract. We hold that, pursuant to HRS § 103D-701(g) and because the evaluation of the proposals was in violation of the procurement code, CARL is entitled to its costs in preparing its proposal. We further hold that, where CARL was deprived of any meaningful relief under the code by the award of the contract to Ameritech in bad faith violation of the code, CARL is entitled to recover its attorneys' fees incurred in successfully challenging the award of the contract before the Hearings Officer and on appeal.

Accordingly, we remand to the Hearings Officer for entry of an order: (1) awarding CARL its costs for preparation of its proposal and its reasonable attorneys' fees in prosecuting

its protest and appeal; and (2) ratifying or terminating the contract as provided for in HRS § 103D-707.

I. BACKGROUND

CARL and Ameritech submitted the only two responses to the Library's November 13, 1995 Request For Proposals No. RFP-96-004-0 (RFP 96-4) for a new computer automation system. Ameritech was chosen to provide the system after a one-day evaluation of the two voluminous and highly technical proposals. The Library notified CARL by letter dated December 19, 1995, postmarked December 27, 1995, and received January 2, 1996, that another vendor's proposal was selected.

By letter dated January 3, 1996, and copied to State Librarian Bartholemew Kane, CARL lodged its formal protest with Lloyd Unebasami, Administrator of the State Procurement Office, pursuant to HRS § 103D-701, which provides:

- (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or the head of a purchasing agency. The protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.
- (b) The chief procurement officer, the head of a purchasing agency, or a designee of either officer, prior to the commencement of an action in court concerning the controversy, may settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with rules adopted by the policy office.
- (c) If the protest is not resolved by mutual agreement, the chief procurement officer, the head of a purchasing agency, or designee of either officer shall promptly issue a decision in writing. The decision shall:
 - (1) State the reasons for the action taken; and
 - (2) Inform the protestor of the protestor's right to review as provided in this part.

- (d) A copy of the decision under subsection (c) shall be mailed or otherwise furnished immediately to the protestor and any other party intervening.
- (e) A decision under subsection (c) shall be final and conclusive, unless fraudulent, or any person adversely affected by the decision commences an administrative proceeding under section 103D-709.
- (f) In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer, after consultation with the head of the using agency, or the head of the purchasing agency, makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the State.
- (g) In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

(Emphases added.) The essence of CARL's protest was that "this was not an open procurement and that another vendor was predetermined from the outset." In support of its contention, CARL stated the following: (1) the evaluation was inadequate; (2) CARL was not given an opportunity to demonstrate its system; and (3) the implementation schedule proposed in the RFP was unrealistic and could only be achieved by a vendor who had received information not contained in the RFP.

Although, as discussed *infra*, CARL mistakenly identified Unebasami as the "chief procurement officer" with authority to resolve protests pursuant to HRS § 103D-701,¹ Unebasami did nothing to correct CARL's error. He referred CARL's protest to Kane and requested that Kane "draft a response

¹ HRS § 103D-203 specifies that the chief procurement officer for the Department of Education, to which the Library is administratively attached, is the superintendent of education. See section II.B.2., *infra*.

for my signature by January 10, 1996. Unebasami also informed Kane that, pursuant to Hawai'i Administrative Rules (HAR) § 3-126-5, "your agency shall not award the contract until the protest has been settled, unless I make a written determination after consulting with you, that the award is necessary to protect substantial interests of the State."

Kane, however, responded directly to CARL by letter dated January 9, 1996, denying the protest. Kane denied the protest on the grounds that: (1) the protest was untimely; (2) the independent evaluation committee conducted a full and complete review of the two proposals; (3) a demonstration was not necessary and was not required by law; and (4) the implementation schedule outlined in the RFP was an essential specification that was an integral part of the RFP. Kane denied that the Library provided any vendor with information that was not in the RFP or that any vendor was authorized by the Library to initiate any act regarding the implementation of the system prior to the award. Kane's letter did not inform CARL of its right to a review of the denial of its protest as required by HRS § 103D-701(c)(2).

CARL received Kane's letter denying its protest on January 12, 1996. On January 22, CARL wrote to Unebasami, seeking "a detailed explanation of which aspects of the evaluation criteria favored the other party and why." Unebasami responded to CARL's letter on January 26, stating that CARL's

letter would be discussed with Kane "in order to prepare a response to you at the earliest possible date." In the meantime, however, Kane executed the contract with Ameritech on January 25, 1996.

By memorandum dated January 30, Unebasami referred CARL's January 22 letter to Kane and informed Kane that his previous response to CARL, denying its protest as untimely, was improper. Unebasami requested that Kane prepare a response to CARL's letter and submit a draft to the State Procurement Office before finalizing and sending it to CARL's attorneys. CARL was to be advised in the response that the contract had already been signed with Ameritech and that the entire contract file was open for public inspection pursuant to HAR S 3-122-58.²

² HAR S 3-122-58, which became effective December 15, 1995, provides that:

- (a) After the contract is signed by all parties, the proposal, except those portions for which an offeror has made a written request for confidentiality, shall be open to public inspection.
- (b) The contract file, including but not limited to the following, shall be opened for public inspection:
 - (1) The register of proposals prepared pursuant to section 3-122-52;
 - (2) A listing of all vendors to whom copies of the request for proposals were distributed;
 - (3) Name of successful offeror and dollar amount of offer;
 - (4) The basis on which the award was made;
 - (5) A copy of the request for proposals;
 - (6) A copy of the successful offeror's proposal;
 - (7) A copy of the unsuccessful offeror's proposal.
- (c) If a person requests disclosure of data, for which an offeror has made a written request for confidentiality, the head of the purchasing agency or a designee shall consult with the attorney general or corporation counsel and make a written determination in accordance with chapter 92F, HRS.
- (d) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with

(continued...)

On January 31, CARL filed a request for hearing with the DCCA, seeking review of Kane's January 9, 1996 denial of its protest. The request for hearing was made pursuant to HRS § 103D-709, which provides:

- (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction 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 under sections 103D-310, 103D-701, or 103D-702.
- (b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the supreme court under section 103D-710.
- (c) The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. The rules of evidence shall be strictly adhered to.
- (d) The hearings officers shall ensure that a record of each proceeding [is compiled]
- (e) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement was previously stayed under section 103D-701(f).
- (f) Hearings officers shall decide whether the determinations of the chief procurement officer or the head of the purchasing agency, or their respective designees were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract.
- (g) The policy office shall adopt such other rules as may be necessary to ensure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard.

²(...continued)
section 92F-42(12), HRS.

Also on January 31, CARL wrote to Kane requesting access, pursuant to HRS ch. 92F and HAR § 3-122-55(b)¹, to the Library's records regarding RFP 96-4 and the subsequent award of the contract.

Unebasami informed CARL by letter dated February 1 that its request for hearing was premature because CARL's January 22 letter "is considered a request for reconsideration[.]". Also, on February 1, Deputy Attorney General Winfred Pong telephoned CARL's attorney, Jeffrey Harris, on behalf of the Library. According to Harris's February 2 letter to Pong, confirming the telephone conversation, Pong had informed Harris that "Lloyd Unebasami concluded CARL Corporation's January 2, 1996, protest has not been denied, that Mr. Unebasami is making the decision on CARL's protest, that he has requested [Kane's] response to the allegations, and that he has prevented any contract from being sent out for signature yet." Pong had also informed Harris "that the Library System and Ameritech were performing work related to the request for proposals regardless of CARL's protest." Harris pointed out that any performance on the contract was in violation of HRS § 103D-701(f), and requested that Pong "advise the Library System and Ameritech to stop performing any work related to the contract unless and until the protest is finally resolved." Harris sent a copy of the letter to Unebasami.

¹ HAR § 3-122-55(b) was a draft regulation. For the text of HAR § 3-122-58 (1995), which became effective one month prior to CARL's information request, see *supra* note 2.

On February 6, in a letter to Unebasami, CARL formally protested the performance of any work on the contract by the Library and Ameritech, alleging that such performance was in violation of HRS § 103D-701(f). Also on February 6, Kane requested by memo that Unebasami approve the award of the contract to Ameritech. Kane's memo argued that: (1) the current vendor, whose contract expired in June 1995, might suddenly cease service at any time; (2) the new system would allow redeployment of fifteen library employees currently involved in maintaining the old system; (3) without the immediate award of the contract, the simultaneously awarded contracts for collections (Baker & Taylor) and on-line serials (Information Access Company) would be delayed; (4) free Internet access would be delayed; (5) recabling the libraries and installation of the frame relay system were underway and would have to be paid for when complete, regardless of whether the automation services were available; and (6) new administrative rules to provide services and user fees were dependant on the new automation system for implementation. Kane urged Unebasami that, "given this information, we hope that you will understand the utmost urgency of awarding this contract and give us permission to do so." Kane sent Unebasami an addendum to the February 6 memo on February 9, in which he contended that the fact that the proposals were scored by an independent evaluation team was an additional reason "why the substantial interests of

the State will be protected by awarding the contract to Ameritech[.]"

The Library informed Ameritech by letter dated February 8, 1996, that it should immediately cease any action that would result in providing goods and services to the Library under RFP 96-4. On the same date, Kane sent another letter to Ameritech. This letter was in response to Ameritech's fax the previous day, which informed Kane that "March 4 is no longer a realistic functionality date. Due to the delays, this will postpone the functionality date till [sic] April 15." Notwithstanding the order to stop work, which was not mentioned, Kane responded that "[y]our telefacsimile of February 7, 1996 was disappointing and unacceptable. It is imperative for Ameritech as well as the HSPLS to meet a Monday, March 4, 1996 functionality deadline."

On February 12, CARL filed an "Emergency Motion for Order Stopping Work with Other Vendor On RFP No. 96-004-0" with the Hearings Officer. CARL alleged that, despite its February 6 protest and the Library's statement that it requested Ameritech to cease performing work on the contract, "CARL has been informed by an employee of the Library who fears retaliation that Library employees have been instructed to continue working with the other vendor on the RFP[,]" and that, "[i]n a telephone conversation on the morning of February 12, 1996, Mr. Pong admitted that some of these [tasks related to the contract] were occurring." CARL apparently withdrew its emergency motion when, also on February

12. Pong confirmed his assertion that work had stopped on all data conversion from the old system to the Dynix system and on terminating the cabling. The following day, Harris requested that Pong have the library comply with CARL's January 31 information request.

By memorandum to Unebasami, dated February 16, Kane reiterated his February 6 request that Unebasami approve the award of the contract to Ameritech and make the determination, as required by HRS § 103D-701(f), "that the award of the contract without delay is necessary to protect the substantial interests of the State." In addition to his earlier arguments, Kane asserted that the Library was likely to prevail on the merits of CARL's protest. Kane concluded that "we believe that when the public welfare and interests of the HSPLS are balanced against the CARL Corporation, the interests of the HSPLS must prevail," contending that:

The HSPLS cannot function without the automation system. Without the immediate award of the contract, approximately 800,000 library cardholders would have no library access or services[,] approximately 512 library employees will face layoff and loss of employment, and the State's economic and education systems would be drastically impacted.

On February 17, CARL filed an additional protest with Unebasami, alleging that Ameritech's proposal was not responsive

Of course, at the time the memo was drafted, the merits of CARL's protest were still before Kane, whose decision on the protest, pursuant to HRS § 103D-701, had been pending for a month. Despite the purported urgency in proceeding with work on the contract, Kane waited another month before denying the protest, on the same grounds cited both in his initial January 9 denial and in his memo to Unebasami.

to the RFP because there were material deviations from the RFP that affected the price, quantity, and quality of the goods and services offered. CARL supplemented its protest by letter dated February 20, enumerating the material differences between the requirements of the RFP and the terms of the proposed contract.⁵ On February 22, Unebasami informed CARL by letter that its additional protest would delay any response to its January 22 request for reconsideration and requested further explanation of the material deviations between the RFP, CARL's proposal, and the proposed Ameritech contract enumerated in CARL's February 20 letter. CARL provided the requested information on March 1, 1996.

On March 12, Kane denied all three of CARL's protests. Kane denied CARL's January 22 request for reconsideration of his January 9 denial on essentially the same bases as the original denial. The February 6 protest of the performance of work under the contract in violation of HRS § 103D-701(f) was denied on the ground that the Library did not know, at the time it executed the Ameritech contract, that the protest was not yet resolved because Unebasami did not forward CARL's "request for reconsideration" to Kane until February 1. Further, Kane asserted that any work performed by Ameritech after the contract was executed on January

⁵ CARL had obtained a copy of the contract proposed by Ameritech and executed by Ameritech on December 28, 1995. CARL's copy did not reflect the January 25 execution by Kane, and CARL was apparently unaware that the contract had, in fact, been executed.

25^c was performed at Ameritech's own risk and cost and that work that did involve the expenditure of public funds, i.e., the cabling work and the frame relay system were non-vendor specific and "would be required upon the installation of an automation system by any vendor." The February 17 protest was denied "primarily because the protest has failed to compare Ameritech's actual proposal submitted on December 13, 1995, with the RFP No. 96-004-0."⁷

The following day, March 13, Unebasami sent Kane a memo that stated, without further explanation, that "[p]ursuant to Section 103D-710(f) and based upon our review, it has been determined that the award of the contract to Ameritech without delay is necessary to protect the substantial interests of the

This statement was apparently the first notice to CARL or its attorneys that the contract with Ameritech had been executed.

Kane did not explain how CARL could have done so, where CARL did not have Ameritech's proposal due to the Library's failure to respond to any of CARL's information requests. See POF 248 ("Mr. Kane did not produce documents and information in response to this [January 31, 1996] request or as directed by the State Procurement Office"); and Harris' affidavit attesting that he received no response to his January 31 and February 13 information requests until after the protest was denied on March 12; see also Library's memorandum in opposition to CARL's motion in limine, stating that "a copy of [Ameritech's] proposal was provided to Petitioner as soon as a final determination was made that [Ameritech] was the successful offeror, that it was properly awarded the contract, and that its proposal included no confidential information." (Emphasis added.)

Moreover, Unebasami's February 22 request for information specifically requested that CARL provide, with respect to each of the alleged material deviations referred to in its February 20 letter,

the page and item number, a quote of the specific language or numbers, and an explanation of the deviation(s), etc., for:

- a. The request for proposal (96-004-0);
- b. CARL Corporation's offer; and
- c. Ameritech's contract.

State." Also on March 13, Unebasami wrote to Harris and explained that:

As CARL's protest has been determined to be timely, the CPO's function here is then to determine whether an award without delay is necessary to protect the substantial interests of the State. As part of the determination process, our office reviewed your allegations and all of the information submitted to date. Our office looked closely at the RFP's requirements and the evaluation process which was undertaken for this contract. We found that the evaluation process was not compromised and the determination of award reached fairly and in accordance with the RFP.

Accordingly, after careful consideration of the allegations, the available materials, and RFP, we have concluded that to authorize the Hawaii State Library System to proceed with its contract with Ameritech is necessary to protect the substantial interests of the State.

On March 19, 1996, CARL filed a Request for Hearing with the Office of Administrative Hearings, pursuant to HRS § 103D-709, concerning Kane's decision. CARL filed an additional Request for Hearing on March 21, 1996, seeking review of Unebasami's decision that further action on the contract was necessary to protect the substantial interests of the State. The following day, CARL filed an "Emergency Motion for Order Stopping Work on RFP No. 96-004-0." The motion was heard and orally denied on April 2, 1996, FOF 282.¹

Ameritech's motion to intervene was filed on April 9, 1996 and granted on April 12. The evidentiary hearing before Senior Hearings Officer Rodney A. Maile commenced on April 17, 1996. The issues, as framed in CARL's prehearing statement, were:

¹ The audiotape of the April 2, 1996 hearing is included in the record, but is inaudible and was apparently not transcribed.

1. Did the Hawaii State Public Library System ("HSPLS") consult with Ameritech Library systems ("ALS") about its computer scheme before requesting a proposal from Carl Corporation ("CARL") on November 13, 1995, and receiving it on December 13, 1995?
2. Did HSPLS provide ALS information about this scheme that it did not provide to CARL before December 19, 1995?
3. Did HSPLS consider ALS's information about the networks and systems covered by the scheme that it did not request from CARL?
4. Did ALS's proposal about these networks and systems comply with the Request for Proposals given to CARL on November 13, 1995?
5. Did HSPLS and ALS sign the contract on January 25, 1996, and continue to work after CARL submitted its protest on January 2, 1996?
6. Was continuing work after March 13, 1996, necessary to protect a substantial interest of the State?
7. Whether HSPLS violated state procurement laws in its award of the automation system contract to ALS, requiring the rescission of the contract?
8. Whether CARL is entitled to an award of the contract or the rebidding of the contract, and its costs in preparing its bid proposal and its attorneys' fees and costs incurred in this protest?

The Hearings Officer issued his FOF, COL, and Order on August 15, 1996. He made 282 FOF, which are not disputed on appeal. The FOF, record, and exhibits recount the history of this procurement and the relationship between Ameritech, its subcontractor, Maui High Performance Computing Center (MHPCC), and the Library, and indicate the following sequence of events.

Sometime in 1994, the Library began looking at major changes in its operations. It was apparently experiencing difficulties with its existing computer system and, as a result of budget cuts, was considering "outsourcing" computer services.

The Library also wanted to provide free Internet access to the public, and, in November 1994, State Librarian Bart Kane had discussions with MHPCC about providing this service as well as shifting the Library's other computer functions to MHPCC. To achieve these objectives, the Library would need to replace its existing network with a frame relay network. Under an educational initiative plan announced by GTE-Hawaiian Tel (GTE), GTE offered a \$2000 credit to each public library for installation and monthly service fees on the frame relay network. The credit was not available to vendors.

Correspondence memorializing those discussions and formalizing the relationship between the Library and MHPCC was exchanged in early 1995, preliminary to a Memorandum of Understanding (MOU).⁹ The letters indicate that the Library and MHPCC contemplated a partnership between MHPCC, GTE, and the Library with the objectives of: (1) Internet access for the Library through MHPCC and GTE's educational initiatives; and (2) migration of the Library's computer systems to MHPCC.

Meanwhile, also in November 1994, an Ameritech representative attended the Hawai'i Library Association Conference, and, while in Hawai'i, met or spoke with representatives of both the Library and MHPCC. Brad Whittle, a sales manager for Ameritech, followed up on the contacts made at the conference, and, in February 1995, discussed with Library

⁹ It is not evident from the record whether the MOU was executed.

personnel the possibility of locating an automation system for the Library at MHPCC. Between January and March 1995, Ameritech sent the Library several price quotes on a computer automation center.

In March or April 1995, the Library initiated its re-engineering project and agreed that a MHPCC representative, Mary Ann Bufalini, would sit on the Library's re-engineering committee. In May 1995, MHPCC received an initial contract to commence providing Internet access to the Library; however, in June, MHPCC was notified to put the Internet access activity on hold until the re-engineering project was completed.

During the spring and summer of 1995, Ameritech managed to insert itself into the library-MHPCC relationship. In June 1995, Kane attended the American Library Conference in Chicago, and he and his wife had lunch with Whittle and Ameritech's president and vice president in one of Ameritech's suites. They discussed the Library's re-engineering project, the use and operation of automation centers, and Ameritech's automation centers. On July 3, 1995, Kane met with MHPCC representatives regarding the re-engineering project. Kane informed MHPCC that the project was moving along faster than expected and that he was ready to form a technical committee to design a new telecommunications network. Another MHPCC representative, Burt Lum, was assigned to this "telecom" committee. Kane also informed MHPCC that he had found a vendor for the computer

automation system, Ameritech, and that Ameritech representatives would be in Hawai'i to visit Kane later in the month and would like to visit MHPCC.

During July 1995, the Library's telecom committee and GTE discussed the equipment and configuration of the frame relay system. On July 26 and 28, Library representatives met with MHPCC representatives to discuss the re-engineering program, Internet services, and the automation of the library system. Lum, MHPCC's representative on the telecom committee, left the meetings with the understanding, reflected in his notes, that Ameritech would be performing the work to automate the Library.

Sometime in July or August 1995, Whittle contacted MHPCC to determine whether MHPCC's hardware could run Ameritech's "Dynix" library automation software. On August 2, Whittle informed a library representative that the Library's current computer system was not compatible with, and could not run on, the computer system operated by MHPCC, which is a UNIX based system. Whittle also arranged to visit MHPCC in August, and Kane asked if he could come along.

During the first week of August 1995, there were three meetings involving representatives of the Library, MHPCC, and GTE to discuss the frame relay system, which was intended by the Library to be used for its entire automation system, including Internet access, and was to terminate at MHPCC. The Library asked for information from GTE on the cost of frame relay network

work "in preparation [for] an August 30, 1995 meeting." FOF 62. GTE understood that the Library was interested in working with MHPCC and GTE in migrating the frame relay.

On August 10, 1995, the Library wrote to Ameritech, outlining the goals of the re-engineering project. In that letter, the Library informed Ameritech that it was considering a move to MHPCC and that it was looking for products that, unlike its current automation software, could run on MHPCC's hardware. Whittle and another Ameritech representative, Debra Park, visited Hawai'i on August 28 and 29, 1995. At a meeting on August 28, between the Ameritech and Library representatives, Kane provided an update on the re-engineering process, emphasized the importance of re-engineering, and said that nothing would be worse than going through all the effort and not having the process come to fruition. During the same meeting, Whittle offered to prepare a "pre-proposal" for the Library's consideration by mid-September. Another meeting was held that afternoon with technical staff of the Library, who provided details regarding how the current network was set up, including the current cabling.

The following day, Kane went with Whittle and Park to MHPCC for a meeting with MHPCC representatives. The purpose of the meeting was to discuss MHPCC's participation in the Library's re-engineering efforts in order for MHPCC to price its services to the Library and Ameritech. During the meeting, Ameritech

learned that its Dynix software could not run effectively on MHPCC's hardware and that, if Ameritech was to use MHPCC, it would have to provide the hardware for MHPCC's personnel to manage. The group discussed Kane's January 2, 1996 deadline for full functionality, which was designed to coincide with the opening of the legislative session. Also at the August 29 meeting, Whittle asked Lum to secure price estimates for the new frame relay system from GTE. Whittle testified that, at the time, he was unaware of any communication between the Library and GTE regarding the pricing and configuration of the frame relay system, although Lum was MHPCC's representative on the Library's committee that had been discussing the matter with GTE.

During the August 28 and 29, 1995 meetings between Ameritech and the Library, they discussed the Library's budget and how much it could spend on the automation system. They also discussed the time line for the installation of the automation system. On August 31, 1995, because he had promised to call and let him know if Ameritech could meet the Library's deadlines, Whittle faxed Kane, indicating that Ameritech could meet a January installation deadline if it began work on the project immediately. In particular, Ameritech needed information about configuration and peripherals to prepare its proposal.

Also on August 31, 1995, following the August 29 meeting, Margaret Lewis of MHPCC sent a status report on the library project to other staff at MHPCC and identified "Ameritek".

[sic] as "the vendor who will be hardware/software provider for this project."

In September 1995, GTE met with a library representative, Heide Miller-Pakvasa, and Lum of MHPCC to discuss specifics of the frame relay system. GTE's account manager, Phylis Morihara, took notes of a conversation between Lum and Pakvasa, reflecting that they discussed Dynix, Ameritech, and Whittle, as well as the time line for REPs, on an automation system.

Also in September 1995, Whittle made available a Dynix demonstration database to Pakvasa and the re-engineering team over the Internet. Pakvasa circulated information to library personnel on how to access the Dynix demonstration program and toured the program herself. Other library staff specifically asked for access to the program.

During September 1995, Ameritech exchanged information with MHPCC in preparation for submission of its pre-proposal. The Library also provided Ameritech with various information necessary for Ameritech's pre-proposal, including:

- (1) information about the Library's equipment and capacity requirements for the automation system; (2) the number, type, and model number of equipment required by the Library;
- (3) information about the Library's Automation Inventory;
- (4) local telephone rates; (5) details about peripheral equipment; (6) on-line equipment existing at the Library;

(7) microcomputer data and central site equipment; (8) conversion utilities; (9) information on library sites, number of computers, and speeds by which the circuits would be established to each site; and (10) graphics depicting the various library sites connected to the various frame relay breaks, the work station, router, a DSU/CSU, and terminal server. The information requested by [Ameritech] and provided by [the Library] was necessary for [Ameritech's] preparation of its proposal in response to the RFPs.

On September 19, 1995, Whittle faxed Kane a seventy-one page document entitled "Response to a Request for Proposal for a Computer Automation System for HS[P]LS." The pre-proposal contained three possible automation system scenarios and contained information that Ameritech had obtained from MHPCC about the frame relay costs. On September 22, 1995, the Library determined to proceed by request for proposal, rather than invitation for bid, on the purchase the new computer automation system.

Whittle and Park were in Hawaii and met with representatives of the Library on September 28 and 29, 1995 to discuss Ameritech's pre-proposal. Whittle and Park presented the pre-proposal, discussed the Dynix automation center, answered questions, and received feedback on the pre-proposal in a meeting with Kane and two other Library staff on the morning of September 28. During the meeting, the Library staff discussed the

Library's budget restrictions and its budget range for the automation center. The group also discussed the January 2, 1996 deadline, which was of critical importance to Kane. Kane asked whether it was possible to have the system installed and operational by then. Whittle called Ameritech's headquarters and, after speaking to several people, confirmed with Kane that Ameritech could meet the January 2 deadline.

There was another meeting that afternoon, including the same participants from the morning session, with the addition of Lum and Bufalini of MHPCC, at which the discussion centered around Ameritech's relationship with MHPCC and the frame relay system. The following day, the same group met again, joined by Kane's wife, Elaine Murphy. The purpose of the meeting was to discuss the RFP process. Murphy was present to share her experience with the proposal evaluation process, obtained as a City employee. Kane asked Whittle and Park for information that would help the Library with the RFP process, and Whittle provided the Library a sample RFP. As in the meetings the preceding day, the group discussed what the RFP should include.

On October 2, 1995, the Library issued RFP-96-001-0 for "Sealed Proposals and Pricing for Vendor Operated Automation Center, Integrated Library Automation System, and Frame Relay Telecommunications Network." (RFP 96-1). Prior to the issuance of RFP 96-1, Ameritech took steps in preparation for the installation of its automation system for the Library, including:

(1) pre-ordering equipment that would be required for the automation system; (2) starting the process of recovering data from the Library's existing system; (3) trying to start converting information into Ameritech's automation system; and (4) assembling a team of Ameritech's staff to write the responsive proposal, as well as configuration, contract, and implementation teams.

The deadline for the submission of proposals was set in RFP 96-1 as October 23, 1995, with the contract to be awarded on November 1, 1995, and the new system to be operational and in use by January 2, 1996. The ability to implement the contracted services within sixty days of the award of contract was specifically made a "Vendor Qualification."

Before any responsive proposals were received, Kane informed the library's transition team that Ameritech would complete the network design and cabling specifications. Management action plans (MAP) prepared by Pakvasa on or about October 4, 1995 listed as necessary actions: (1) "[f]inalize details with MHPCC"; (2) "[p]repare MHPCC facility"; and (3) "[l]oad software & library data on new equipment in Utah [Ameritech's location].". Under the "person responsible" column of the MAP relating to the frame relay network, "Ameritech" was assigned responsibility for completing the network design and cabling specifications, ordering the equipment for the MHPCC and library sites, and installing and configuring the network

equipment. Ameritech was also assigned responsibility for almost all of the tasks related to "[a]utomation - Internet," as well as several tasks related to "[a]utomation - Baker & Taylor."¹¹

Only CARL and Ameritech submitted proposals in response to RFP 96-1.¹¹ On October 30, 1995, Kane informed Whittle by telephone that Ameritech had been awarded the contract under RFP 96-1. On November 8, 1995, however, the Library informed Ameritech and CARL that RFP 96-1 had been canceled because of the failure to publish notice of the RFP.

The Library issued RFP-96-004-0 (RFP 96-4) on November 13, 1995. The schedule of events described in RFP 96-4 required proposals to be submitted by, and opened on, December 13, 1995. The proposals would be evaluated on December 15, 1995, the contract awarded on December 22, 1995, and the new system operational and in use by February 20, 1996. Other than changes in dates and deadlines, the only difference between RFP 96-1 and RFP 96-4 was the removal of the requirement that the vendor provide cabling for the libraries.¹² RFP 96-4, like RFP 96-1,

¹¹ Baker and Taylor's contract to acquire books for the Library was part of Kane's plan to "outsource" library functions.

¹² The Library's existing service vendor, Data Research Associates (DRA), withdrew as a possible offeror under RFP 96-1 on October 16, 1995, informing Kane in a letter that it would be impossible to establish an automation center and be operational by the stated deadline and observing that the deadline and other requirements of RFP 96-1 indicated to DRA that the Library had already selected a vendor.

¹² Notwithstanding the requirement in RFP 96-1 that the vendor provide cabling, it appears that the Library decided to do the recabling itself to save money. During discussions over Ameritech's September 19 pre-proposal, the Library and Ameritech discussed the high cost of recabling, and the

(continued...)

requested proposals for the purchase, installation, and maintenance of the automation system and included a requirement that the automation center's operating system "must be an open system running UNIX."

Again, Ameritech and CARL submitted the only proposals in response to RFP 96-4. Ameritech's proposal included the siting of the automation center at MHPCC and utilized MHPCC for Internet connection. Ameritech's proposal provided pricing only for the leasing of the automation system; CARL's proposal provided pricing for both purchase and lease of the system. The automation system proposed by Ameritech runs under a UNIX operating system; CARL's runs on a Tandem operating system and supports a POSIX environment, which is the industry standard UNIX implementation.

The RFP also required the vendor to provide telephone lines and firm pricing for telephone charges. Ameritech's proposal included telephone lines as an option, and its cost proposal excluded telephone charges and provided only an estimate of the annual frame relay charges from GTE, noting that the estimated charges did not include the \$2,000 per/library credit offered by GTE.

¹²(...continued)
Library began looking for another funding source to cover the cost of recabling. On October 30, 1995, Kane asked Hawaiian Electric Company for the services of a project manager to oversee the cabling work, which was to be done by the Library's technicians.

The RFP required a quote for 550 ports or terminals. Ameritech's response provided for 524 ports, or 515 terminals. CARL's response provided for 550 terminals. Ameritech's proposal stated that Ameritech was "prepared to meet the time schedules outlined. Specifically, [Ameritech] will have a system operational and in use by February 20, 1996." CARL, on the other hand, noted that "[i]mplementation of the [telecommunications] network will need to begin immediately upon contract signing. Typically there are 45-60 day lead times for circuit installation." CARL's implementation schedule, therefore, identified April 10, 1996 as the date for the "live" use of the system and asked the Library to "note that this is a very aggressive schedule, and any delays will result in delays in a live system date." (Emphasis in original.)

Members of the Library's re-engineering team created the Proposal Evaluation Worksheets, which were based on the factors listed in the RFP. Out of a maximum of 200 possible points, "Business Profile" was assigned 20 points, "Cost Proposal" was assigned 50 points, "Response to Specifications" was assigned 50 points, "Installation and Training" was assigned 30 points, and "Automation Center Service and Support" was assigned 50 points. Each of these headings was then broken down into subcategories, with the relative importance of each assigned by Library staff. Separate worksheets were prepared for several of the functional specifications and for the cost evaluation. A

member of the Library staff calculated the proposals' scores, based on the 30-point total, for "Functional Specifications."

The scores in the remaining categories were calculated by a team of three evaluators, who met for the purpose of evaluating the proposals on December 15, 1995. Each of the evaluators had experience in library automation; two were librarians at libraries utilizing Ameritech automation systems, one was a librarian at a library employing a CARL system. The evaluators were not provided any materials to review prior to December 15, 1995 and were instructed that the Library had no experience with either vendor, so it had no opinion as to which was better. The evaluators were told only to go through the proposals and use the RFP to make their recommendation. The evaluators were not instructed that they could consider only the RFP and the proposals and could not rely on their outside experience in evaluating the proposals. Nor were they instructed on how to use the scoring worksheets and the completed worksheets for "Functional Specifications." Because they were told that they had one day to complete the evaluation, they did not read the entire proposals or check references. The evaluators in fact relied on their own subjective beliefs and their knowledge of the different automation systems proposed and the companies proposing them, in evaluating which automation system was better for the Library.

One of the evaluators did not complete the cost evaluation worksheet because he had to leave early. After he left, the other two evaluators telephoned Ameritech's office in Utah and asked whether, in view of the difference in the cost proposals, there were any additional charges not reflected in Ameritech's total cost. They were told that there were no additional costs. The two evaluators who completed the cost evaluation worksheet did not consider the differing terms of the two proposals. Recognizing that they did not have the capability to perform a comparative evaluation of all the various purchase and lease options, they compared CARL's purchase option with Ameritech's leasing proposal, rather than comparing CARL's leasing option with Ameritech's leasing proposal. The evaluators also failed to take into consideration the five and one-half year duration of the contract, but compared the costs only for the first year of the contract.

The three evaluators agreed that the deadline prescribed in RFP 96-4 was unrealistic and impossible for vendors to meet. Nonetheless, at least one evaluator scored CARL below Ameritech because some of the items, under CARL's proposal, would become operational only after the February 20, 1996 deadline.

In scoring the two proposals, the evaluation team awarded a total of 443.5 points to Ameritech and 327 points to CARL. Kane accepted the recommendation of the evaluation team

and notified Whittle on December 18, 1995 that Ameritech had been awarded the contract under RFP 96-4.

Between December 18, 1995 and January 25, 1996, when Kane executed the contract, there were further negotiations between the Library and Ameritech regarding the terms of the contract. The final contract differed from the RFP in several respects. For example, the RFP required the vendor to provide a frame relay system and telephone lines to the Library. The contract, however, stated that the Library was responsible for all costs of installation and maintenance of all telecommunication lines and frame relay services.

The Hearings Officer entered the following challenged
COL:

13. Whereas incomplete contract specifications may be fatal to an [Invitation]F[or]B[id], they are inherent in the nature of an RFP where the agency is seeking guidance from the bidders as to how the general service it seeks can be provided.

18. [The Library's] preference as stated in the RFP for an automation system which runs a UNIX operating system is not arbitrary or unreasonable, nor does it amount to an abuse of discretion.

19. [The Library's] preference as stated in the RFP for an automation system which runs a UNIX operating system did not significantly favor [Ameritech] over [CARL] in the evaluation of the competing proposals inasmuch as the Worksheets awarded one point out of 200 for a proposal offering a UNIX system.

20. When Mr. Kane denied [CARL's] protest on January 9, 1996, it was not unreasonable for him to believe that pursuant to section 103D-701(e), his decision was final and conclusive.

21. It was also not unreasonable for Mr. Kane to believe that after his final decision was issued on January 9, 1996, and before any administrative

proceeding was commenced under HRS § 103D-709, there was no pending protest under HRS § 103D-701(a) that would require that no action be taken on the award of the Contract.

22. The scope of the Hearings Officer's ability to fashion a remedy in the instant case is governed by section 103D-707, concerning remedies after an award.

23. The determination that substantial State interests were involved allowed [The Library] and [Ameritech] to proceed under the Contract despite the pendency of [CARL's] protests.

24. [CARL] did not meet its burden of proving by a preponderance of evidence that the CPO's decision of March 13, 1996, finding that the award of the Contract to Intervenor without delay was necessary to protect the substantial interests of the State despite [CARL's] protest was in violation of the law or violated the Constitution, statutes, regulations, or the terms and conditions of the solicitation.

25. Should the Hearing Officer find that the solicitation or award of the Contract was in violation of the law or that [the Library] violated the Constitution, statutes, regulations, or the terms and conditions of the solicitation, in the absence of any evidence or claim that [Ameritech] acted fraudulently or in bad faith in securing the Contract, the remedies available are limited to ratification or termination of the contract. HRS § 103D-707(1)(a).

26. Should any remedy be appropriate, in order to determine whether the remedy should be ratification or termination, "the best interests of the State" must be considered. If "the best interests of the State" require ratification, the contract may be ratified notwithstanding a solicitation or award of contract in violation of law.

27. It is beyond the Hearings Officer's authority to award the Contract to [CARL].

28. It is beyond the Hearings Officer's authority to determine "best interests of the State"; consequently, should the solicitation or award of the Contract be determined to be in violation of the law, or should it be determined that [the Library] violated the Constitution, statutes, regulations, or the terms and conditions of the solicitation, the Hearings Officer must remand the matter back to the contracting officer for a determination of "the best interests of the State."

29. The law limits the Hearings Officer's remedy-related authority to "decid[ing] whether the determinations of the chief procurement officer or the head of the purchasing agency . . . were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation."

30. The rules adopted by the CPO in accord with the legislative directive provide only that:

the chief procurement officer or the head of a purchasing agency may ratify or affirm the contract or terminate it in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.

31. [CARL] did not prove by a preponderance of the evidence that [the Library] had determined to select [Ameritech's] proposal under RFP 96-4 at any time prior to receiving the independent evaluation team's report of December 15, 1995.

32. [CARL] did not prove by a preponderance of the evidence that, in light of the performance and recommendation of the independent evaluation team, any alleged preference of Mr. Kane for [Ameritech] had any bearing on [the Library's] selection of [Ameritech's] proposal under RFP 96-4.

33. [CARL] did not prove by a preponderance of the evidence that Mr. Kane "rigged" RFP 96-4 so as to make [the Library's] selection of [Ameritech's] proposal more likely.

(Citations omitted.) The Hearings Officer also concluded that:

34. [CARL] proved by a preponderance of the evidence that the evaluation process and the concomitant award of the contract to [Ameritech], did not comply with HRS § 103D-303(g).^[13]

In his Order, the Hearings Officer commented that,

¹³ 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. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

although there were numerous meetings and discussions between Mr. Kane, [the Library's] staff, and [Ameritech] representatives, such meetings and discussions in and of themselves, were not prohibited by HRS Chapter 103D. The real focus in this case is whether the evaluation of the proposals from [Ameritech] and [CARL] were in accordance with the procedures outline[d] in RFP-96-4 and the applicable statutes and rules.

The Hearings Officer explained that,

[g]iven the nature and extent of the evidentiary presentations by [Ameritech] and [CARL] regarding the details of their proposals, it would have been unrealistic and unfair to expect the evaluators to understand such details without being provided additional explanations and time.

Even though the efforts of the independent evaluators and [the Library's] staff were undertaken in good faith, as a result of the compounding of misunderstandings between the evaluators and [the Library's] staff, the entire evaluation process became irretrievably flawed.

Accordingly, the Hearings Officer concludes that [CARL] proved by a preponderance of the evidence that [CARL's] proposal submitted in response to RFP-96-4, did not receive a complete evaluation in comparison with [Ameritech], as required by HRS § 103D-703(g).

Based on his FOE and COI, the Hearings Officer ordered "that the proposals submitted by [Ameritech] and [CARL] in response to RFP-96-4 be remanded back to [the Library] for proper evaluation, after which [the Library] shall ratify and affirm the contract, or terminate the contract as provided for in HRS § 103D-707(1), (A) and (B)."

On August 19, 1996, CARL timely filed an application in this court for judicial review of the Hearings Officer's decision pursuant to HRS § 103D-710, which provides:

- (a) Any person or governmental body aggrieved by a final decision of a hearings officer under section 103D-709 may apply for judicial review of that decision. The proceedings for review shall be instituted in the supreme court.
- (b) An application for judicial review shall not operate as a stay of the decision rendered under section 103D-709.

- (c) Within twenty calendar days of the filing of an application for judicial review in the supreme court, the hearings officer shall transmit the record of the administrative proceedings to the supreme court.
- (d) The review shall be scheduled as expeditiously as practicable. It shall be conducted on the record of the administrative proceedings, and briefs and oral argument. No new evidence shall be introduced in the appellate court, except that the court may, if evidence is offered which is clearly newly discovered evidence and material to the just decision of the appeal, admit the same.
- (e) Upon review of the record the court may affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

CARL contends that the evidence proved that Ameritech was provided an unfair advantage in the bidding process in violation of the procurement code and requests that this court

reverse or modify the Final Order (except as to Conclusion of Law No. 34), and terminate and void the award of the contract to Dynix under RFP-96-004-0, invalidate the proposal submitted by Dynix under RFP-96-004-0, award the contract under RFP-96-004-0 to CARL, award CARL its costs in preparing the proposal, and its attorneys' fees and costs incurred in the protest and on this application for judicial review.

II. DISCUSSION

The standard by which this court reviews the decisions of a hearings officer is governed by HRS § 103D-710(e), which is virtually identical to HRS § 91-14(g) (1993), and provides that

conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and [the Hearings Officer's] exercise of discretion under subsection (6). Accordingly, a reviewing court will reverse [a Hearings Officer's] finding of fact if it concludes that such finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. On the other hand, the [Hearings Officer's] conclusions of law are freely reviewable.

Hardin v. Akiba, 84 Hawai'i 305, 310, 933 P.2d 1339, 1344 (1997)

(citations omitted)

A. Jurisdiction

The Library and Ameritech contend that this court lacks jurisdiction to review the Hearings Officer's decision. They argue that CARL is not a "person aggrieved by a final decision of a hearings officer under section 103D-7.09" because the Hearings Officer's decision was not final, and CARL may get the relief it seeks when the Library reevaluates the proposals on remand.

They rely on our interpretations of the term "final order" in the context of HRS Chapter 91: "Final order" means an order ending the proceedings, leaving nothing further to be accomplished. Consequently, an order is not final if the rights of a party involved remain undetermined or if the matter is retained for further action." Mitchell v. State, Dep't of Educ. 77 Hawai'i 305, 307, 884 P.2d 368, 370 (1994) (quoting Gealon v. Keala, 60 Haw. 513, 520, 591 P.2d 621, 626 (1979) (citations omitted)).

Unlike HRS § 91-14(a), however, under which this court has jurisdiction to review "a final decision and order in a

contested case." HRS § 103D-710(a) provides jurisdiction to review "a final decision of a hearings officer under section 103D-709." HRS § 103D-712 provides that "[r]equests for judicial review under section 103D-710 shall be filed in the supreme court within ten calendar days after the issuance of a written decision by the hearings officer under section 103D-709."

Pursuant to HRS § 103D-709, "hearings officers shall have power to . . . find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the supreme court under section 103D-710." HRS § 103D-709(b). The "written decision" that the hearings officer has the power, and is, in fact, required, to make is "whether the determinations of the chief procurement officer or the head of the purchasing agency . . . were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract." HRS § 103D-709(f).

Having made the determination required by HRS § 103D-709(f) -- that Kane's denial of CARL's protest and award of the contract to Ameritech were in violation of the procurement code because "the evaluation process and the concomitant award of the contract . . . did not comply with HRS § 103D-303(g)," COL 34 -- and having issued a written decision to that effect, pursuant

to HRS § 103D-709(b), that written decision was "final and conclusive" unless appealed.

Nothing in the procurement code or its implementing regulations gives the Hearings Officer authority to remand to the Library for reevaluation of the proposals.¹⁴ Unlike HRS § 103D-710(e), which authorizes this court, on review, to "affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for further proceedings; or . . . reverse or modify the decision and order[.]" *id.* (emphasis added), HRS § 103D-709 gives the Hearings Officer jurisdiction to "review and determine de novo any request from any . . . offeror . . . aggrieved by a determination of the chief procurement officer [or] head of a purchasing agency[,]'" and authorizes the Hearings Officers to "issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision" regarding "whether the determinations of the chief procurement officer or the head of the purchasing agency . . . were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract." HRS §§ 103D-709(a), (b) & (f). Presumably because of the obvious need for expeditious review of

¹⁴ As discussed *infra*, where the determination that the solicitation or award was in violation of law is made prior to the award of the contract, one of the remedies is to revise the solicitation or award to comply with the law. HRS § 103D-706(2). Had the contract not been awarded to Ameritech before the Hearings Officer issued his decision, then remand to the Library for reevaluation of the proposals would have been appropriate under HRS § 103D-706(2). Because the contract was already awarded, this remedy was inapplicable and, obviously, futile.

public contracting decisions.¹⁶ the code simply does not authorize the Hearings Officer to remand to the contracting agency under these circumstances. Instead, the Hearings Officers' written decisions are to be "final and conclusive," HRS § 103D-709(b), and any request for judicial review must be filed within ten days of such written decision. HRS § 103D-712(b).

Accordingly, we hold that, pursuant to HRS § 103D-709, the Hearings Officer's order remanding the matter to the Library for reevaluation of the proposals was in excess of his statutory authority, and we reverse that portion of the decision.¹⁷ We further hold that, pursuant to HRS § 103D-710, this court has jurisdiction to review the Hearings Officer's decision.

B. Remedies Under the Procurement Code

Ultimately, the Hearings Officer's decision was that the award of the contract to Ameritech was in violation of HRS § 103D-303(g). In other words, the Hearings Officer decided in CARL's favor. Nonetheless, CARL requests review of the Hearings Officer's other conclusions that, essentially, there were no other violations of the procurement code. CARL's appeal from a favorable decision, its requested relief, and the arguments in its briefs make clear that this appeal is an attempt to obtain relief beyond that afforded by the Hearings Officer. Although we

¹⁶ We note that, although the Hearings Officer's order remanding to the Library for reevaluation of the proposals was issued on August 15, 1996, and "[a]n application for judicial review shall not operate as a stay of the decision rendered under section 103D-709[,]" HRS § 103D-710(b), as of December 1996, when briefing was completed, the reevaluation had not yet occurred, and there is no indication that it has occurred since.

agree with CARL that the violations of the procurement code were not limited to the faulty evaluation of the proposals, the number of violations of the procurement code has no bearing on the remedies available. Therefore, rather than address the Hearings Officer's conclusions on each alleged violation, we discuss only those necessary to determine CARL's remedy.

Unlike the American Bar Association's Model Procurement Code for State and Local Governments (ABA Model Code), after which it was modeled, see Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal at 39, or, apparently, any other jurisdiction's procurement code, the State Procurement Code provides that

[t]he procedures and remedies provided for in this part, and the rules adopted by the policy office, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, . . . to resolve their claims or differences. The contested case proceedings set out in chapter 91 shall not apply to protested solicitations and awards[.]

HRS § 103D-704.¹⁶

¹⁶ Section 9-401 of the ABA Model Code, "Waiver of Sovereign Immunity in Connection with Contracts," authorizes judicial, as well as administrative, actions challenging the solicitation or award of contracts, and provides in part:

(1) Solicitation and Award of Contracts. The [designated court or courts of the State] shall have jurisdiction over an action between the [State] and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.

Id. (brackets in original). Section 9-401 of the ABA Model Code was omitted from the State Procurement Code and replaced with HRS § 103D-704, *supra*.

The "remedies" available to a person aggrieved in connection with the solicitation or award of a contract are described in HRS §§ 103D-705 to 103D-707. HRS § 103D-705 provides that "[t]he provisions of section 103D-706 and section 103D-707 apply where it is determined administratively under sections 103D-701 . . . and 103D-709, or upon judicial review or action under section[] 103D-710 . . . , that a solicitation or award of a contract is in violation of the law." Sections 103D-706 and 103D-707 provide:

[§103D-706] Remedies prior to an award. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (1) Cancelled; or
- (2) Revised to comply with the law.

[§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, provided it is determined that doing so is in the best interests of the State; or
 - (B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination;
- (2) If the person awarded the contract has acted fraudulently or in bad faith:
 - (A) The contract may be declared null and void; or
 - (B) The contract may be ratified and affirmed if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be appropriate.

In making the determination whether ratification of the contract is in the best interest of the State, the following factors are among those considered:

- (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.

HAR § 3-126-38(a)(4).

Thus, the award of the contract before it has been determined whether the solicitation or proposed award is in violation of law effectively limits the relief available to the person aggrieved by the solicitation or award. Where the contract has not yet been awarded, it is still possible to cancel the solicitation and proposed award, or to correct the violation. Once the contract has been awarded, whether or not it is in violation of law, and notwithstanding the prejudice to the aggrieved person or the public, the contract may still be ratified, providing it is "in the best interests of the State." Moreover, the further performance on the contract has proceeded, the more likely it is, given the applicable factors, that ratification of the contract is "in the best interests of the State," effectively eliminating any remedy, either to the public or the protestor, from an illegally entered contract.

1. Execution of the Ameritech contract

This case provides an example of the difference in available remedies once the contract has been awarded. CARL contended before the Hearings Officer, and maintains on appeal, that Ameritech's proposal should not have been considered because (1) it was not responsive to the RFP, and (2) Ameritech was disqualified from submitting a proposal due to its participation in developing the specifications for the RFP.¹⁷ The Hearings Officer did not address these issues, presumably because of his conclusion that "the real focus of this case" was the evaluation procedures. CARL urges us to reach these issues on appeal because it contends that, where Ameritech's proposal was nonresponsive or Ameritech was precluded from bidding, this court may disqualify Ameritech's proposal and award the contract to CARL, the only remaining responsive offeror.

Had the contract not been executed, the relief CARL seeks would have been available. If the Hearings Officer had

¹⁷ HRS § 103D-405(d) provides that:

Outside contractors may be utilized to prepare specifications and work statements in the development of a solicitation. Contractors paid for those services shall be precluded from bidding on or receiving a contract when they participated in any way in the development of the solicitation package or any resulting contract.

Although the legislature apparently did not contemplate the situation where a prospective contractor is involved in the preparation of specifications without pay, the identical concern is raised: "In such cases the concern is that the firm could either skew competition in favor of itself when developing the terms of the procurement, or, through its inside knowledge of the agency's requirements, gain an unfair advantage in the competitive bidding process." Medco Behavioral Care Corp. of Iowa v. State Dep't of Human Servs., 553 N.W.2d 556, 565 (Iowa 1996) (explaining analogous federal regulation) (citation omitted).

agreed with CARL, prior to the award of the contract, he could either have ordered the cancellation of the solicitation and precluded Ameritech from submitting a proposal on any subsequent solicitation based on the same specifications or have revised the solicitation to comply with law by eliminating Ameritech's proposal from consideration, which would have had the same effect. HRS § 103D-706.¹⁸ Because the contract had already been executed, however, even if the Hearings Officer or this court agreed that Ameritech's proposal should not have been considered, the only remedy available is ratification or termination of the contract pursuant to HRS § 103D-707, not the award of the contract to CARL as the only responsive, qualified offeror.

Because the award of the contract so severely limits the relief available, HRS § 103D-701(f) provides that,

[i]n the event of a timely protest [to the chief procurement officer or the head of a purchasing agency] under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer, after consultation with the head of the using agency, or the head of the purchasing agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.

(Emphasis added.) In this case, however, Kane executed the contract with Ameritech on January 25, 1996; there was no "substantial interest" determination made until March 13, 1996.

¹⁸ Even if he disagreed with CARL's contentions regarding the disqualification of Ameritech's proposal, the Hearings Officer's conclusion that the evaluation of the proposals was not in compliance with the Code would have required him to cancel the solicitation or revise it to comply with law, had the contract not been executed. In that case, his remand for a proper evaluation would have been appropriate.

We hold, therefore, that the award of the contract to Ameritech was in violation of HRS § 103D-701(f). Moreover, the record establishes as a matter of law that Kane's execution of the contract was in bad faith.

CARL's timely protest was received on January 3, 1996. Unebasami instructed Kane on January 4 not to award the contract to Ameritech unless he, Unebasami, issued a substantial interest determination, and further instructed Kane to draft a reply for his signature. Kane proceeded to deny the protest directly, without Unebasami's review, on January 9. CARL received the denial on January 12 and timely filed a request for reconsideration on January 22; Kane executed the contract with Ameritech on January 25. The Hearings Officer "concluded" that, "[w]hen Mr. Kane denied [CARL's] protest on January 9, 1996, it was not unreasonable for him to believe that pursuant to section 103D-701(e), his decision was final and conclusive[,]¹⁹ COL 20, and that

[i]t was also not unreasonable for Mr. Kane to believe that after his final decision was issued on January 9, 1996, and before any administrative proceeding was commenced under HRS § 103D-709, there was no pending protest under HRS § 103D-701(a) that would require that no action be taken on the award of the Contract.

COL 21. COL 20 and 21 are actually findings of fact, and, therefore, reviewed under the "clearly erroneous" standard.¹⁹

¹⁹ The Hearings Officer failed to enter any COL regarding whether Kane's January 25 execution of the contract was in violation of HRS § 103D-701(f), which is dependent on compliance with the terms of the statute, rather than on Kane's state of mind.

We hold that the finding that Kane acted reasonably is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." HRS § 103D-710(e)(5). Notwithstanding HRS § 103D-701(e), which provides in part that "[a] decision under subsection (c) shall be final and conclusive[,] the implementing regulations specifically provide for reconsideration of the decision of the chief procurement officer or the head of the purchasing agency and treat the decision after reconsideration as the "final decision" rendered pursuant to HRS § 103D-701. HAR § 3-126-8 (1995) provides:

Request for Reconsideration. (a) Reconsideration of a decision of the chief procurement officer or the head of a purchasing agency may be requested by the protestor, appellant, any interested party who submitted comments during consideration of the protest, or any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) Requests for reconsideration of a decision of the chief procurement officer or the head of a purchasing agency shall be filed not later than ten working days after receipt of such decision.

(c) A request for reconsideration shall be acted upon as expeditiously as possible. The chief procurement officer or the head of a purchasing agency may uphold the previous decision or reopen the case as such officer deems appropriate.

(d) The decision under subsection (c) shall be final and the protesting bidder or offeror shall be informed:

- (1) Whether the protest is denied or sustained; and
- (2) If the protest is denied, the protestor's right to an administrative proceeding pursuant to subchapter 5.

(e) The protesting bidder or offeror shall inform the State within five working days after the final decision if an administrative appeal will be filed. An appeal shall be filed within seven calendar days of the determinations under . . . this section[.]

(Emphasis added.) Even if, as the Hearings Officer implicitly found, Kane was unaware of CARL's January 22 request for reconsideration when he executed the contract on January 25, the period during which such a request could be filed had not yet expired. Pursuant to HAR § 3-126-8(b), CARL had until January 26, 1996, to file its request for reconsideration. Therefore, it was not reasonable for Kane to believe, on January 25, that his denial of the protest was final and conclusive and that there was no pending protest that would require him to suspend any further action.

The Hearings Officer implicitly concluded that Kane should not be charged with knowledge of the applicable regulations; his reliance on HRS § 103D-701 was sufficient to make his execution of the Ameritech contract reasonable. We disagree. First, by virtue of his position as the head of a purchasing agency with authority to enter contracts, Kane is certainly chargeable with knowledge of the regulations applicable to public procurement. Second, Kane had actual knowledge of those regulations. His initial denial of CARL's protest cited, as its basis, a regulation in the same subchapter as HAR § 3-126-8. Third, Kane could not rely on the finality of his decision under HRS § 103D-701(e), inasmuch as his denial of the protest was in violation of HRS § 103D-701(c), given his failure to inform CARL of its right to review.

The record, therefore, not only belies the findings that Kane's execution of the contract was "not unreasonable"; it demonstrates bad faith. HAR § 3-126-36(c) (1995) provides in pertinent part that "[s]pecific findings of reckless disregard of clearly applicable laws or rules must support a finding of bad faith."²⁰ Once CARL's timely protest was filed, and during its pendency, Kane was prohibited by the Code and its implementing regulations from executing the contract until the chief procurement officer made a written "substantial interest" determination. Kane was certainly aware of HRS § 103D-7(f), and was specifically informed by Unebasami that, pursuant to HAR § 3-126-6, the Library was not to award the contract during the pendency of the protest. Kane's disregard of the mandate of clearly applicable law, as well as the specific directions of Unebasami, was, at best, reckless. In his zeal to have the project completed before the end of the legislative session, Kane prematurely awarded the contract in violation of law, effectively restricting CARL's opportunity to participate in a fair solicitation should it prevail on its protest. We therefore hold that Kane's conduct was in bad faith.

²⁰ Because bad faith requires a factual finding, it is generally determined by the trier of fact, rather than the appellate court. In this case, however, bad faith can be ascertained from the record. See, e.g., *Enos v. Pacific Transfer & Warehouse, Inc.*, 79 Hawai'i 452, 459, 903 P.2d 1273, 1280 (1995) (reviewing entire record where trial court's sanction order did not contain specific findings of bad faith conduct). Moreover, under the circumstances of this case, the Hearings Officer is in no better position than this court to determine whether Kane acted in bad faith. Kane did not testify at the hearing, and, therefore, any finding by the Hearings Officer regarding his state of mind would have to be based on record, rather than on Kane's testimony, demeanor, and credibility.

2. "Substantial Interest" Determination

No written determination that would even arguably meet the requirements of HRS § 103D-701(f) was made until March 13, 1996. In its entirety, the written determination consisted of a statement by the Administrator of the State Procurement Office, Unebasami, in a memo to Kane, that "[p]ursuant to Section 103D-701(f) and based upon our review, it has been determined that the award of the contract to Ameritech without delay is necessary to protect the substantial interests of the State."

With respect to this written "substantial interest determination," the Hearings Officer concluded that "[t]he determination that substantial State interests were involved allowed [the Library] and [Ameritech] to proceed under the Contract despite the pendency of [CARL's] protests." COL 23. COL 23 is "in violation of . . . statutory provisions." HRS § 103D-710(e)(1). A determination that substantial State interests were "involved" is not sufficient, under the plain language of HRS § 103D-701(f), to allow the Library to proceed with the contract despite CARL's protest. Not only must substantial State interests be "involved," but the delay required to resolve the solicitation protest must threaten to impair those interests such that "award of the contract without delay is necessary to protect" them. HRS § 103D-701(f) (emphasis added).

The Hearings Officer also concluded that

24. [CARL] did not meet its burden of proving by a preponderance of evidence that the CPO's decision of March 13, 1996, finding that the award of the Contract to [Ameritech] without delay was necessary to protect the substantial interests of the State despite [CARL's] protest was in violation of the law or violated the Constitution, statutes, regulations, or the terms and conditions of the solicitation.

The only FOF relevant to COL 24 referred to Kane's February 6 and 16 memos to Unebasami, reciting the arguments made therein. The Hearings Officer also found that:

276. By memorandum to Mr. Kane dated March 13, 1996, the CPO determined that the award of the Contract to [Ameritech] without delay was necessary to protect the substantial interests of the State.

To the extent that the Hearings Officer found that Unebasami was the "Chief Procurement Officer" with authority to make the substantial interest determination pursuant to HRS § 103D-701(f),

we hold that finding is clearly erroneous, and COL 24 is, therefore, "wrong."

HRS § 103D-203 provides in pertinent part that:

The chief procurement officer for each of the following state entities and the several counties shall be:

- (7) The department of education – the superintendent of education; and
- (8) The remaining departments of the executive branch of the State and all governmental bodies administratively attached to them – the administrator of the procurement office of the department of accounting and general services.

HRS § 103D-204 establishes the office of the administrator of the procurement office and provides that "[t]he administrator shall be the chief procurement officer for the governmental bodies of the executive branch other than the University of Hawaii and the department of education, and those governmental bodies

administratively attached thereto." (Emphasis added.)

Responsibility for operating the Library ultimately rests with the Board of Education, but the Library is administratively attached to the department of education. See 1981 Haw. Sess. L. Act 150, § 7 at 300-04 (transferring responsibility for operation of library system from Department of Education to Board of Education through State Librarian); but see Hse. Conf. Comm. Rep. No. 20, in 1981 House Journal, at 905-06 ("Through this bill, the public library system is hereby placed under the sole and direct control of the Board of Education, to be administered by the State Librarian, and is placed in the Department of Education for administrative purposes only." (Emphasis added.)).

Therefore, Unebasami, the administrator of the State Procurement Office, was not authorized to make the substantial interest determination in this case, and his March 13, 1996 memo to Kane did not satisfy the requirement of HRS § 103D-701(f). Nowhere in the record is there evidence that there was a proper substantial interest determination made by the Superintendent of Education; thus, the Library's continued work on the contract, as well as the January 25 execution of the contract, was in violation of HRS § 103D-701(f).

¹¹ Kane's February 6 and 15, 1996 letters to Unebasami, urging him to issue a written substantial interest determination pursuant to HAR § 3-126-5, were characterized by Kane as "Request[s] to Award Contract to Ameritech[.]" Where the contract to Ameritech had already been executed in violation of HRS § 103D-701(f), a subsequent substantial interest determination, even one conforming to the requirements of the statute, could not retroactively cure the initial violation.

Moreover, COL 24 is wrong for substantive, as well as procedural, reasons. Even if Unebasami had been authorized to make the "substantial interest" determination, his written determination failed to identify, and the Hearings Officer failed to make findings regarding, the State interests implicated and how those interests would be impaired by delay.

The general rule established by HRS § 103D-701(f) is that a timely protest halts solicitation and contract activities until the protest is resolved. By maintaining the status quo during the pendency of a protest, violations of the procurement code can be rectified before the work on the contract has proceeded so far that effective remedies, for the protestor and the public, are precluded by expense and impracticality.

Because the Code both shortens deadlines for filing protests and applications for review and expedites the administrative hearings process, the delay contemplated is minimal, generally a few months.¹² There are, however, situations where a delay of several months before a contract may be awarded would have serious repercussions on the continuation of essential State functions. It is in these situations that the solicitation or award is allowed to proceed, upon a written determination that "the award of the contract without delay is

¹² An application for review of the Hearings Officer's decision in this court obviously increases the potential delay before a final decision is reached, but the pendency of an application for review, in itself, does not delay further action with respect to the contract. See HRS § 103D-710(b) ("[a]n application for judicial review shall not operate as a stay of the decision rendered under section 103D-709").

necessary to protect the substantial interests of the State."

HRS § 103D-701(f).

As the commentary to ABA Model Code § 9-101, which is substantively identical to HRS § 103D-701(f), explains:

In general, the filing of a protest should halt the procurement until the controversy is resolved. In order to allow essential governmental functions to continue, Subsection (6) provides that the [State] may proceed with the solicitation or award of the contract, despite the protest, upon a determination in writing by the Chief Procurement Officer or the head of the Purchasing Agency that such action is necessary. It is expected that such a determination will occur only in those few circumstances where it is necessary to protect a substantial interest of the [State].

(Emphasis added.)

The Hearings Officer apparently found that Unebasami's determination was based on Kane's February 6 and 16 memos, but failed to enter any FOF or COL that the interests cited therein were "substantial" and would be harmed by delay on the contract.

Unebasami's March 13, 1996 letter to Harris certainly suggests that he relied more on Kane's assessment of the merits of CARL's protest than on any evaluation of the impact on State interests. Although the merits of CARL's protest is a necessary and proper basis for Kane's decision under subsection 701(c), consideration of the merits of CARL's protest has no place in the "substantial interest" determination required by subsection 701(f). Indeed, if the contracting officials could both deny the protest and authorize performance of the contract based on their assessment of the merits, subsection 701(f) would be meaningless. Moreover, if an erroneous assessment of the merits of the protest

by the contracting officials could result not only in denial of the protest, but also in the elimination of any remedy because the contract has been awarded and performed based on that same assessment, there would be little purpose served by review of the decision as provided for in HRS §§ 103D-709 and 103D-710.

To the extent that the substantial interest determination was based on an assessment of the merits of CARL's protest, we hold that it was improper and did not satisfy HRS § 103D-701(f). To the extent that Unebasami relied on the interests cited in Kane's February 6 memo, we hold that CARL met its burden of proving by a preponderance of the evidence that continued performance on the contract pending resolution of its protest was not necessary to protect substantial State interests.

Kane's memo argued that the contract with the current vendor, DRA, had expired on June 30, 1995 and that service could terminate at any time, without significant notice, thereby adversely impacting library operations. The complete cessation of library automation services is the only argument advanced by Kane that even approaches impairment of a substantial State interest requiring award of the contract without delay. The record, however, shows by a preponderance of the evidence that performance of the Ameritech contract without delay was not necessary to maintain library automation services. Keith Fujio, who was employed by the Library as the Director of the Management Information Branch and the Administrative Services Officer, with

responsibility for administration of contracts, all purchases, and payroll, was called as a witness by the Library. On cross-examination by CARL, he testified that his staff had communicated with DRA "and the indication we were given [was that,] because of all these subsequent problems that arose, they would still support us on a month-to-month extension agreement." He further testified that the maintenance contract with DRA renews automatically from year to year if both parties agree to all the terms and that his understanding was that DRA was willing to continue providing services under its contract until the protest was resolved and a new vendor commenced providing services.

Fujio's testimony was undisputed..

Therefore, although the State may have a substantial interest in continuing library automation services, award of the contract to Ameritech without delay was not necessary to protect that interest, and CARL proved as much by a preponderance of the evidence. The rest of Kane's memo to Unebasami merely describes how the library would be inconvenienced by maintaining the status quo during any delay in performing the contract and identifies no substantial interest of the State that would suffer.

Accordingly, we hold that COL 24 is wrong and that the award of and performance on the Ameritech contract was in violation of HRS § 103D-701(f). We further hold that a "substantial interest determination," pursuant to HRS § 103D-701(f), must specifically identify the State interests

involved and articulate why it is necessary for the protection of those interests that the contract be awarded without delay.

C. Jurisdiction to Impose Remedies

The Hearings Officer concluded that "[t]he scope of the Hearings Officer's ability to fashion a remedy in the instant case is governed by section 103D-707, concerning remedies after an award." COL 22; see also COL 25 & 27. The Hearings Officer also concluded that, in order to determine whether the contract should be ratified or terminated pursuant to HRS § 103D-707, the best interests of the State must be considered. COL 26.

Finally, the Hearings Officer concluded that he was without authority to determine the best interests of the State and that, therefore, should he conclude that the award of the contract was in violation of law, he was required to remand the matter back to the contracting officer to make this determination and to decide whether to ratify or terminate the contract. COL 28-30.

The conclusion that a remand was necessary was based on HAR § 3-126-38(1), which provides:

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 the head of a purchasing agency may ratify or affirm the contract or terminate it in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.

(Emphasis added.) The Hearings Officer's interpretation of the regulation is incorrect and leads to the absurd result that, where the head of a purchasing agency has awarded a contract in

violation of law, even if the action was in bad faith, he or she has exclusive jurisdiction to fashion the remedy for his or her own wrongdoing. The Procurement Code has already been declawed by the addition of the "exclusive remedy" provision, HRS § 103D-704; the Hearings Officer's interpretation of HAR § 3-126-38 would render it toothless as well.

Neither the language of HRS §§ 103D-705 to 103D-707, nor the language of HAR 3-126-38(1), however, requires that interpretation. HRS § 103D-705 provides that the remedy provisions, HRS §§ 103D-706 and 707, apply where it is determined administratively, either by the head of the purchasing agency, pursuant to HRS § 103D-701, or by the Hearings Officer, pursuant to HRS § 103D-709, or judicially, pursuant to HRS § 103D-710, that the solicitation or award of a contract is in violation of law. HRS § 103D-707 provides that, where that determination is made after an award, the contract may be ratified or terminated.

By its plain language, HAR § 3-126-38(1) clearly applies only where the head of the purchasing agency or the chief procurement officer finds, pursuant to HRS § 103D-701, that the protested solicitation or award was in violation of law: "Upon finding after award [that the solicitation or award is in violation of law,] the chief procurement officer or the head of a purchasing agency may [ratify or terminate the contract]." Where the chief procurement officer or head of a purchasing agency finds that there was no violation of law, and, after de novo

review, pursuant to HRS § 103D-709, a Hearings Officer finds otherwise, HAR § 3-126-38 has no application. In that case, by a common sense reading of HRS §§ 103D-705 and 103D-707, it is incumbent upon the Hearings Officer to determine whether to ratify or terminate the contract.

We hold, therefore, that COL 28 and 29 are wrong and vacate that part of the August 15, 1996 order remanding the case to the Library to ratify and affirm the contract, or terminate the contract as provided for in HRS § 103D-707(1)(A) and (B). We instead remand to the Hearings Officer to make that determination. Although the Hearings Officer may consider the factors enumerated in HAR 3-126-38(4), supra, those factors are not the exclusive determinants of "the best interests of the State." To determine whether the ratification of an unlawfully awarded contract is in the State's best interests, consideration must also be given to the State's interest in achieving the purposes of the procurement code, which are revealed by its legislative history:

The purpose of this bill is to revise, strengthen, and clarify Hawaii's laws governing procurement of goods and services and construction of public works.

Specifically, the bill establishes a new comprehensive code that will:

- (1) Provide for fair and equitable treatment of all persons dealing with the government procurement system;
- (2) Foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and

(3) Increase public confidence in the integrity of the system.

Sen. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39.

As the Supreme Court of New Mexico explained in
Planning & Design Solutions v. City of Santa Fe, 885 P.2d 628
(N.M. 1994):

The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. Of all the interests involved in competitive bidding, the public interest is the most important. An economical and efficient system of procurement directly benefits taxpayers.... It is certainly in the public interest that the [State] abide by the procurement rules it has set for itself.

Id. at 631 (citations and internal quotation marks omitted). The public interest in the integrity of the procurement code cannot be ignored when determining whether it is in the best interests of the State to ratify an unlawfully awarded contract.²²

D. CARL is Entitled to its Costs and Attorneys' Fees

We agree with the Library and Ameritech that CARL is not entitled to the remedy it seeks -- rescission of the contract with Ameritech and award of the contract to CARL. However, we agree with CARL that it may recover its costs of preparing its proposal and its attorneys' fees incurred in its protest.

²² On remand, the Hearings Officer may also consider whether the contract with Ameritech satisfies the standard delineated in Konno v. County of Hawai'i, 85 Hawai'i 61, 937 P.2d 397 (1997) (holding that privatization of worker positions within the civil service system, which encompasses those services that have been customarily and historically provided by civil servants, violates constitutionally mandated merit principles and civil service statutes), an issue that is not before this court and upon which we express no opinion.

1. CARL may recover its bid preparation costs pursuant to HRS § 103D-701(g).

In concluding that his authority to fashion a remedy was limited to HRS § 103D-707, the Hearings Officer did not consider HRS § 103D-701(g), which provides:

In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

Although this provision is contained in the subsection governing initial agency review and not in HRS § 103D-709, which governs review by the Hearings Officer, hearings officers have jurisdiction to review determinations made pursuant to HRS § 103D-701 *de novo*. HRS § 103D-709(a). Therefore, hearings officers have jurisdiction and authority to act on protested solicitations and awards in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS § 103D-701.

By its express terms, a protesting bidder is entitled to recover its bid preparation costs pursuant to HRS § 103D-701(g) if: (1) the protest is sustained; (2) the protestor should have been awarded the contract; and (3) the protestor is not awarded the contract. It is implicit in the provision that it applies only in those cases where the contract has been awarded before the resolution of the protest. Were this not the case, a determination that a protestor "should have been awarded

the contract under the solicitation but is not" would be premature and nonsensical because, in the typical protest, pursuant to HRS §§ 103D-701(f) and 103D-709(e), the award of the contract does not occur until after the protest is finally resolved by a hearings officer.

In this case, only two of the three express requirements of HRS § 103D-701(g) were satisfied: CARL's protest was sustained, and CARL was not awarded the contract. There was no determination, however, of whether CARL "should have been awarded the contract[.]"

CARL proposed three separate and distinct bases upon which it contends that it should have been awarded the contract:

(1) Ameritech's proposal contained material deviations from the RFP and, therefore, was not responsive to the RFP, leaving CARL as the only responsive offeror; (2) Ameritech should have been precluded from submitting an offer pursuant to HRS § 103D-405(d) and HAR § 3-122-13(e), again leaving CARL as the sole remaining and responsive offeror; and (3) after taking into account the price and the evaluation factors contained in the RFP, CARL's proposal was the most advantageous to the State, and, therefore, CARL should have been awarded the contract.

The Hearings Officer, however, did not address CARL's first two contentions in his FOF, COL, and Order; with respect to the third -- that CARL's proposal, when properly evaluated, was the most advantageous to the State -- the Hearings Officer

concluded that "the entire evaluation process" was so "irretrievably flawed" that it could not be used to determine who should have been awarded the contract. Therefore, the Hearings Officer did not, and could not, determine whether CARL "should have been awarded the contract under the solicitation," but, rather, ordered the Library to reevaluate the proposals on remand.

Obviously, neither the Hearings Officer nor this court has the technical qualifications to conduct an independent evaluation of the proposals and to determine, based on their relative merits in comparison with the requirements of the RFP, which proposal was most advantageous to the State. However, as discussed in section II, A., *supra*, the Hearings Officer was without statutory authority to remand to the Library for a reevaluation. The only way it could be determined, at this point, whether CARL "should have been awarded the contract" would be for this court to remand to the Library for reevaluation for the sole purpose of determining CARL's entitlement to bid preparation costs. On the facts of this case, such a remand would, we believe, be a futile exercise.

The Library, in response to CARL's protest, denied that the evaluation in any way failed to comply with the procurement code. It vigorously defended that position before the Hearings Officer, and, on appeal, continues to maintain that Ameritech was properly awarded the contract. More significantly, the matter

was remanded to the Library for reevaluation, albeit improperly,
almost a year ago; there is no indication, however, that the
Library has complied with the Hearings Officer's order to
properly evaluate the proposals.²⁴ Finally, the Library has
already demonstrated bad faith in its handling of CARL's protest.

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. In Paul Sardella Construction Company, Inc. v. Braintree Housing Authority, 329 N.E.2d 762 (Mass. Ct. App. 1975), aff'd, 356 N.E.2d 249 (Mass. 1976), the Massachusetts Appeals Court explained that:

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

²⁴ The pendency of CARL's appeal to this court does not excuse the Library's failure to reevaluate the proposals because "[a]n application for judicial review shall not operate as a stay of the decision rendered under section 103D-709." HRS § 103D-710(b).

to be assumed by prospective bidders that such an authority would not abide by the applicable statutes in making its awards.

Id. at 766-67. We agree and, accordingly, hold 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,²⁵ 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).

In this case, the Hearings Officer concluded that "the evaluation process and the concomitant award of the contract to [Ameritech] did not comply with HRS § 103D-303(g) [,] COL 34, because CARL's proposal "did not receive a complete evaluation in comparison with [Ameritech.]" Because "the entire evaluation process" was "irretrievably flawed," it could not be determined whether CARL should have been awarded the contract. CARL prevailed in its protest and was not awarded the contract; the contract was awarded to Ameritech in bad-faith violation of HRS § 103D-701(f). Therefore, we hold that CARL is entitled to recover its bid preparation costs, which the Hearings Officer found to be approximately \$30,000.00. FOF 169.

²⁵ We note that our holding would not apply where the flaw in the evaluation is one that can be retroactively corrected by the Hearings Officer, such as an inadvertent mathematical error requiring only recalculation.

2. Carl may recover its attorneys' fees incurred in the protest.

CARL contends that it is also entitled to an award of its attorneys' fees and costs incurred both in the protest hearing and in this judicial review, "given HS[P]LS's and Kane's misconduct and attempt to deny CARL its rights to a fair and equitable bidding process and a full and fair hearing." Neither the Library nor Ameritech disputes CARL's entitlement to attorneys' fees in their briefs. Because nothing in the procurement code precludes an award of attorney's fees to a successful protestor, and, under the circumstances of this case, requiring CARL to bear the fees incurred in its protest would undermine the purposes of the Code, we agree with CARL.

The only mention of attorney's fees in the relevant sections of the Code is found in HRS § 103D-701(g), which provides in part that "the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees." The placement of the provision in section 701, which defines the authority of the head of the purchasing agency or chief procurement officer to resolve protested solicitations, as well as the plain language -- "costs in connection with the solicitation, including bid preparation costs other than attorney's fees" -- demonstrate that the provision has no applicability to this court's authority to award attorney's fees incurred in the protest. The provision, by its clear and

unambiguous terms, refers to attorney's fees incurred in the solicitation, not the protest,²⁶ and is a restriction on the authority of the head of the purchasing agency and the chief procurement officer.

Nowhere in the Code is the award of attorney's fees incurred in a protest expressly prohibited.... Arguably, however, such an award is implicitly prohibited by HRS § 103D-704, which provides:

The procedures and remedies provided in this part, and the rules adopted by the policy office, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, a suspension or debarment proceeding, or in connection with a contract controversy, to resolve their claims and differences. The contested case proceedings set out in chapter 91 shall not apply to protested solicitations and awards, debarments or suspensions, or the resolution of contract controversies.

We have often stated that:

In construing statutes, a court's primary objective is to ascertain and give effect to the intention of the legislature as gleaned primarily from the language contained in the statute itself.... Accordingly, "[i]t is well settled that this court is bound by the plain, clear and unambiguous language of a statute unless the literal construction would produce an absurd and unjust result, and would be clearly inconsistent with the purposes and policies of the statutes.".... The foregoing does not preclude an examination of sources other than the language of the statute itself even when the language appears clear upon perfunctory review.... Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

²⁶ At the point in the protest at which the 701(g) determination is made, there will, in most cases, have been very little, if any, attorney involvement. The protest to the agency consists of a letter setting forth the information enumerated in HAR § 3-126-3, a response to any request for information made by the agency pursuant to HAR § 3-126-4, and, in some cases, a request for reconsideration of the agency's decision pursuant to HAR § 3-126-8.

Survivors of Medeiros v. Maui Land & Pineapple Co., 66 Haw. 290, 297, 660 P.2d 1316, 1321 (1983) (citations omitted); see also Konno, 85 Hawai'i at 71, 937 P.2d at 407; Shipley v. Ala Moana Hotel, 83 Hawai'i 361, 365, 926 P.2d 1284, 1288 (1996); Bragg v. State Farm Mut. Auto. Ins. Co., 81 Hawai'i 302, 306, 916 P.2d 1203, 1207 (1996); Sato v. Tawata, 79 Hawai'i 14, 17, 897 P.2d 941, 944 (1995). We believe that a literal construction of HRS § 103D-704, on the facts of this case, produces an unjust result, inconsistent with the policies of the procurement code.

The procurement code was enacted in an attempt to address real problems making daily headlines. The Code prescribes strict procedures for the procurement of goods and services by State agencies, for the purposes of: (1) providing fair and equitable treatment of all persons dealing with the government procurement system; (2) fostering broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency; and (3) increasing public confidence in the integrity of the system.

There are only two mechanisms for enforcing the provisions of the code. Intentional violation of its provisions by "any person" is a misdemeanor, and in addition to the applicable criminal penalty, the violator is subject to removal from office and liable to the State for its costs incurred. HRS § 103D-106. Enforcement under this provision, like any criminal statute, is at the discretion of the prosecutor.

The other enforcement mechanism is through protests by aggrieved participants in the process. The remedies available when a protest is sustained are limited; generally the solicitation must be canceled or revised to comply with the Code. In either case, though, the successful protestor has the "remedy" of an opportunity to participate in a fair procurement process and be awarded the contract if its bid or offer is the most advantageous to the State.

Where, however, the contract has been awarded before the protest is decided, there is no "remedy" for the protestor who has proven that the process was in violation of the Code. After the award of the contract, the contract can only be ratified or terminated, with the relevant factors favoring ratification in direct relation to the progress made towards completion of the contract. Although ratification or termination of a contract found to have been awarded in violation of the Code may vindicate the public's interest in the integrity of the procurement process, neither "remedy" affords the protestor the opportunity to be awarded the contract based on the merits of its proposal. Thus, it is not the exclusive remedy provision of the Code that deprives a protestor of meaningful relief; in this case, CARL's lack of a remedy stems from Kane's unilateral, bad-faith, decision to award the contract to Ameritech in violation of HRS § 103D-701(f).

The Code itself thus contains an inherent incentive for an agency to award the contract immediately upon receipt of a protest: it can avoid the delay and expense that would be incurred in the cancellation and resolicitation should the protestor prevail. In addition, there is a built-in disincentive for an aggrieved participant to pursue a protest past the agency stage once the contract has been awarded: regardless of whether it is successful in proving a violation of the code, and no matter how egregious the violation, the only potential relief available to the protestor is recovery of its bid preparation costs. Requiring such a protestor to bear its own attorney's fees strengthens the financial disincentive to pursue a protest once the contract has been awarded, and essentially nullifies the most effective enforcement mechanism in the Code.

In the long term, this can only decrease competition among vendors. Moreover, if the procedural provisions of the Code are unenforceable except at the discretion of the prosecutor, the Code cannot "[i]ncrease public confidence in the integrity of the system" or, as it demonstrably failed to do in the instant case, "[p]rovide for fair and equitable treatment of all persons dealing with the government procurement system." Although the Code does not expressly authorize the award of attorney's fees under the circumstances of the instant case, interpreting HRS § 103D-704 to preclude such an award renders the

Code incapable of furthering the purposes and policies that required its enactment.

We do not believe that the legislature intended this result. The remedy provisions of the procurement code were intended to encourage the settlement of disputes "through administrative processes to save time and expense for both parties while preserving all rights and maintaining fairness." Sen. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39 (emphasis added). Fairness is not maintained, however, by shifting the economic burden of enforcing the Code to a protestor, who, because of bad-faith actions of the contracting official, has been deprived of any means of being made whole following fruitless participation in an unlawfully conducted procurement process.

Although the Code specifically addresses the appropriate remedy when the vendor awarded the contract acts fraudulently or in bad faith, HRS § 103D-707(2), it does not appear that the legislature contemplated a purchasing agency's bad-faith violation of the procedural requirements designed to promote fairness and public confidence in the integrity of the procurement code. We have held that, "[a]mong courts' inherent powers are the powers to create a remedy for a wrong even in the absence of specific statutory remedies, and to prevent unfair results." Richardson v. Sport Shinko (Waikiki Corporation), 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994) (citations omitted).

This inherent power is codified in HRS § 602-5(7), which acknowledges this court's jurisdiction and power "[t]o make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it." (Emphasis added.)

Accordingly, because the legislature has failed to provide any statutory remedy for bad faith conduct on the part of the purchasing agency, and because requiring the protestor to bear the financial burden of enforcing the Code under these circumstances undermines the purposes of the Code, we hold 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. See, e.g., Bolander & Sons v. City of Minneapolis, 438 N.W.2d 735, 738-39 (Minn. Ct. App. 1989) (holding that where the contract is currently being performed, the successful protestor is entitled to its costs in preparing its unsuccessful bid and its expenses, including attorney's fees), aff'd, 451 N.W.2d 204 (Minn. 1990).

III. CONCLUSION

For the reasons stated above, we vacate the Hearings Officer's August 15, 1996 Order that "the proposals submitted by [Ameritech] and [CARL] in response to RFP-96-4 be remanded back to [the Library] for proper evaluation, after which [the Library] shall ratify and affirm the contract; or terminate the contract as provided for in HRS § 103D-707(1)(A) and (B)."

We remand to the Hearings Officer for any necessary further hearings, followed by entry of an order (1) awarding CARL its costs of preparing its proposal in response to RFP 96-4, and its reasonable attorney's fees in prosecuting its protest and appeal; and (2) ratifying or terminating the contract as provided for in HRS § 103D-707.

On the briefs:

Jeffrey S. Harris and
Matt A. Tsukazaki (of
Torkildson, Katz, Fonseca,
Jaffe, Moore & Hetherington),
for petitioner-appellant

John P. Deller, Deputy
Attorney General; for
respondent-appellee

Alan M. Oshima and
Lawrence M. Reifurth (of
Oshima Chun Fong & Chung),
for intervenor

CONCURRING AND DISSENTING OPINION BY RAMIL, J.,
WITH WHOM NAKAYAMA, J., JOINS

I concur in the opinion except with respect to part II.D.2, in which the majority awards CARL its reasonable attorneys' fees in prosecuting its protest and appeal. Both the Code and our precedent fail to provide for such a remedy.

It is well-settled that "no attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation, or agreement." Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Haw. 605, 618, 575 P.2d 869, 878 (1978).

Hawai'i follows the traditional American rule that ordinarily attorney's fees cannot be awarded as damages or costs where not so provided by statute, stipulation or agreement. . . . This traditional American rule requires the litigant for whom legal services are rendered to assume the burden of paying for those services. Thus, ordinarily counsel fees are not recoverable against the losing party in the absence of statute, agreement or stipulation authorizing the allowance thereof. Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 53 Haw. 69, 487 P.2d 769 (1971); Berkness v. Haw'n Elec. Co., 51 Haw. 437, 462 P.2d 196 (1969); Chun v. Park, 51 Haw. 462, 462 P.2d 905 (1969); Estate of Campbell, 45 Haw. 475, 382 P.2d 920 (1963); Yokochi v. Yoshimoto, 44 Haw. 297, 353 P.2d 820 (1960); Von Holt v. Izumo Taishia Kyo Mission, 44 Haw. 147, 355 P.2d 40 (1960), aff'd. 44 Haw. 365, 355 P.3d 40 (1960); Welsh v. Campbell, 42 Haw. 490 (1958); Bishop Trust Co. v. Cooke Trust Co., 39 Haw. 641 (1953). This rule was equally applicable whether the pending controversy was at law or in equity: Dress Mfg. Co. v. Cadinha, 33 Haw. 456 (1935); and Young Chun v. Robinson, 24 Haw. 368 (1912).

Shoemaker v. Takai, 57 Haw. 599, 604, 561 P.2d 1286, 1289 (1977) (internal quotation marks omitted). See also THC Financial Corp. By and Through Osborne v. LR & I Development One, 65 Haw. 477, 653 P.2d 789 (1982); Cain v. Cain, 59 Haw. 32, 42, 575 P.2d 468,

476 (1978); Salvador v. Popaa, 56 Haw. 111, 530 P.2d 7 (1974); Brown v. Tokuda, 49 Haw. 311, 417 P.2d 635 (1966). For over eighty years, the law has been consistent on this issue, and I see no compelling reason set forth by the majority for changing this precedent.

The Code does not authorize the recovery of CARL's attorneys' fees, nor is there evidence of a stipulation or other agreement that does so. Accordingly, I would decline to grant CARL's request for its attorneys' fees in prosecuting its protest and appeal because, on the record, there is no valid basis for their recovery.

As a court, our decisions relating to disputes governed by the application of statutory law . . . must be based on that statutory law as it currently exists, and not on statutory law as it could be or even as it should be. The determination of what that law could be or should be is one that is properly left to the people, through their elected legislative representatives.

Konno v. County of Hawaii, 85 Hawai'i 61, 79, 937 P.2d 397, 415, as modified on reconsideration (1997) (motion for reconsideration and order of amendment).

Mario F. Bernal

Diana A. Nakayama

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

CARL CORPORATION) Case No. PCH-96-4
)
)
Protestor,) HEARINGS OFFICER'S FINDINGS OF
) FACT, CONCLUSIONS OF LAW, AND
vs.) FINAL ORDER
)
)
STATE OF HAWAI'I DEPARTMENT OF)
EDUCATION, HAWAI'I STATE)
LIBRARY SYSTEM,)
)
)
Respondent,))
)
and))
)
DYNIX, INC. dba AMERITECH))
LIBRARY SERVICES,)
)
)
Intervenor.)

**HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER**

I. CHRONOLOGY OF THE CASE

By request for hearing filed with the Office of Administrative Hearings ("OAH") on March 19, 1996, CARL Corporation ("Protestor") requested an administrative hearing to contest the March 12, 1996, decision of Bartholomew Kane ("Mr. Kane"), director of the Hawaii State Public Library System ("Respondent"), in which Mr. Kane denied three separate protests and/or requests for reconsideration filed by Protestor with Mr. Lloyd Unebasami, the Chief Procurement Officer ("CPO") for the State of Hawaii as follows:

- Letter dated January 22, 1996, from Thomas D. Bratschun, Esq., on behalf of Protestor, to the CPO. By letter dated January 30, 1996, the CPO requested that Mr. Kane review the January 22 letter as a request for reconsideration of his decision of January 9, 1996, in which he denied Protestor's protest submitted by letter dated January 2, 1996.
- Letter of protest dated February 6, 1996, from Jeffrey S. Harris, Esq., on behalf of Protestor, to the CPO, in which Protestor protested that work relating to the subject of the initial protest was on-going.
- Letter of protest dated February 17, 1996, from Mr. Harris, on behalf of Protestor, to the CPO, in which Protestor protested that Dynix, Inc., dba Ameritech Library Services ("Intervenor") "did not comply with the material terms of the request for proposals" and that there were material deviations in Intervenor's proposal which "affect price, quantity and quality." This particular protest was supplemented by a subsequent letter dated February 20, 1996, from Mr. Harris to the CPO.

Protestor followed with another request for hearing, file-dated March 21, 1996, which sought review of the CPO's decision dated March 13, 1996, which held that further action on the contract issued to Intervenor under Hawaii State Library System, RFP No. 96-004-0 ("RFP 96-4"), was needed to protect substantial interests of the State. Protestor's requests for hearing were made pursuant to section 103D-709, Hawaii Revised Statutes ("HRS"), and section 3-126-42 Hawaii Administrative Rules ("HAR").

On March 22, 1996, the OAH, Rodney A. Maile, Senior Hearings Officer, presiding, filed and subsequently served upon Mr. Harris and Winfred K. T. Pong, Deputy Attorney General and Respondent's attorney, a Notice of Hearing and Pre-Hearing Conference ("Notice of Hearing").

On April 2, 1996, a hearing was held to consider arguments in response to Protestor's Emergency Motion For Order Stopping Work on RFP 96-4 filed March 22, 1996. Protestor moved for an order directing that all work related to the contract under RFP 96-4 be stopped pending the hearing called for in the Notice of Hearing. Upon consideration of the memoranda and arguments submitted, Protestor's motion was orally denied on April 2, 1996.

The pre-hearing conference which had initially been noticed to be held on March 29, 1996, was rescheduled pursuant to the agreement of the parties to April 2, 1996. The pre-

hearing conference was attended by Mr. Harris, on behalf of the Protestor, and Mr. Pong, on behalf of the Respondent. Patricia Ohara, Deputy Attorney General, appeared at the pre-hearing conference on behalf of the CPO.

Protestor sought issuance from the OAH of several subpoena duces tecum directed toward various of Respondent's and Intervenor's employees and representatives. In view of the fact that discovery was not provided for in administrative proceedings under chapter 103D, HRS, Protestor and Respondent agreed, and the OAH ordered, that certain subpoenae would issue with a return date of April 8, 1996, for purposes of receipt of all documents to be produced, and that the hearing would be deemed to have commenced at that time, although the first day of testimony would be deferred until April 17, 1996.

On April 8, 1996, Intervenor, through its counsel Lawrence M. Reifurth, appeared and advised of its desire to intervene in the proceedings. Pursuant to section 3-126-51, HAR, Intervenor's motion to intervene was to be filed in writing and required seventy-two hours notice before it could be heard. Intervenor's motion was filed on April 9, 1996, and was granted on April 12, 1996.

On April 16, 1996, Protestor's Motion in Limine To Prohibit The State Librarian From Introducing and Admitting Evidence Which Was Not Produced To Protestor In Response To Its Requests For Information was heard. Upon consideration of the memoranda and arguments submitted by the parties, the Motion in Limine was denied.

On April 17, 1996, the evidentiary hearing began, conducted by Senior Hearings Officer Maile. Protestor was represented by Mr. Harris and Matt A. Tsukazaki, Esq. Respondent was represented by Winfred Pong, Esq., Deputy Attorney General. Mr. Reifurth represented the Intervenor.

At the conclusion of the evidentiary hearing, the parties agreed to submit written closing arguments and proposed findings of fact and conclusions of law pursuant to the following schedule:

- Protestor's Final Written Argument May 13, 1996
- Respondent's and Intervenor's Final Written Argument May 24, 1996
- Protestor's Reply Argument May 30, 1996
- Proposed Findings of Fact, Conclusions of Law June 24, 1996

The Hearings Officer, having considered the evidence and arguments presented during the course of the hearing as well as the parties' post-hearing submissions, in light of the entire record in this matter, and applying the statutory burdens of producing evidence and persuasion imposed upon the Protestor under section 103D-709(c), HRS, hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

A. Background of the Parties and Their Representatives

1. Data Research Associates ("DRA") was the automation vendor for the Hawaii public library system from April 1993, until the award of the automation vendor contract to Intervenor. Protestor's Proposed Findings of Fact No. 17, modified.

2. Intervenor is a division of Ameritech Corporation, located in Provo, Utah, which provides library-related products and services. Tr. at 808, 847. In particular, Intervenor offers three main product lines: 1) automation services; 2) content/information access services; and 3) retrospective conversion services. Within the automation service product line, Intervenor offers three products: 1) Notice; 2) Horizon; and 3) Dynix. Dynix, the product at issue in this proceeding, is a library automation system that runs on a UNIX platform. Tr. at 809. Intervenor's Proposed Findings of Fact No. 1.

3. Protestor is a Denver-based company specializing in library and information delivery systems. Protestor is a wholly owned subsidiary of Knight-Ridder Information, Inc., which has as its primary product, the CARL System, a turnkey library management system designed to serve large, networked libraries in regional or cooperative settings. Exhibit 74A, at 1. Intervenor's Proposed Findings of Fact No. 2.

4. Protestor does not provide costing or functionality information to libraries unless asked first to provide the information; however, Intervenor does provide such information. Tr. at 568. Intervenor's Proposed Findings of Fact No. 42, modified.

5. Intervenor has automated approximately 3,700 libraries worldwide in 32 countries and is referred to as the worldwide leader in automation. Tr. at 814. Intervenor's Proposed Findings of Fact No. 3.

6. Protestor has installed its automation system on over 420 libraries around the country. Exhibit 74A, at 1. Over 800 libraries use Protestor's system (including gateways and full systems) for integrated information management, information and document delivery services, while over 450 libraries are presently supported on the system. Exhibit 74A, at 3. Intervenor's Proposed Findings of Fact No. 4.

7. Intervenor has automated approximately 40% of all automated libraries in the United States. Intervenor's nearest competitor, in terms of market share, is GEAC, with approximately 20% of the automated library market. Tr. at 814. DRA follows at approximately 15%. Innovative Interfaces and Searcy's both have about 10% of the automated library market, while Protestor has approximately 5%. Tr. at 815. Intervenor's Proposed Findings of Fact No. 5.

8. In 1995 alone, Intervenor automated approximately 437 libraries while Protestor automated approximately eight. Tr. at 815. Intervenor's Proposed Findings of Fact No. 6.

9. Respondent currently has in place a DRA Integrated Library System to provide certain basic library functions. Exhibit D, at 1; Exhibit HH, at 1. Intervenor's Proposed Findings of Fact No. 7.

10. When one library automation system replaces another, the replacing system must either start anew or it must take the information already on the library's existing system and translate it so that the information is readable and usable on its own system. This process of moving information from the prior system to the replacement system is called "migrating" the system. Intervenor has successfully migrated three DRA systems (Tr. at 936), while Protestor has never migrated a DRA system. Tr. at 527, 528. Intervenor's Proposed Findings of Fact No. 8.

11. Intervenor employs approximately 1000 people worldwide (Tr. at 840), with 88 of those people in its sales department (Tr. at 815), while Protestor employs approximately 100 people (Tr. at 564) and has a sales group of 3 people: Ms. Becky Lunzini, the company's president, Mr. Ward Shaw, the company's chief executive officer and Mr. Donald Kaiser, the company's director of marketing. Tr. at 559, 560. Intervenor's Proposed Findings of Fact No. 9.

12. As part of their respective sales practices, Intervenor's sales people make "cold calls" on potential customers (Tr. at 824), while Protestor's sales people rarely make cold calls. Tr. at 561. Intervenor's Proposed Findings of Fact No. 10.

13. Mr. Bartholomew A. Kane is the State Librarian, head of the Hawaii State Library System, Department of Education.

14. Ms. Kathy Sterrett is employed by Respondent as a Librarian IV, and was a member of the Respondent's re-engineering team selected by Mr. Kane.

15. Ms. Diane Eddy is employed by Respondent as a Librarian V, and was a member of the Respondent's re-engineering team selected by Mr. Kane. Ms. Eddy is also the president of the State Library Association.

16. Ms. Hiede Miller-Pakvasa is employed by Respondent as a data processing systems analyst in Respondent's Research and Evaluation Services Section ("RESS") since 1991.

17. Mr. Robert E. Gibbons is employed by Respondent as a data processing analyst in RESS. Mr. Gibbons has been a data processing analyst in RESS for approximately 20 years.

18. Mr. Alan Nakamoto is an automated systems equipment technician ("ASET") in Respondent's Management Information Systems department. An ASET maintains and repairs all of Respondent's computer equipment.

19. Ms. Betty Kingery is employed by Respondent and is currently a Managing Librarian I. Ms. Kingery was the department head of RESS and was on the management team for Respondent's new automation system.

20. Ms. Leana F. Sahli is employed by Respondent as a Computer Programmer IV in Respondent's Management Information Branch. Ms. Sahli was a member of RESS through 1995.

21. The Maui High Performance Computing Center ("MHPCC") is a computer support center operated by the University of New Mexico in Kihei, Maui, State of Hawaii. MHPCC receives federal funding and primarily provides support services to military projects, such as the Air Force telescope installation on Haleakala, Maui. However, MHPCC has also civilian and commercial clients for its computer and electronic resources.

B. Pre-RFP Contact Between Intervenor and Respondent

22. On or about March 25, 1994, Linda Wilson (nee Linda Miller), Intervenor's sales representative for California, Arizona, Nevada, and Hawaii, met Betty Kingery at Intervenor's booth.¹ At that time, Ms. Kingery was part of Respondent's management team, the head of the Respondent's Research and Evaluation Services Sections ("RESS"). Ms. Kingery spent approximately an hour with Ms. Wilson at Intervenor's booth, and Ms. Kingery had the opportunity to see Intervenor's Dynix system demonstrated. After speaking with Ms. Kingery, Ms. Wilson was of the impression that Ms. Kingery was anxious to upgrade Respondent's system and migrate to the Dynix system. Protestor's Proposed Findings of Fact No. 1, modified.

23. During the summer 1994 American Library Association ("ALA") meeting in Miami, Florida, Ms. Wilson had lunch with Mr. Kane, at which time she noted that Respondent was unhappy with their then-current DRA system, that there had been some "butting of heads" between the Respondent and DRA concerning DRA's obligation to "get some things done," that Mr. Kane was working to "reorganize" the Respondent's system, and that a "re-engineering project" was underway within that system. Tr. at 824. Intervenor's Proposed Findings of Fact No. 13, modified.

24. Protestor has no record of meeting with any of Respondent's personnel during the summer 1994 ALA meeting in Miami. Tr. at 563. Intervenor's Proposed Findings of Fact No. 12.

25. As part of her follow-up during the fall of 1994, Ms. Wilson attended the Hawaii Library Association ("HLA") Conference where Intervenor staffed an information booth. Tr. at 825.²

26. While in Hawaii for the HLA conference, Ms. Wilson met with various of Respondent's personnel for the purpose of gathering more information concerning changes

¹ Although the parties stipulated that Ms. Wilson met with Ms. Kingery on March 25, 1994, the stipulation did not indicate where the meeting took place. Tr. at 1043.

² Ms. Kingery testified that she visited the Intervenor's booth during a HLA conference in 1994. Although Ms. Kingery was impressed with Intervenor's product, Ms. Kingery did not pass the information back to Mr. Kane. Tr. at 325. Intervenor's Proposed Findings of Fact No. 14, modified..

underway within Respondent's system, to test the political climate, and to get a feel for other contracts in the area. Ms. Wilson also met with Mr. Corey Lindo, the Digital Equipment Corporation representative servicing the Respondent, and talked with him about his knowledge concerning the Respondent. Tr. at 825. Furthermore, Ms. Wilson collected information at the time concerning MHPCC, and appears to have spoken with MHPCC representatives Kenneth Cole and Mary Ann Bufalini. Tr. at 826. Intervenor's Proposed Findings of Fact No. 16.

27. During that same time period, Ms. Wilson followed up by providing various of Respondent's personnel with literature and information concerning Intervenor's experience with library automation systems. Ms. Wilson prepared and presented a cost estimate, both for a stand-alone system and for an automation center-type system. Tr. at 826. Intervenor's Proposed Findings of Fact No. 17.

28. Protestor did not attend the 1994 HLA convention. Tr. at 562. Intervenor's Proposed Findings of Fact No. 15.

29. During 1994, Ms. Wilson had already begun gathering information on MHPCC which was left in her Hawaii sales files after she was transferred to another position. Tr. at 826. Respondent's Proposed Findings of Fact No. 3.

30. In approximately January 1995, Ms. Wilson transferred to another position within Intervenor's office and Mr. Brad Whittle, Ms. Wilson's supervisor, took over the responsibility for the Hawaii account. Tr. at 826. Intervenor's Proposed Findings of Fact No. 18.

31. Subsequently, Mr. Whittle renewed his acquaintance with the Respondent by reviewing Ms. Wilson's files and telephoning some of the main contacts identified there. Mr. Whittle attempted to telephone Mr. Kane, but was unable to make contact. He then called Ms. Carolyn Spencer. Ms. Spencer said, however, that she was not involved in library automation services, and so directed him to Ms. Kingery. Tr. at 827. When Mr. Whittle spoke with Ms. Kingery in early February 1995, Ms. Kingery said that Ms. Wilson had promised to send out a "revised configuration" and asked that Mr. Whittle carry through on that promise. Tr. at 830, 827. Intervenor's Proposed Findings of Fact No. 19.

32. On or about February 28, 1995, MHPCC expressed its interest in providing Respondent with computer-based information services. MHPCC and Respondent had been discussing Internet access to the libraries through MHPCC and the migration of Respondent's on-line public access catalog and other computer systems to the MHPCC. MHPCC also informed Respondent about the \$2,000 credit offered by GTE Hawaiian Telephone to each public library for installation and monthly services fees on data network connections, although Respondent would be responsible for connecting the frame relay network to its own computer system. Exhibit 1.

33. In February 1995, Mr. Whittle solicited additional information from Ms. Kingery and then sent a new cost proposal for both (1) the outright purchase of a new system, and (2) the "outsourcing" of various traditional library functions (the automation center-type approach). Tr. at 827. Intervenor's Proposed Findings of Fact No. 20.

34. During his conversations with Ms. Kingery in February 1995, Mr. Whittle asked whether a system might be located at MHPCC. Mr. Whittle was interested in MHPCC because of its substantial computer resources, including UNIX processors on IBM machines, and because Mr. Whittle was exploring the possibility of running Intervenor's automation center system directly on the MHPCC system.³ Mr. Whittle followed up by sending Ms. Kingery certain information relating to MHPCC and Intervenor's systems. Tr. at 828. Intervenor's Proposed Findings of Fact No. 21.

35. On or about March 2, 1995, Respondent received a price quote from Intervenor for a DEC 2100 AlphaServer 3-way, dated January 9, 1995. Exh. 2. Protestor's Proposed Findings of Fact No. 2, modified.

36. On or about March 3, 1995, Respondent received a price quote from Intervenor for a computer automation center, dated February 10, 1995. Exh. 3. Protestor's Proposed Findings of Fact No. 2, modified.

37. The January 9, 1995, and February 10, 1995 proposals from Intervenor were received by RESS and forwarded to the appropriate persons with Respondent. Protestor's Proposed Findings of Fact No. 2, modified.

³ Intervenor's Dynix system operates on a UNIX based system.

38. In or around late March of 1995, Respondent established a re-engineering team comprised of Respondent's employees: Ms. Kingery, Diane Eddy, and Kathy Sterrett. The re-engineering team was responsible for the three projects which comprised Respondent's re-engineering efforts, including the selection of a new automation system. Mr. Kane's intention through the formation of this team was to outsource technical services (acquisitions and cataloging) as well as automation services. Tr. at 593 and 836. Protestor's Proposed Findings of Fact No. 5, modified, and Respondent's Proposed Findings of Fact No. 5.

39. In late May 1995, Mr. Whittle asked Ms. Stacey Smith to travel to Hawaii to see Ms. Kingery and Mr. Kane. Ms. Smith told Mr. Whittle that Mr. Kane informed her that the re-engineering project was nearing completion. Ms. Smith reported that the Respondent was "looking at doing something evolutionary and revolutionary" in the library industry by "outsourcing everything." Tr. at 835. Intervenor's Proposed Findings of Fact No. 22.

40. While on her visit in May 1995, Ms. Smith met with Mr. Corey Lindo and learned about "the state of the State," where Hawaii was "at financially," about the deficit and state budget cuts. Furthermore, Ms. Smith learned the background of various library officials and personnel. Tr. at 838. Intervenor's Proposed Findings of Fact No. 26.

41. Following Ms. Smith's return to Utah, Intervenor's next contact with Respondent occurred when Mr. Whittle telephoned Mr. Kane in late May or early June 1995 to arrange a meeting at the ALA summer convention to be held in Chicago during the middle of June. Tr. at 839. Intervenor's Proposed Findings of Fact No. 27.

42. On or about June 2, 1995, Liana Sahli from RESS sent an e-mail to Stacey Tate (Smith) requesting information on voice emulation hardware. Exhibit 8. Ms. Sahli also discussed the equipment with other vendors who sold the hardware, and eventually purchased the hardware from Pacific Business Machines. Ms. Sahli was not aware when purchasing the voice emulation hardware whether it would be part of the overall office automation or whether any particular automation vendor would be able to use it. Tr. at 386-387. Intervenor's Proposed Findings of Fact No. 28.

43. In or around June 1995, while at the ALA convention in Chicago, Mr. Whittle organized a luncheon meeting with Kane, Kane's wife, Mr. Tom Quarton (Intervenor's president), Mr. Arthur Brady (Intervenor's current vice president of sales), Mr. Whittle and

Ms. Debra Park (the company's new western sales representative). The luncheon meeting was conducted in one of Intervenor's suites at the convention site. Tr. at 841. During the luncheon meeting, Mr. Kane and Intervenor's representatives discussed Respondent's re-engineering project, and the use and operation of automation centers. The Intervenor's representatives also talked about the company's automation centers, where they were located, what Intervenor had done with them and how they were operated. Tr. at 843. Intervenor's Proposed Findings of Fact Nos. 29 and 30, modified, and Protestor's Proposed Findings of Fact No. 4, modified.

44. During the Chicago ALA luncheon with Intervenor, Mr. Kane explained that Respondent would be looking to outsource its computer services and that he would be speaking with other vendors while at the ALA meeting.⁴ Tr. at 844. Intervenor's Proposed Findings of Fact No. 31.

45. Though Protestor staffed an information booth at the summer 1995 ALA convention, there is no record to establish that any Protestor representative met with or spoke to any of Respondent's personnel during the convention. Tr. at 563-564. Intervenor's Proposed Findings of Fact No. 32.

46. In or around June, 1995, Ms. Eddy, at the direction of Mr. Kane, began gathering information on the request for proposals ("RFP") and the invitation for bids ("IFB") procurement processes. Tr. at 687-89. Protestor's Proposed Findings of Fact No. 6, modified.

47. On or about July 3, 1995, Mr. Kane met with MHPCC representatives about the Respondent's re-engineering effort, and they agreed that Mary Ann Bufalini, MHPCC's representative, would sit on the Respondent's re-engineering committee as the representative for MHPCC. Ex. 162. Protestor's Proposed Findings of Fact No. 8, modified.

⁴ Typically, libraries have not outsourced any of their services, other than obtaining their cataloging services from a particular vendor. Libraries routinely maintain a technical services staff that handles all other processing. Tr. at 836. Over time, libraries have begun to outsource their computing services, but no other library functions. What the Respondent proposed to do by its intention to "outsource everything" was to outsource not only the computing services, but the technical services as well (cataloging and acquisitions). To this extent, Respondent's outsourcing proposals were novel. Tr. at 836. Intervenor's Proposed Findings of Fact Nos. 23, 24 and 25.

48. According to the electronic notes kept by Margaret Lewis of MHPCC, during Mr. Kane's meeting with MHPCC representatives on July 3, 1995, Mr. Kane indicated that he had found a vendor for a RS600 computer automation system, (Intervenor) and that Intervenor was interested in working with MHPCC. Ms. Lewis' electronic notes also indicated that Mr. Kane informed the MHPCC representatives that Intervenor's representatives would be visiting Mr. Kane and Respondent in July of 1995, and they would like to meet with MHPCC to review MHPCC's set-up at that time. Ex. 162. Protestor's Proposed Findings of Fact No. 8, modified.

49. On or about July 26, 1995, Respondent's representatives met with MHPCC representatives to discuss the Respondent's re-engineering program. As a result of the July 26, 1995 meeting, at least some of the MHPCC representatives were left with the impression that Intervenor would be performing the work to automate the State library system. Protestor's Proposed Findings of Fact No. 10, modified.

50. On or about July 26, 1995, Respondent asked GTE Hawaiian Telephone ("GTE") for verification of the availability of frame relays for all libraries. Tr. at 256, 329-330; Exs. 193 and 193-A. Protestor's Proposed Findings of Fact No. 11, modified.

51. In or around July 1995, Respondent and GTE discussed the type of equipment to be used in the frame relay system, how the network would be configured, and different technical scenarios. Tr. at 331. Protestor's Proposed Findings of Fact No. 11, modified.

52. In July 1995, Mr. Whittle spoke with Ms. Eddy to find out where Respondent stood with respect to its re-engineering efforts and its related interest in outsourcing computer services. Mr. Whittle also wanted to arrange another on-site visit in order to introduce Ms. Park to Respondent's personnel. Ms. Park had only recently become Intervenor's western sales representative, and would be responsible for Respondent's account. Tr. at 845. Intervenor's Proposed Findings of Fact No. 33, modified.

53. Mr. Whittle followed up on his telephone conversation with Ms. Eddy with several other calls in which he confirmed the dates, times and schedules for the on-site visit. Tr. at 845. The visit was ultimately set for August 28 and 29, 1995. Tr. at 847, 848. Intervenor's Proposed Findings of Fact No. 34.

54. Among the telephone calls made by Mr. Whittle during the July/August period was a call to Ken Cole at MHPCC at which time he was directed to speak with Mary Ann Bufalini, MHPCC's sales representative on Oahu. Mr. Whittle wanted to meet with MHPCC to determine whether MHPCC might be able to run the Intervenor's software on its system. Tr. at 846. Intervenor's Proposed Findings of Fact No. 35.

55. After arranging with Ms. Bufalini to visit the MHPCC site in August, 1995, Mr. Whittle mentioned in a telephone conversation with Respondent that he and Ms. Park intended to meet with MHPCC while they were in Hawaii. Upon learning of Intervenor's intention to visit MHPCC, Mr. Kane asked if he could come along. Tr. at 846. Intervenor's Proposed Findings of Fact No. 36.

56. Up to the point where Mr. Whittle advised Mr. Kane that he had arranged to meet with MHPCC personnel while in Hawaii in late August, Mr. Kane had never mentioned MHPCC to Mr. Whittle. Tr. at 846; Tr. at 934. Intervenor's Proposed Findings of Fact No. 37.

57. Mr. Whittle pursued MHPCC for more than the possibility that it might do business with Intervenor. Ameritech Corporation's Electronic Commerce Division (of which Intervenor is a part), for instance, had previously helped convert other supercomputing centers in the U.S. to business applications, and helped them diversify away from reliance on government contracts. Tr. at 847. Intervenor's Proposed Findings of Fact No. 38.

58. On or about July 28, 1995, Respondent's representatives met with MHPCC representatives again to discuss the best way to proceed with Respondent's re-engineering program, Internet services, and the automation of the library system. August 21, 1995, was discussed as the target date to meet with the experts in the various fields that would be involved in the project. Tr. at 102 - 103; Ex. 165. Protestor's Proposed Findings of Fact No. 12, modified.

59. On or about August 2, 1995, Ms. Eddy contacted Mr. Whittle to gather general information on what type of software would be needed to establish the management information system which would be required in the future by the newly reengineered State library system. Exhibit 11. Tr. at 85. Respondent's Proposed Findings of Fact No. 9.

60. On August 2, 1995, Mr. Whittle informed Ms. Eddy that Respondent's DRA computer system was not compatible with the computer system operated by MHPCC. Exhibit 11. Mr. Whittle also informed Ms. Eddy that MHPCC ran on a IBM SP2 system, which is a UNIX based system, and that the current automation system used by DRA which was a DEC system, could not run on the MHPCC operating system. Mr. Whittle provided Respondent with this information so that Respondent could compare the Intervenor's automation system with DRA's system, the Dynix computer automation system. Tr. at 998 - 999; 1031. Protestor's Proposed Findings of Fact No. 16, modified.

61. On or about August 2, 1995, representatives from Respondent and MHPCC met to discuss Internet implementations for Respondent. Ex. 153. Protestor's Proposed Findings of Fact No. 13.

62. On or about August 4, 1995, Respondent's staff and GTE representatives discussed how to migrate the frame relay for other sorts of data transfer between the libraries. Tr. at 245. Respondent asked for information from GTE on the cost of frame relay work in preparation of an August 30, 1995 meeting. The coordination of the frame relay work involved Respondent, GTE, and MHPCC. Tr. at 257; Exhibit 194. Protestor's Proposed Findings of Fact No. 14, modified.

63. On or about August 6, 1995, GTE representatives subsequently met with Respondent's staff and MHPCC representatives that were in charge of Respondent's frame relay work, to discuss the frame relay system, that was terminating at MHPCC. The frame relay system was intended by Respondent to be used for its entire automation system, including Internet access. Tr. at 335 - 336. Protestor's Proposed Findings of Fact No. 15, modified.

64. On or about August 8, 1995, Mr. Kane, his staff and Intervenor scheduled meetings for August 28 and 29, 1995, to discuss a new automation system for Respondent. Exhibits 9, 12; Tr. at 82, 86, and 1002-3. Protestor's Proposed Findings of Fact No. 19, modified.

65. By letter dated August 10, 1995, Respondent provided Intervenor with more information about Respondent's re-engineering project. Respondent reiterated its interest in MHPCC and that it was looking for products which were compatible with MHPCC's system.

Exhibit 13; Tr. at 86-87, and 1006-7. Protestor's Proposed Findings of Fact No. 16, modified.

66. On or about August 21, 1995, Respondent submitted a proposal to GTE for a frame relay from the Salt Lake library to the main library. Exhibit 196. On or about August 21, 1995, Respondent informed GTE of its intention to migrate all 48 public libraries, if funding was available. Tr. at 274. Protestor's Proposed Findings of Fact No. 21, modified.

67. On or about August 22, 1995, GTE understood that Respondent was interested in working with MHPCC and GTE in migrating the frame relay. Tr. at 337. Protestor's Proposed Findings of Fact No. 22, modified.

68. Mr. Whittle and Ms. Park visited Hawaii on August 28 and 29, 1995.

69. On August 28, 1995, Mr. Whittle and Ms. Park met with Mr. Kane, Ms. Eddy, and Ms. Sterrett, between 9:00 a.m. to 11:30 a.m. At which time, Mr. Kane re-emphasized the importance of re-engineering, saying that nothing would be worse than to go through all the effort that Respondent had been going through and not be able to have the re-engineering process come to fruition. Mr. Kane provided an update on Respondent's re-engineering project. According to Mr. Kane, the outsourcing of technical services, computing services and magazine subscriptions was critical to the re-engineering efforts. Tr. at 848. Protestor's Proposed Findings of Fact No. 23, modified; and Intervenor's Proposed Findings of Fact No. 39.

70. During the same meeting on August 28, 1995, Mr. Whittle and Ms. Park discussed what an automation center arrangement could do for the Respondent and how such an arrangement might meet the Respondent's needs. Specifically, Mr. Whittle and Ms. Park sought to tie in Intervenor's product offerings to the needs that Respondent had discovered during its re-engineering process. Tr. at 849. Intervenor's Proposed Findings of Fact No. 40.

71. During that same meeting, Mr. Whittle offered to prepare a "pre-proposal" for the Respondent's consideration. Within Intervenor, a pre-proposal is a summary document which outlines the potential customer's current system, and describes how Intervenor's product/service offerings might be able to address any existing shortcomings or solve any problems. Mr. Whittle offered to provide the pre-proposal by mid-September. Tr. at 850. Intervenor's Proposed Findings of Fact No. 41.

72. During the afternoon on August 28th, Mr. Whittle and Ms. Park went to visit the Respondent's RESS division in Salt Lake (Oahu) (Tr. at 854) and met with Mr. Kane, Ms. Eddy, Ms. Kingery, Mr. Gibbons, Ms. Miller-Pakvasa, and Ms. Sahli of RESS. Tr. at 851, 852. During the afternoon meeting with RESS, Mr. Whittle and Ms. Park asked questions of the RESS staff for the purpose of developing a more complete picture of Respondent's existing network and system. Tr. at 852. Mr. Gibbons, in particular, provided Mr. Whittle and Ms. Park with technical details concerning the current VAX set up, and how the current network was set up, including the current cabling. Tr. at 853. During this meeting, Intervenor explained the advantages of the UNIX-based software products in comparison to the VMS system that was then being used by Respondent. Intervenor's Proposed Findings of Fact No. 43, modified, and Protestor's Proposed Findings of Fact No. 27, modified.

73. On the morning of August 29, 1995, Mr. Kane at Intervenor's invitation flew to Maui with Mr. Whittle and Ms. Park to meet with MHPCC representatives Margaret Lewis, Mary Ann Bufalini, and Burt Lum, to discuss MHPCC's participation in Respondent's re-engineering efforts with Intervenor. Tr. at 108-112, 115, 854, 1010; Exhibit 168. This meeting lasted approximately two and one half hours. Tr. at 1013. The group discussed Ameritech's corporate structure, the work stations platforms under consideration for the automation system, and software systems available through Dynix for the automation system. Tr. at 108-112, 115; Exhibit 168. The purpose of this meeting was to discuss MHPCC's involvement in the automation of Respondent in order for MHPCC to price its services to Respondent and Intervenor. *Id.* The group discussed Respondent's January 2, 1996, deadline to complete Respondent's automation. *Id.* Protestor's Proposed Findings of Fact No. 28, modified.

74. During the morning meeting of August 29, 1995, Intervenor learned that MHPCC's SP2 system could not effectively run Intervenor's software and, therefore, if Intervenor was to use MHPCC's system, it would have to provide the hardware for MHPCC personnel to manage. Tr. at 856. Intervenor's Proposed Findings of Fact No. 44.

75. During the morning meeting of August 29, 1995, Mr. Whittle asked Mr. Lum, MHPCC's Technical Marketing Manager, to secure some price estimates since Respondent's new system would require a new network. Tr. at 859. At the time that Mr. Whittle asked

Mr. Lum to work with GTE, Mr. Whittle was unaware of any communication that Respondent may have had with GTE concerning the pricing and configuration of a frame relay system. Tr. at 1003. The first time that Mr. Whittle ever heard anything on the subject, in fact, was after Protestor filed its protest in this case. Tr. at 1004. Intervenor's Proposed Findings of Fact No. 45.

76. On August 29, 1995, after the MHPCC meeting, Mr. Kane, Mr. Whittle and Ms. Park, had lunch in Maui and returned to Mr. Kane's office for another meeting with Ms. Sterrett and Ms. Eddy. In this meeting, the group discussed what they had learned from and about MHPCC, and reconfirmed that Intervenor would be submitting a written proposal in the middle of September 1995. Tr. at 857. Protestor's Proposed Findings of Fact No. 29.

77. In the August 28 and 29, 1995, meetings between Respondent and Intervenor, the parties discussed Respondent's budget and how much money the library could spend on the automation system. Tr. at 1058-59. Protestor's Proposed Findings of Fact No. 30.

78. On or before August 31, 1995, Mr. Kane and Intervenor discussed the general timeline for the installation of the automation system by Intervenor for Respondent. Exhibit 16; Tr. at 1017-19. Protestor's Proposed Findings of Fact No. 32.

79. On or about August 31, 1995, Intervenor confirmed with Respondent that in order to meet Respondent's timetable, Intervenor needed to begin working on the project right away. In particular, Intervenor needed information about configuration and peripherals to prepare its proposal and to take other steps to build the new automation system. Exhibit 16; Tr. at 1019-20. Protestor's Proposed Findings of Fact No. 33, modified.

80. On or about August 31, 1995, based upon its meetings and discussions with Mr. Kane and Intervenor, at least several members of the MHPCC staff were of the understanding that Intervenor was going to be Respondent's library automation system vendor and would be the hardware/software supplier for this project. Tr. at 115-116; Exhibit 171, modified.

81. On or about September 3, 1995, Mr. Kane and Intervenor scheduled a meeting between the two groups for September 28 and 29, 1995. Exhibit 22. The meeting agenda included meeting with Elaine Murphy (Mr. Kane's wife), to discuss Honolulu City and County

projects. *Id.* The meeting agenda also included a demonstration of the Dynix system for Respondent. *Id.* Protestor's Proposed Findings of Fact No. 34, modified.

82. On or about September 6, 1995, Ms. Miller-Pakvasa was informed that Intervenor's demonstration database was available to Respondent's re-engineering team and selected RESS members. No staff member ever told Ms. Miller-Pakvasa that they viewed the demonstration database. Tr. at 176. Intervenor's Proposed Findings of Fact No. 51. Ms. Miller-Pakvasa circulated information to Respondent's personnel involved in the re-engineering project and the automation system on accessing the Intervenor's Dynix demonstration program. Exhibit 35; Tr. at 182-183. The information was used by Ms. Miller-Pakvasa to tour the Dynix system. Tr. at 170. The ability to tour the Dynix system was made available to Respondent's staff involved in the re-engineering project. *Id.* Ms. Miller-Pakvasa toured through the Dynix system to look for any technical problems to assist Respondent's staff in understanding the use of the Dynix system. Tr. at 174-176; Exhibits 148, 149. The Dynix system was made available to Respondent's staff involved in the re-engineering project and automation system. Tr. at 173-176. Respondent's staff specifically asked for access to the Dynix demonstration program. *Id.* Protestor's Proposed Findings of Fact No. 35, modified.

83. Respondent's re-engineering team members met together on September 7 and 8, 1995, to discuss Respondent's automation needs. Tr. at 31, 88.

84. On or about September 12, 1995, MHPCC and Intervenor exchanged information about the automation system to assist Intervenor in preparing the cost proposal for Respondent. Tr. at 118-121, 125-126; Exhibits 172, 173, 174, 175, 176, 177, 178, 180. Intervenor provided a timetable to MHPCC regarding the submission of its proposal to Respondent on the automation system and the issuance of the RFP by Respondent. *Id.* Intervenor knew before RFP-96-1 was issued, that Respondent would be issuing an RFP for a computer automation system for Respondent. *Id.* Protestor's Proposed Findings of Fact No. 36, modified.

85. Intervenor asked MHPCC to secure information and price estimates from GTE for frame relay work. Vol. VI at 859-60. Protestor's Proposed Findings of Fact No. 37, modified.

86. On or about September 12, 1995, Intervenor informed MHPCC about the timeline for the installation of Respondent's automation system and the RFP process. Exhibit 172; Tr. at 1073. Intervenor intended to submit a proposal for the automation system to Respondent by September 20, 1995. Intervenor understood that Respondent would issue a RFP for the automation system in October, 1995. Intervenor also understood that Respondent would issue a notice of proceeding in October, 1995, and a flash cut installation from the DRA system to the Intervenor's Dynix system would be done before the legislative session, January 10 to 15, 1996. Exhibit 172; Tr. at 119-121. Protestor's Proposed Findings of Fact No. 39, modified.

87. During the period prior to the issuance of RFP 96-1, in response to Intervenor's requests, Respondent's staff provided Intervenor with various information which was necessary for Intervenor to prepare its proposal to Respondent for the automation system. Respondent provided Intervenor with information about Respondent's equipment and capacity requirements for the automation system, the number, type and model number of equipment required by Respondent. Tr. at 178-179; 247-249; 858; and 1064-65; Exhibits 18, 19, 20, 21, 23, 24, 25. Respondent also provided Intervenor with information about the Respondent's Automation Inventory (Exhibit 29); local telephone rates (Exhibit 30); details for Respondent's peripherals (Tr. at 171-172; 1064-65); on-line equipment existing at Respondent (Exhibit 1551; Tr. at 172-173); microcomputer data and central site equipment (Tr. at 1069); and conversion utilities (Exhibits 43 and 44). Respondent provided Intervenor with information on library sites, number of computers, and the speeds by which the circuit would be established to that site. Tr. at 129-133; Exhibit 181. Respondent also provided Intervenor with graphics depicting the various library sites connected to the various frame relay breaks, the work station, router, a DSU/CSU, and terminal server. Tr. at 133-34; Exhibit 181. Protestor's Proposed Findings of Fact No. 40, modified.

88. From the time that Mr. Whittle and Ms. Park returned home on August 29, 1995, until they returned in late September, 1995, Mr. Whittle had a series of telephone calls and faxes to and from various of Respondent's personnel in which Mr. Whittle tried to clarify the information concerning Respondent's system obtained from the August 28 meeting with RESS personnel. Tr. at 858. Mr. Whittle sought the detailed information in order to assist

him in preparing the pre-proposal that he had promised. Tr. at 859. Intervenor's Proposed Findings of Fact No. 47.

89. Some of the information which Mr. Whittle requested had to be gathered from the individual libraries, and took several weeks to prepare. Tr. at 172, 173. Some of the information, such as the DRA customer list, was never provided. Exhibit 31; Tr. at 90. Intervenor's Proposed Findings of Fact No. 48.

90. In addition to spending the first half of September 1995 securing the information necessary for inclusion in the pre-proposal, Mr. Whittle had a number of telephone and fax communications with Respondent's personnel arranging and confirming the September 28 and 29 meetings on Oahu during which he and Ms. Park would present Intervenor's pre-proposal. Tr. at 860, 861. Intervenor's Proposed Findings of Fact No. 49.

91. While gathering information for purposes of preparing the pre-proposal, Mr. Whittle spoke to Mr. Lum and learned that GTE had available a credit which would apply to libraries. Mr. Whittle did not learn about the GTE credit from Respondent. Tr. at 931-932. Intervenor's Proposed Findings of Fact No. 50.

92. When Mr. Whittle returned home on August 29, 1995, he had promised Mr. Kane that he would provide him with the pre-proposal within two weeks. Tr. at 868. On September 19, 1995, Mr. Whittle faxed an apology to Mr. Kane for his failure to meet the self-imposed deadline and advised that the document would be faxed later that day. Exhibit 32. The apology was entirely the consequence of Mr. Whittle's concern over his failure to live up to his own deadline; Mr. Kane had not called to ask about the pre-proposal despite the fact that it was almost a week late. Tr. at 869. Intervenor's Proposed Findings of Fact No. 52.

93. Mr. Whittle helped Respondent select the proper circuits and speeds to be used for the frame relay. Tr. at 1004-05. Mr. Kane provided the information on the configuration of the frame relay work to Intervenor. *Id.*; Tr. at 1094-96; Exhibit 40. This information on frame relay network was not provided to Protestor at any time prior or after the issuance of the RFPs. Tr. at 464. The frame relay network configuration diagram provided by Mr. Kane to Respondent was incorporated into the responses by Intervenor to both RFP-96-1 and RFP-96-4. Tr. at 1005-06; 1095-96. Protestor's Proposed Findings of Fact No. 41, modified.

94. In securing information from Respondent, Mr. Whittle communicated with Mr. Kane, Ms. Sterrett, Ms. Eddy, Ms. Kingery, Mr. Gibbons, and Ms. Miller-Pakvasa. Tr. at 858 Intervenor asked for the information to help it prepare its proposal to Respondent for the automation center. *Id.* at 859. The information requested by Intervenor and provided by Respondent to Intervenor was necessary for Intervenor's preparation of its proposal in response to the RFPs. Tr. at 1066, 1070. Protestor's Proposed Findings of Fact No. 42, modified.

95. Later in the day on September 19, 1995, Mr. Whittle faxed a copy of Intervenor's pre-proposal to Mr. Kane. Exhibit 33 (2102330051). Although the Intervenor's document was entitled, "Response to a Request for Proposal for a Computer Automation System for HSLS" dated September 21, 1995, Intervenor frequently prepares pre-proposals (Tr. at 867), and refers to these pre-proposals as "responses" to RFPs because its provisions are derived from the company's standard RFP boilerplate responses. Tr. at 866. Intervenor's pre-proposal consisted of seventy-one (71) pages. Ex. 33. Intervenor's Proposed Findings of Fact No. 53, modified; and Protestor's Proposed Findings of Fact No. 43, modified.

96. The Intervenor's September 21, 1995 pre-proposal contained three possible automation system scenario's which Intervenor understood was what Respondent wanted in an automation system. Tr. at 156, and 1082. The Intervenor's September 21, 1995 pre-proposal contained within it information Intervenor obtained from MHPCC about the frame relay costs. Tr. at 1079-80. Protestor's Proposed Findings of Fact No. 44, modified.

97. The automation system configuration in Intervenor's September 22, 1995 proposal to Respondent is very similar to the automation system configuration ultimately proposed by Intervenor's in response to RFP-96-1. Tr. at 127-129; Exhibits 179, 76a. Protestor's Proposed Findings of Fact No. 39, modified.

98. The September 21, 1995 proposal from Intervenor contained three possible automation system scenario's which Intervenor understood was what Respondent wanted in an automation system and contained information Intervenor obtained from MHPCC about the frame relay costs. Tr. at 156; 10821 and at 1079-80. Protestor's Proposed Findings of Fact No. 44.

99. On or about September 22, 1995, Respondent confirmed that its purchase of a computer automation system would have to comply with the request for proposal procurement process. Exhibit 34. Protestor's Proposed Findings of Fact No. 55.

100. On or before September 25, 1995, Ms. Sterrett reviewed Intervenor's initial proposal with Mr. Whittle. Exhibit 37. Ms. Sterrett in turn, briefed Mr. Kane on her review of Intervenor's proposal. Tr. at 33-34. Ms. Sterrett and Mr. Whittle discussed the high cost for the automation system, and the errors in factual information on which the proposal was based. Intervenor responded that it would correct those errors. Tr. at 1091-92. Intervenor's initial proposal raised questions about the cost of recabling of the library to accommodate a new automation system and about the high cost of a new automation system in general. The Intervenor's initial proposal was used by Respondent to draft a RFP to better address Respondent's objectives. Tr. at 35; Exhibit 3336. Protestor's Proposed Findings of Fact No. 46, modified.

101. During this period of time, Respondent began looking at the application of the GTE Educational Initiative Program. The GTE Educational Initiative Program is a program made available by GTE to the Department of Education in which schools and libraries are entitled to a \$2,000 credit toward advanced network services through GTE. Tr. at 349-352. The Respondent, based on 49 or 50 library sites, was entitled to \$2,000 per site or \$98,000 - \$100,000 credit from GTE. This program was announced in May, 1994, and was not available to vendors. *Id.* The frame relay work for the Respondent's automation system qualifies for the GTE Education Initiative Program credits.⁵ Tr. at 353. Protestor's Proposed Findings of Fact No. 47.

102. On September 28, 1995, between 8:00 a.m. and 12 noon, Mr. Kane, Ms. Sterrett, and Ms. Eddy, met with Mr. Whittle and Ms. Park. Tr. at 42. In this meeting, the group discussed Intervenor's automation center proposal. Intervenor presented the proposal and discussed how its automation center functions and operates, and clarified questions. In this meeting, Respondent disclosed their budgetary restrictions, and Respondent's budget

⁵ The RFPs do not contain any information about the use of the GTE Education Initiative Program \$2,000 credit. Tr. at 973. Intervenor learned of the credit in September, 1995. *Id.* Protestor's Proposed Findings of Fact No. 48.

range for the automation center. Tr. at 864. The group also discussed the January 2, 1996, deadline for the operation of the automation center, which was tied into when the Hawaii State Legislature would be reconvening, and that "in terms of being able to politically position the whole re-engineering project that having a system installed and running January 2nd would be very advantageous to Bart Kane and the State Library." Tr. at 864. During this meeting, Mr. Whittle discussed the logistics of installing the automation center with Intervenor's support staff at Intervenor's home office. Consequently, Mr. Whittle informed Mr. Kane that Intervenor could meet the January 2, 1996 deadline. Tr. at 869-70, 872. Protestor's Proposed Findings of Fact No. 49, modified.

103. In the afternoon of September 28, 1995, Mr. Whittle and Ms. Park met with Mr. Kane, Ms. Eddy, Ms. Sterrett, and Mr. Lum and Ms. Bufalini of MHPCC. In this meeting, the group discussed the installation of the frame relay circuits, and the capabilities of the Intervenor's automation center. Tr. at 872-73. Protestor's Proposed Findings of Fact No. 50, modified.

104. As a result of the September 28, 1995 meeting, Mr. Lum understood that the selection of the automation vendor would be subject to a request for proposal process and that there was a possibility that Intervenor would not be selected as the Respondent's automation vendor. Tr. at 159. Intervenor's Proposed Findings of Fact No. 59, modified.

105. On September 29, 1995, Mr. Kane and his wife Elaine, along with Ms. Sterrett, and Ms. Eddy, met with Mr. Whittle and Mr. Park from 8:00 a.m., until 12 noon. Tr. at 41, 43, 44, 89, and 875. In this meeting, the group discussed in general terms the RFP process and what would take place. Tr. at 875-76. Mr. Kane asked for information from Intervenor to help Respondent with the RFP process. *Id.* Protestor's Proposed Findings of Fact No. 51.

106. On September 29, 1995, Ms. Sterrett, Ms. Eddy, Ms. Carol Lawrence Toma, and Ms. Miller-Pakvasa, met with Mr. Whittle and Ms. Park for lunch. Tr. at 164-165. Protestor's Proposed Findings of Fact No. 52.

107. In the afternoon of September 29, 1995, other members of Respondent's staff met Mr. Whittle and Ms. Park. Like their earlier meetings, Respondent and Intervenor discussed what Respondent would like to have in its computer automation system. Tr. at 43.

The group discussed Respondent's automation objectives. Tr. at 44. The term "automation objectives" refers to all matters and items covered by the then yet-to-be-issued RFPs. Tr. at 48.

108. Mr. Whittle and Ms. Park had intended to perform a product demonstration of the Dynix system on September 29, 1995, but Ms. Sterrett declined the offer on behalf of the Respondent, explaining that an RFP would be forthcoming and that vendors would not be allowed to demonstrate their products as part of that process. Tr. at 878. Intervenor's Proposed Findings of Fact No. 62.

109. Respondent's staff and Intervenor's representatives also discussed in these meetings the deficiencies in Intervenor's September 21, 1995 proposal and what the RFP should include. Exhibit 183. Prior to the issuance of the RFPs, the meetings with Intervenor helped Respondent decide what would be best to put in the RFPs, including that its system would be the solution of Respondent's needs. Tr. at 691, 966. Intervenor helped Respondent assess its needs and based on that assessment, Intervenor informed Respondent how Intervenor could address Respondent's needs and provide the solution. Tr. at 967. Protestor's Proposed Findings of Fact No. 54, modified.

110. A summary of Respondent's phone records reveals that from August, 1995, through September 31, 1995, Respondent's personnel placed a total of 45 telephone calls and/or fax transmissions to Intervenor and Intervenor's representatives or agents. Exhibit 217. During the month of October, 1995, during the period covered by RFP-96-001-0, a total of 28 telephone calls and/or fax transmissions were made by Respondent's personnel to Intervenor and Intervenor's representatives or agents. *Id.* During the month of November, 1995, during the period covered by RFP-96-004-0, to the issuance of the award in mid-December, 1995, a total of 6 telephone calls and/or fax transmissions were made by Respondent's personnel to Intervenor and Intervenor's representatives or agents. *Id.* Protestor's Proposed Findings of Fact No. 59, modified.

111. Through the numerous discussions between Respondent's staff and Intervenor, the parties exchanged information about the re-engineering program, the Library computers' capabilities, and Intervenor's computer automation system. The information provided by Respondent to Intervenor which related to the size of Respondent's current automation

system was helpful in Intervenor's preparation of its proposal for a new automation system to Respondent. Tr. at 250. Protestor's Proposed Findings of Fact No. 60.

112. The information generated by Mr. Gibbons, which was sent to Mr. Whittle in August and September, 1995, was some of the information given to Protestor in the RFPs. Tr. at 272. Protestor's Proposed Findings of Fact No. 61, modified.

113. On or about September 28 or 29, 1995, Ms. Miller-Pakvasa expressed to Intervenor's representatives an interest in being employed by Intervenor as the assistant administrator of the automation system Intervenor was providing to Respondent. Tr. at 203-204.

114. Prior to the issuance of the RFP-96-1, Intervenor took steps in preparation for the installation of its automation system for Respondent, including: 1) pre-ordering equipment that would be required for the automation system. Tr. at 880-81; 2) trying to start the process of recovering data from the Respondent's DRA system. Exhibit 41; Tr. at 878-88; 3) trying to start converting information into Intervenor's automation system; and 4) assembling a team of Intervenor's staff to write the responsive proposal, and configuration, contract, and implementation teams. Tr. at 880. Protestor's Proposed Findings of Fact No. 56, modified.

115. In addition to face-to-face meetings, there were numerous telephone calls between Respondent's staff and Intervenor prior to the issuance of RFP-96-001-0, and numerous transmittal by facsimile documents and other information between Respondent and Intervenor. Exhibits 145, 146, 215, 216, 217.

- a. Ms. Sterrett had three telephone conversations with Mr. Whittle. Tr. at 32-33;
- b. Ms. Eddy had three or four telephone conversations with Intervenor's representatives in August and September, 1995. Tr. at 83; and
- c. Ms. Miller-Pakvasa had two or three telephone calls with Dynix representatives and sent maybe two or three fax transmittals with documents and information. Tr. at 163, 165-166.

Protestor's Proposed Findings of Fact No. 57 and 58, modified.

116. When Mr. Whittle returned to Utah in the first week of October 1995, he contacted Respondent's personnel by fax and telephone in an effort to obtain the DRA migration tapes. Tr. at 879. Mr. Whittle had previously told Mr. Kane that Intervenor would need to have access to library data in order to perform the data migration by the January 2, 1996 date mentioned by Mr. Kane. Tr. at 874. Nevertheless, when Mr. Whittle requested access to the library's data, Ms. Sterrett advised Mr. Whittle that Intervenor would not be provided with the DRA migration tapes because Respondent would then have to provide the information to all vendors. Tr. at 879. Intervenor's Proposed Findings of Fact No. 62, modified.

117. When Mr. Whittle returned to Utah in the first week of October 1995, he established a "virtual team" within Intervenor, including proposal writers, configuration, contracts and implementation people who would be responsible for responding to the RFP that Respondent was expected to issue. Tr. at 880. Intervenor's Proposed Findings of Fact No. 64.

118. Also in October 1995, Mr. Whittle pre-ordered equipment that Intervenor would subsequently propose for Respondent's use. It is customary for sales managers within Intervenor's corporate structure to pre-order equipment of this type, and risk was minimal because all of the equipment that Mr. Whittle ordered could be used in other installations that were upcoming in the event that Intervenor did not get the contract. Tr. at 880, 881. Intervenor's Proposed Findings of Fact No. 65.

C. The RFP Process and RFP 96-1

119. By letter dated September 5, 1995, Mr. Kane advised the CPO of Respondent's reengineering project and the fact that Respondent was in the process of preparing several RFPs. Mr. Kane requested assistance from the CPO's office, since it was "critical that these RFPs be released as quickly as possible." Exhibit 212 (71023300002) . Intervenor's Proposed Findings of Fact No. 66.

120. By letter dated September 12, 1995, the CPO advised Mr. Kane that he had instructed his staff to advise on and review Respondent's RFPs. The CPO said, however, that

the office's workload precluded the office from actually issuing the RFPs. Exhibit 212 (7102330003). Intervenor's Proposed Findings of Fact No. 67.

121. After speaking with the CPO's office, Respondent's reengineering team determined that the vendor selection for a new automation system warranted the use of a request for proposal process rather than an invitation for bid process. A memorandum dated September 22, 1995 requesting approval of this decision was forwarded to Mr. Kane. As the Respondent's Procurement Officer, Mr. Kane approved the process. Exhibit 34. Intervenor's Proposed Findings of Fact No. 68.

122. The September 29, 1995 meeting of Mr. Whittle, Ms. Park, Mr. Kane, his wife, Ms. Sterrett and Ms. Eddy was of some assistance to the Respondent, but Respondent did not necessarily rely on information or discussion from the meeting in preparing its subsequent RFP. Tr. at 89. Intervenor's Proposed Findings of Fact No. 69, modified.

123. On or about September 29, 1995, Mr. Whittle provided to Respondent a sample RFP in the same form that Intervenor frequently provided to public libraries nationwide. Tr. at 1097. Intervenor's Proposed Findings of Fact No. 70.

124. On October 2, 1995, Respondent initiated a public procurement of goods and services by issuing Request for Proposals No. RFP-96-001-0 for Sealed Proposals and Pricing for Vendor Operated Automation Center, Integrated Library Automation System, and Frame Relay Telecommunications Network ("RFP 96-1"). Exhibit D, cover page. By the RFP 96-1, Respondent sought proposals from vendors for the purchase, installation and maintenance of an automation center supporting a completely integrated system of on-line library functions. Exhibit D, at 2, 3 (Statement of Intent). Intervenor's Proposed Findings of Fact No. 72.

125. It was Respondent's stated intent to outsource through RFP 96-1 the following library functions to a single vendor:

- a. In-house and Internet electronic mail;
- b. Internet Domain Name and WWW server;
- c. Graphical, PC-based Internet and library function access; and
- d. Library management information system.

Exhibit D, at 2, 3 (Statement of Intent). Intervenor's Proposed Findings of Fact No. 73.

126. Pursuant to RFP 96-1, Respondent would accept proposals through October 23, 1995, and the proposals would be opened on October 24, 1995. Exhibit D, at 4. A committee selected by the Procurement Officer (Mr. Kane) would then evaluate the proposal on the basis of a 200 point, multi-part, format devised by the Respondent. Exhibit D, at 6. Intervenor's Proposed Findings of Fact No. 74.

127. At some time on or shortly after October 2, 1995, Intervenor and Protestor received copies of RFP 96-1. Tr. at 484, 881. Intervenor's Proposed Findings of Fact No. 75.

128. After the issuance of RFP-96-001-0, on October 3, 1995, Intervenor, Mr. Kane and Respondent's staff, continued to discuss matters related to automation system and RFP-96-001-0. Exhibit 185. Intervenor asked for information from Mr. Kane and Respondent's staff. Exhibit 46. Intervenor also asked for information which would allow it to proceed with its conversion of the DRA system to Intervenor's system. Exhibit 52. Intervenor provided Respondent's staff with information on the extraction and conversion of the data in the DRA system into Intervenor's system. Exhibit 51. Intervenor expressed the need to complete data extraction to ensure that Respondent's implementation timetables could be met. Exhibit 49. Protestor's Proposed Findings of Fact No. 71, modified.

129. Intervenor asked Respondent's staff to do a MARC extract and to send the tape to Intervenor. Intervenor asked for information on the cost of phone lines, cabling, and the conditions of payment by Respondent for the automation system. Exhibit 46. Intervenor also asked for information on securing extract utilities from DRA. Exhibit 49. Intervenor discussed the features of the Dynix system with Mr. Kane and why Intervenor was a worthy partner with Respondent. *Id.* Protestor's Proposed Findings of Fact No. 72, modified.

130. Intervenor also asked Respondent's staff for information to insure that Intervenor's proposal was accurate, including information about Respondent's PC capabilities, including location, configuration, disk, memory, ports, and intended uses and users. Exhibit 52. Intervenor also asked Respondent if Intervenor had to include cabling costs or whether Respondent would pay for it. Exhibit 46. Intervenor informed Respondent that cabling installation by the vendor may affect Respondent's timetable for the automation system. *Id.* Protestor's Proposed Findings of Fact No. 73, modified.

131. Respondent's staff responded to Intervenor's requests and began looking into the MARC extraction as requested by Intervenor. Exhibit 53. Protestor's Proposed Findings of Fact No. 74, modified.

132. On October 4, 1995, Intervenor forwarded to MHPCC, a detailed description of the duties and responsibilities of the System Administrator required to eventually oversee the operations of the Respondent's automation system. Tr. at 138; Exhibit 186.

133. On or about October 4, 1995, Ms. Miller-Pakvasa prepared an action plan for the implementation of the Intervenor's automation system. Exhibit 150; Tr. at 186-187. The action plan was an outline of possible events or steps to make the automation system operational. In her October 4, 1995 action plan, Ms. Miller-Pakvasa identified Intervenor as the vendor for Respondent's automation system. Vol. I at 189; Exhibit 150. Intervenor had explained to Respondent what Intervenor's process would be for starting-up the automation system and this process was incorporated into the Respondent's action plan. Tr. at 189-190. Protestor's Proposed Findings of Fact No. 75, modified.

134. Prior to October, 1995, Respondent had intended that the vendor of the automation system would do the frame relay work or recabling of the Respondent. Tr. at 289-290. Protestor's Proposed Findings of Fact No. 77, modified.

135. Sometime prior to October 10, 1995, Respondent disclosed to Intervenor and MHPCC that Respondent did not have the funding to contract for the total project as originally intended. Tr. at 141-142; Exhibit 186. In meetings between Respondent, Intervenor, and MHPCC, the parties discussed Respondent's available funding for the automation system. *Id.* Protestor's Proposed Findings of Fact No. 78, modified.

136. On or about October 10, 1995, MHPCC submitted its cost estimate for the maintenance and administrative support for the automation system to Intervenor. Ex. 187. Protestor's Proposed Findings of Fact No. 79, modified.

137. As part of RFP 96-1, Respondent provided for the possibility of a pre-proposal conference on October 11, 1995, if requested by any of the vendors. Exhibit D, at 4. After receiving the RFP 96-1, Mr. Whittle telephoned Ms. Sterrett concerning the pre-proposal conference. Mr. Whittle advised that he could not be present for the conference, but would like to be patched in by phone in the event that a conference occurred. No other vendors

indicated interest in a pre-proposal conference, and thus none was held. Tr. at 888. Intervenor's Proposed Findings of Fact No. 76.

138. On or about October 16, 1995, DRA withdrew as a possible bidder under RFP-96-001-0. Ex. 56. DRA informed Mr. Kane that it would be impossible to establish an automation center and be operational by January 2, 1996. DRA stated its observation that based upon the timelines and other requirements in the RFP, that Respondent had already selected a vendor. DRA noted that Mr. Kane had failed to return telephone calls and requests from DRA. Ex. 56. Protestor's Proposed Findings of Fact No. 81.

139. Through October 17, 1995, Respondent continued with efforts to extract data from DRA files as requested by Intervenor. Exhibit 65. The extraction of files from the DRA automation system was necessary before Intervenor's automation system could begin operating. Tr. at 395-397; Exhibits 88, 91, 92. Protestor's Proposed Findings of Fact No. 83.

140. On or about October 19, 1995, Respondent provided Protestor with a vendor's question and answer sheet. Exhibits 59, AA, AA-1; Tr. at 488, 490. None of the questions listed were questions asked by Intervenor in its letters to Respondent. *Id.* The written questions and answers from Respondent were provided three days before the responses to RFP-96-1 were due. Tr. at 488-490. Protestor's Proposed Findings of Fact No. 84.

141. While preparing Intervenor's response to RFP 96-1, Mr. Whittle spoke with Mr. Charles Yoshioko of Unisys about the possibility of locating the automation center at the Unisys site. Mr. Whittle learned that Unisys could not support a UNIX platform and that it did not have the high speed Internet connection which MHPCC had, so Mr. Whittle made the decision to include MHPCC as part of Intervenor's proposal in response to RFP 96-1. Tr. at 889-890. Intervenor's Proposed Findings of Fact No. 77.

142. On October 19, 1995, Respondent faxed a set of questions that had been received from vendors along with the answers to those questions. Exhibit AA-1, AA. Intervenor's Proposed Findings of Fact No. 78.

143. On October 23, 1995, Intervenor submitted its proposal in response to RFP-96-1. Tr. at 1081. Portions of Intervenor's proposal were very similar to "option one" of

Intervenor's September 21, 1995 proposal. Tr. at 1083. Protestor's Proposed Findings of Fact No. 89, modified.

144. Prior to submitting its October 23, 1995 proposal, Intervenor discussed the various options submitted in its September 21, 1995 proposal with Respondent. When Intervenor responded to RFP-96-1, it decided to submit "option one" of Intervenor September 21, 1995 proposal, as Intervenor's proposal in response to the RFP-96-1. Tr. at 1084. Protestor's Proposed Findings of Fact No. 91, modified.

145. On or about October 23, 1995, Protestor submitted its proposal in response to RFP-96-1. Tr. at 494 and 496. Protestor's Proposed Findings of Fact No. 91.

146. By letter dated October 25, 1995, Intervenor expressed concerns to Mr. Kane that Protestor had received Intervenor's initial September 21, 1995 proposal to Respondent for an automation system. Exhibit 61. Intervenor made several disparaging remarks about Protestor and its system. *Id.* Protestor's Proposed Findings of Fact No. 87, modified.

147. The Intervenor's disparaging remarks statements and comments regarding Protestor and Protestor's system were not true, and despite the concerns voiced by Intervenor, Protestor had not been provided a copy of Intervenor's September 21, 1995 proposal. Tr. at 466-468.⁶ Protestor's Proposed Findings of Fact No. 88, modified.

148. The responses to RFP 96-1 were evaluated on October 27, 1995 by two evaluators selected on the advice of Mr. Kane, and who had been contacted by Mr. Kane and Ms. Eddy to serve on the evaluation panel. Tr. at 64. Intervenor's Proposed Findings of Fact No. 80.

149. On October 30, 1995, Mr. Whittle received a telephone call from Mr. Kane advising that Intervenor had been awarded the contract under RFP 96-1. Tr. at 894. Intervenor's Proposed Findings of Fact No. 81.

150. On or about October 30, 1995, Mr. Kane asked Hawaiian Electric Company for the services of a project manager to oversee the cabling work for the automation center

⁶ At the hearing, Mr. Whittle testified that he had no personal knowledge to support the statements made against Protestor in Intervenor's October 25, 1995 letter. Tr. at 1116-1122. Protestor's Proposed Findings of Fact No. 88, modified.

performed by Respondent's technicians. Exhibit 62. Protestor's Proposed Findings of Fact No. 94, modified.

151. On October 31, 1995, Mr. Kane met with Ms. Sterrett, Ms. Eddy, Doris Lee from the State Procurement Office, John Penebacker, and Winfred Pong, Esq., the State Deputy Attorney General representing the Respondent. Tr. at 49, 50.

152. On or about October 31, 1995, Mr. Whittle received a telephone call from the Respondent advising that someone had anonymously complained about RFP 96-1, that the matter was being investigated, and until the investigation was completed, the award was being rescinded. Tr. at 895. Intervenor's Proposed Findings of Fact No. 77, and Intervenor's Proposed Findings of Fact No. 82, modified.

153. On November 8, 1995, Respondent informed Protestor that RFP-96-1 had been canceled because of the failure to publish the notice of the request for proposal before it was distributed to various vendors. Mr. Kane also stated that the preparation time may have been insufficient. Exhibit 64. Protestor's Proposed Findings of Fact No. 98, modified.

D. Proposals In Response To RFP 96-4

154. After the issuance of RFP 96-1, and based upon discussions with Intervenor regarding Intervenor's initial September 19, 1995 proposal, and because of concerns over the cost of the project, Respondent decided to remove the recabling of the library from the subsequent RFP No. 96-4. Tr. at 37. Respondent looked for another funding source to cover the cost of recabling the Library. *Id.* Protestor's Proposed Findings of Fact No. 93, modified.

155. On November 13, 1995, Respondent issued Request for Proposals No. RFP-96-004-0 for Sealed Proposals and Pricing for Vendor-Operated Automation Center, Integrated Library Automation System, and Frame Relay Telecommunications Network ("RFP-96-4"). Exhibits 66, 67; Tr. at 17. The resolicitation was published in the **HONOLULU ADVERTISER** on November 10, 1995, and the deadlines for responses to RFP-96-4 was December 13, 1995. *Id.* Other than the changes in the dates and deadlines, the only difference between RFP-96-1 and RFP-96-4 was to remove the requirement for providing cabling for the libraries and to describe the type of cabling that Respondent was having installed in the libraries. Tr. at 207. Protestor's Proposed Findings of Fact No. 98, modified.

156. By the RFP 96-4, Respondent sought proposals from vendors for the purchase, installation and maintenance of an automation center supporting a completely integrated system of on-line library functions. Exhibit HH, at 2, 3. Intervenor's Proposed Findings of Fact No. 86.

157. By its RFP 96-4, Respondent sought to outsource the same library functions, and sought proposals of the same general description, as had RFP 96-1. *Compare* Exhibit D, at 2, 3 with Exhibit HH, at 2, 3. RFP 96-4 provided that (1) proposals could be submitted in response up to December 13, 1995, (2) proposals would be opened on December 13, 1995, (3) the proposals would be evaluated on December 15, 1995, (4) a contract award would be made on December 22, 1995, and (5) the new system was to be operational and in use by February 20, 1996. Exhibit HH, at 4. Intervenor's Proposed Findings of Fact No. 87.

158. Legal notice of RFP 96-4 was given on page F8 of the November 10, 1995 *Honolulu Advertiser*. Exhibit 211 (71013300015-17). Intervenor's Proposed Findings of Fact No. 88.

159. The RFP was available to vendors beginning at 8:30 a.m. on November 13, 1995. Exhibit 211 (71013300015). Intervenor's Proposed Findings of Fact No. 89.

160. On November 13, 1995, Respondent mailed notice to both Protestor and Intervenor that Respondent would be renewing its request for proposals pursuant to a new RFP, numbered RFP-96-004-0. Exhibits II, JJ. Intervenor's Proposed Findings of Fact No. 85.

161. On or about November 13, 1995, Hawaiian Electric Company volunteered the services of Philip Mow to design and organize the recabling work for Respondent's automation center. Exhibit 68. In conjunction with this appointment, Mr. Kane formed a team of Respondent's technicians to perform the recabling work with Mr. Mow's guidance. *Id.* Protestor's Proposed Findings of Fact No. 99, modified.

162. The following vendors received copies of the RFP: Intervenor (mailed 11/14); Protestor (mailed 11/14); Data House Inc. (picked up 11/13); DRA (mailed 11/21); IBM (picked up 11/13); Unisys (picked up 11/13); and Relevant Data (picked up 11/13). Exhibit 211 (71013300015-16). Intervenor's Proposed Findings of Fact No. 90.

163. RFP 96-4 included a requirement that the automation center's operating system "must be an open system running UNIX." Exhibit HH, at 8. UNIX is among the most widely used operating systems in use among automated public libraries. Tr. at 1250-1253. Intervenor's Proposed Findings of Fact Nos. 91 and 92, modified.

164. RFP 96-4 included as a functional specification for the system's public access catalog, under the sub-heading of graphical user interface for public access, the requirement that "the system should offer an interface to [Protestor's] Kid's Catalog product, an exciting color graphical interface designed especially to appeal to children." Exhibit HH, at 70. Intervenor's Proposed Findings of Fact No. 93.

165. RFP 96-4 sought proposals for "a vendor-operated automation center." Exhibit HH, at 1. Intervenor occasionally refers to its automation system as a "Dynix Automation Center." E.g., 76A, C-1. Intervenor's Proposed Findings of Fact Nos. 94 and 95.

166. RFP 96-4 provides that Respondent has 548 "allocated" ports, but has 508 ports "in use." Exhibit HH, Appendix C, at 4. Intervenor's Proposed Findings of Fact No. 97.

167. On November 22, 1995, Intervenor requested an opportunity to demonstrate its automation system. Exhibit 70. Ms. Sterrett informed Protestor by telephone that the RFP did not call for a demonstration of the vendor's automation system. Tr. at 65. Protestor's Proposed Findings of Fact No. 100, modified.

168. On or about December 13, 1995, Protestor and Intervenor submitted sealed proposals to Respondent in response to RFP 96-4. Exhibits 74A, 76A. Intervenor's Proposed Findings of Fact No. 101.

169. Protestor spent approximately \$30,000.00 in preparing its response to RFP 96-4. Protestor's Proposed Findings of Fact No. 102, modified.

170. Intervenor's proposal provided for 515 terminals. Exhibit 76A, at C-2. Intervenor's Proposed Findings of Fact No. 102.

171. Protestor's proposal provided for 550 terminals. Tr. at 435. Intervenor's Proposed Findings of Fact No. 103.

172. Intervenor's proposal provided an estimated cost for frame relay installation of \$20,000, and an annual frame relay charge of \$120,000, based on estimates provided by GTE Haw Tel. The proposal also noted that the estimate's phone charges did not include \$2,000 per public library credit available from GTE Haw Tel. Tr. at 435. Intervenor's Proposed Findings of Fact No. 104.

173. Intervenor's September 1995 pre-proposal referred to the availability of the GTE Haw Tel \$2,000 credit per library. Tr. at 931-932. Intervenor's Proposed Findings of Fact No. 105.

174. Protestor's proposal did not include reference to the \$2,000 per public library credit available from GTE Haw Tel. Exhibit 74A. Intervenor's Proposed Findings of Fact No. 106.

175. Intervenor's proposal concerning the \$2,000 per public library credit available from GTE Haw Tel was based on information obtained from MHPCC at Mr. Whittle's request. Tr. at 932-933. Intervenor's Proposed Findings of Fact No. 107.

176. Though proposed as an option in Intervenor's proposal, the telecommunications network costs were removed from the Contract only during the Contract negotiation phase when Mr. Kane sent a telecom request to the Department of Budget & Finance concerning installation of the frame relay system. Exhibit 89. Intervenor's Proposed Findings of Fact No. 108.

177. Intervenor's proposed automation system runs under a UNIX operating system. Tr. at 829. Intervenor's Proposed Findings of Fact No. 109.

178. Protestor's proposed automation system runs on a Tandem computer which in addition to the Tandem proprietary operating system, also supports a POSIX environment, which is the industry standard UNIX implementation. Tr. at 541. Intervenor's Proposed Findings of Fact No. 110, modified.

179. Intervenor's proposal noted that Intervenor was "prepared to meet the time schedules outlined. Specifically, [Intervenor] will have a system operational and in use by February 20, 1996." Exhibit 76A, D-4. Intervenor's Proposed Findings of Fact No. 111.

180. Protestor's December 13, 1995 proposal included a copy of the "Schedule of Events" from Respondent's RFP 96-1 with an installation deadline of January 2, 1996.

Exhibit 74A, at 92 (page 4 following the "Modules" section). Intervenor's Proposed Findings of Fact No. 112.

181. Protestor's proposal made no direct response to the installation deadline provided in Respondent's "Schedule of Events." Exhibit 74A, at 92 (page 4 following the "Modules" section). Intervenor's Proposed Findings of Fact No. 113.

182. The implementation schedule attached to Protestor's proposal identified no "operational" date, but did include telecommunications/peripherals equipment delivery on March 16, 1996, and Internet connection on April 10, 1996. Exhibit 74A, immediately prior to "Training" section. Intervenor's Proposed Findings of Fact No. 114.

183. Intervenor's proposal included within "Section H -- Additional Information", its bank references and 1993 and 1994 annual reports of its corporate parent. Exhibit 76A. Intervenor's Proposed Findings of Fact No. 115.

184. RFP-96-4 required a cost proposal that conformed to the statement of intent. Exhibit H at 5. The statement of intent invited proposals for purchase, installation and maintenance. Exhibit H at 2. Intervenor's response provided bid pricing for only the leasing of the automation system and did not provide a price for the purchase of the system. Exhibit 76-A; Tr. at 534-535. Protestor's Proposed Findings of Fact No. 103, modified.

185. Protestor's response complied with the requirements of the RFP-96-4 and provided both bid price for both the purchase and leasing of the automation system. Exhibit 74-A; Tr. at 534-535. Protestor's Proposed Findings of Fact No. 104.

186. RFP-96-4 required the vendor to provide telephone lines and firm pricing for telephone charges. Intervenor's response was telephone lines were optional and provided only an estimate and accounted for the GTE Educational Initiative Program credit. Tr. at 436-437; 1235-1236. RFP-96-4 required a quote for 550 ports. Intervenor's response was for 524 ports. Tr. at 435-436, 509. RFP-96-4 required a brief explanation of any yes/no answers to responses to functional specifications. Intervenor responded to most functional specifications by saying "available" with no explanation. Exhibit 76A. RFP-96-4 required an implementation schedule of the proposed frame relay network; however, Intervenor's proposal did not include this schedule. Tr. at 1235-36. RFP-96-4 required a description of available financing options. Intervenor's proposal only contained one option that was very

similar to one of the three options that Intervenor had submitted to and discussed with Mr. Kane and his staff in September, 1995. Exhibit 76A at C-2, 33; Tr. at 1081-1086. Protestor's Proposed Findings of Fact No. 106, modified.

187. RFP-96-4 requested financial information of the vendor, including two years of annual reports. Exhibit H at 5, 7. Intervenor's proposal did not include any annual reports. Exhibit 76A; Tr. at 1134-1135. Ms. Eddy considered financial stability of the vendor to be significant. Tr. at 641-42 (Eddy). Intervenor's proposal did not include any information about its financial stability. Exhibit 76A. Protestor's Proposed Findings of Fact No. 107, modified.

188. Proposals in response to RFP 96-4 were opened in the presence of three representatives of Respondent on December 13, 1995, at 11:00 a.m. Protestor and Intervenor were the only vendors to submit proposals under RFP 96-4. Exhibit OO. Intervenor's Proposed Findings of Fact No. 116.

E. Respondent's Creation of Evaluation Worksheets

189. Ms. Sterrett and Ms. Eddy served as part of Respondent's re-engineering team. As part of that job, Ms. Sterrett and Ms. Eddy were responsible for determining and implementing the process by which the Respondent would select an automation vendor. Tr. at 689, 690. Intervenor's Proposed Findings of Fact No. 117.

190. Mr. Kane gave no direction to Ms. Sterrett or Ms. Eddy as to how an RFP should be prepared. Similarly, Mr. Kane gave no direction to Ms. Sterrett or Ms. Eddy as to how the RFP responses should be evaluated. Tr. at 690. Intervenor's Proposed Findings of Fact No. 118.

191. Although Ms. Eddy had no formal or special training or education in preparing evaluation worksheets, Ms. Eddy was given the responsibility for creating the Proposal Evaluation Worksheets ("Worksheets") for use by the evaluators. *E.g.*, Exhibits T, U, and V. Intervenor's Proposed Findings of Fact No. 119, modified.

192. In creating the Worksheets, Ms. Eddy, Ms. Sterrett, and Ms. Heide Miller-Pakvasa reviewed the RFP and listed the proposal breakdown set out in the RFP on the

Worksheets, under the column labeled "Proposal Section." Tr. at 608; Exhibit D, at 4, 5, 6; Exhibit HH, at 4, 5, 6. Intervenor's Proposed Findings of Fact No. 120.

193. Ms. Eddy, Ms. Sterrett, and Ms. Miller-Pakvasa added a column to the Worksheets labeled "Section MAX Points" in which "Business Profile" was assigned 20 points, "Cost Proposal" was assigned 50 points, "Response to Specifications" was assigned 50 points, "Installation and Training" was assigned 30 points and "Automation Center Service and Support" was assigned 50 points. Exhibits T, U and V. The maximum point totals were taken directly out of the RFP. Tr. at 609; Exhibit D, at 6; Exhibit HH, at 6. Intervenor's Proposed Findings of Fact No. 121.

194. Ms. Eddy, Ms. Sterrett, and Ms. Miller-Pakvasa added a third column to the Worksheets labeled "Point Breakdown," and a fourth unentitled column in which various subject headings were inserted. The subject headings were phrases or terms lifted from the text associated with the respective Proposal Section headings in the RFP. Tr. at 610. Intervenor's Proposed Findings of Fact No. 122.

195. Ms. Eddy, Ms. Sterrett and Ms. Miller-Pakvasa developed the subject headings on the Worksheets primarily by reading the RFP. Tr. at 610, 639. In addition, they consulted with various other library systems and with other people who had done previous RFPs for Respondent. Tr. at 639. From that, they broke the Proposal Section headings into subparts. Intervenor's Proposed Findings of Fact No. 123.

196. Ms. Eddy prepared the Cost Evaluation worksheet (page 3 of the Worksheet) by applying the State procurement Rules and the RFP allocation of 50 points. Under the Rules for evaluating a proposal's cost, the maximum number of points are assigned to the proposal with the lowest cost. The points allocated to the higher priced proposals must be equal to the lowest proposal priced multiplied by the maximum points available for price divided by the higher proposal price. Tr. at 643. Intervenor's Proposed Findings of Fact No. 124.

197. Ms. Eddy prepared the point breakdown reflected in the column entitled "Point Breakdown" by evaluating for herself the relative importance of the different subcategories identified in the unentitled column. Tr. at 639-649. Intervenor's Proposed Findings of Fact No. 125.

198. Ms. Eddy further prepared evaluation worksheets for the several functional specifications required in the RFP, specifically "Community Resources Functional Specifications" (Exhibit G), "Serials Functional Specification" (Exhibit H), "Cataloging Functional Specifications" (Exhibit I), "Acquisitions Functional Specifications" (Exhibit J), "Circulation Functional Specification" (Exhibit K), "PAC Functional Specifications" (Exhibit L), "Automation Center Functional Specifications -- Partial List" (Exhibit M), "Training Functional Specifications" (Exhibit N), and "Homebound Functional Specifications" (Exhibit O). Tr. at 650. Intervenor's Proposed Findings of Fact No. 126.

199. The functional specification worksheets compared the various responses made by Intervenor and Protestor to questions contained in the RFP. The question numbers themselves represented the questions contained in the RFP. Tr. at 653, 654. Intervenor's Proposed Findings of Fact No. 127.

200. The RFP provided six different possible answers for each question contained in the functional specifications sections (Available; Available/Modified; Testing/date; Development/date; Planning; and Not Planned). Exhibit D, at 6, 7; Exhibit HH, at 6, 7. Ms. Eddy allocated points (which were assigned under the columns labeled "Raw Score") according to the following schedule:

- Available 5
- Available/Modified 4
- Testing/date 3
- Development/date 2
- Planning 1
- Not Planned 0

Tr. at 656. Intervenor's Proposed Findings of Fact No. 128.

201. Ms. Eddy assigned weights to the various questions on the functional specification worksheets by evaluating the relative importance of the specification on a three point continuum running from "Necessary" (3 points), through "Desirable" (2 points) to "Nice" (1 point). Tr. at 658. The breakdown between "necessary", "desirable" and "nice" was accomplished after sending the actual RFP questions to people within Respondent's system who had jobs that would be affected by the functional specification at issue, and having

them rate the desirability of each aspect or item of the questions in the RFP, using the "necessary, desirable and nice" scale. Tr. at 658, 659. Intervenor's Proposed Findings of Fact No. 129.

202. Ms. Eddy then assigned a weight to each functional specification section on the basis of the aforementioned "necessary" (3), "desirable" (2) and "nice" (1) standard. *E.g.*, Exhibit G, at 2. Based on the above, Ms. Eddy summed Intervenor's and Protestor's respective weighted functional specification scores, and calculated an adjusted score on the basis of a 30 point total. Exhibit F. Intervenor's Proposed Findings of Fact No. 130.

203. The Worksheets allocated one point out of a maximum 200 to systems running as a native UNIX operating system. The Worksheets do not distinguish between a native UNIX operating system and a UNIX-based operating system. *E.g.*, Exhibit T, at 1. Intervenor's Proposed Findings of Fact No. 131.

F. Independent Evaluation Team Creation and Operation

204. In December 1995, Ms. Eddy telephoned Dr. Errol Miller and asked him to serve as an evaluator of the proposals which would be submitted in response to RFP 96-4. Tr. at 708. Dr. Miller was employed at BYU-Hawaii as: (1) an associate professor of instructional information sciences, (2) an associate director of academic computing, and (3) director of system development at the library and academic support systems. Tr. at 704. Intervenor's Proposed Findings of Fact No. 132.

205. Dr. Miller was personally familiar with Intervenor's system inasmuch BYU-Hawaii uses an Intervenor automation system. Tr. at 753. Dr. Miller was personally familiar with Protestor's system through his use of the University of Hawaii ("UH") library for his doctoral research, and other continuing interfacing. UH uses Protestor's automation system. Tr. at 753, 754. Intervenor's Proposed Findings of Fact No. 133.

206. In December 1995, Ms. Sterrett telephoned Mr. Ralph Toyama and asked him to serve as an evaluator of the proposals which would be submitted in response to RFP 96-4. Tr. at 781. Mr. Toyama is employed at Leeward Community College as the automation librarian. Tr. at 775. Intervenor's Proposed Findings of Fact No. 134.

207. Mr. Toyama was personally familiar with Protestor's automation system inasmuch as Leeward Community College is part of the UH system. In 1994, the UH system migrated from a GEAC automation system to Protestor's system. Tr. at 779. As a consequence of that migration experience, and his subsequent day-to-day use of Protestor's system, Mr. Toyama was familiar with the capabilities of Protestor's automation system. Intervenor's Proposed Findings of Fact No. 135.

208. The third member of the evaluation team, Ms. Gail Fujimoto, is the head librarian for the Kamehameha Schools. Exhibit X. The Kamehameha Schools utilize one of Intervenor's automation systems in its library. Tr. at 1284. Intervenor's Proposed Findings of Fact No. 136.

209. The evaluators were not provided any materials to review prior to attending the evaluation meeting on December 15, 1995. Tr. at 709, 782. Protestor's Proposed Findings of Fact No. 112.

210. On December 15, 1995, the evaluators met at Respondent's offices to conduct their evaluation of the proposals regarding RFP-96-4. When the evaluators arrived to perform the evaluation, they were instructed that Respondent had no experience with either vendor, so Respondent had no opinion as to which was better. The evaluators were further told that they should go through the proposals and use the RFP to make their recommendation. Tr. at 1208. Intervenor's Proposed Findings of Fact No. 137, modified.

211. In performing their evaluation, the evaluators reviewed the RFP, the proposals (including system documentation), and the functional specification worksheets. From that, and as filtered through their own personal experience, the evaluators filled out the summary evaluation sheets and turned them in at the end of the day to Ms. Eddy. Tr. at 595-596. Intervenor's Proposed Findings of Fact No. 138.

212. The evaluators spot checked Ms. Eddy's calculations on the functional specification worksheets, but assumed that the overall computations were accurate. Tr. at 717. Intervenor's Proposed Findings of Fact No. 139, modified.

213. The evaluators did not know who created the numerical rating system or how it was created. Tr. at 750, 751, 760, 761, 1212, 1220, 1221, 1269. The numerical rating system was not set out in RFP-96-4. Ex. H. Protestor's Proposed Findings of Fact No. 113.

214. Dr. Miller did not make any calculation or allocation concerning the parties' cost proposals (Exhibit T). Because of a prior commitment, Dr. Miller left the evaluation approximately a half hour before the other two evaluators were complete with their work. Tr. at 726. Although Dr. Miller did not complete the portion of the Worksheet regarding the costs of the two proposed systems, Dr. Miller understood that Intervenor's system was significantly less expensive than Protestor's. Tr. at 733. Intervenor's Proposed Findings of Fact No. 140, modified.

215. After Dr. Miller left for the day, Mr. Toyama and Ms. Fujimoto telephoned Intervenor's office in Utah and asked whether, in view of the fact that Intervenor's "bottom line" appeared to be significantly lower than Protestor's bottom line, there were any additional charges not reflected in the Intervenor's total cost. Mr. Toyama and Ms. Fujimoto were told that there were no other charges to bring the Intervenor's system up. Tr. at 1277. Intervenor's Proposed Findings of Fact No. 141.

216. During Mr. Toyama and Ms. Fujimoto's December 15, 1995 telephone call to Intervenor, Intervenor did not alter or otherwise change the conditions, terms, and/or price of the Intervenor's proposal. Tr. at 1277. Intervenor's Proposed Findings of Fact No. 142.

217. Mr. Toyama, in performing his calculation of the respective cost proposals, did not take into account that the contracts were spread out over five and one-half years. Tr. at 1265, 1266. Prior to taking the length of the contract into account, Mr. Toyama had scored the cost proposals as 50 to 15 in Intervenor's favor. Exhibit V. Upon recalculation, Mr. Toyama realized that an additional 22 or 23 points should have been added to Protestor's cost proposal score, resulting in a cost proposal score of 50 to 38 or 50 to 37 in Intervenor's favor. Tr. at 1266. Intervenor's Proposed Findings of Fact No. 143, modified.

218. The evaluators scored the two proposals as 443.5 to 327 in Intervenor's favor. Exhibit XX, at 3. Taking into account Mr. Toyama's error in calculation, and without attributing any further advantage to Intervenor to reflect Dr. Miller's conclusion concerning Intervenor's cost advantage, results in a "corrected" score of 443.5 to 350 in Intervenor's favor. Intervenor's Proposed Findings of Fact No. 144, modified.

219. At the beginning of the evaluation, Ms. Eddy provided some general instructions, but did not provide detailed explanations regarding the evaluation process itself.

As a result, the evaluators were left to their own interpretations of their responsibilities as evaluators, as well as their own interpretations as to the appropriate scores that could be given to each of the proposals.

220. The evaluators performed their review of the proposals to the best of their abilities given the nature of their instructions and their understand of the time constraints. However, each of the evaluators experienced some degree difficulty in performing their respective evaluations. One evaluator assumed that the numerical rating system came from the request for proposals. Tr. at 1279-80. Another evaluator used ballpark figures that the evaluator believed to be relatively appropriate. Tr. at 1262-63. None of the evaluators explained their ranking determinations in writing. The evaluators were not instructed by Respondent's staff that they could only consider RFP-96-004-00, the proposals in response to the RFP, and could not rely on their outside experience. *Id.* at 748-49. The evaluators were not instructed on how to use the functional specifications and the scoring sheets. Tr. at 1278. Protestor's Proposed Findings of Fact No. 115, modified.

221. Because the evaluators were led to believe that their evaluations had to be completed in one day, the evaluators did not read the entire proposals because they felt pressured for time. Tr. at 750, 1197-9, 1221-23, 1242-46, 1249. Additionally, because the instructions provided to the evaluators did not specifically prohibit the evaluators from considering extraneous matters, the evaluators based some parts of their evaluations on information that was not specifically contained in the proposals. Tr. at 748-9, 753-4, 761-4, 773-4, 1216-17, 1223-28, 1260-61, and 1284. Furthermore, because of time constraints, the evaluators did not check references as provided by the request for proposals. Tr. at 1231-34, 1283-84. Protestor's Proposed Findings of Fact No. 116, modified.

222. The evaluators relied on their own subjective belief as to what type of computer upon which the automation system would run, was better for the library system. Tr. at 728-29, 793-44. Protestor's Proposed Findings of Fact No. 94.

223. The evaluators relied on their knowledge of the companies submitting proposals, their operations and their system, and tried to evaluate the proposals based on how they felt the systems would fit in the state library system. Tr. at 717-18, 1217. The evaluators

also relied on their own subjective understanding of the companies and the support services they provided. Tr. at 723-24, 736-37, 749, 1261.

224. The evaluators did not consider differing terms and conditions in analyzing the price of each proposal. Tr. at 759-60, 1238-41. The evaluators did not compare Protestor's leasing proposal with Intervenor's leasing proposal. *Id.* Instead, the evaluators compared Protestor's purchase option with Intervenor's leasing option. *Id.* The evaluators understood that they were comparing the costs of a leased system and the costs to purchase a system. Tr. at 1286. The evaluators also evaluated the costs for only the first year of the five and a half year contract. Tr. at 1263-67. The evaluators recognized that they did not have the capability to perform a comparative evaluation of all the various purchase and lease options. Tr. at 1267-68, 1271, 1285-86. Protestor's Proposed Findings of Fact Nos. 122 and 123, modified.

225. The evaluators agreed that the deadlines of RFP-96-4 were unrealistic on the part of Respondent, and impossible for the vendors to meet. Tr. at 736, 795-96. One evaluator graded Protestor below Intervenor because some items under Protestor's proposal would become operational after the unrealistic deadlines set by Respondent. Tr. at 795-96. Protestor's Proposed Findings of Fact No. 127, modified.

G. Contract Award Process

226. The independent evaluation team completed its review of the proposals submitted in response to RFP 96-4 on December 15, 1995. Exhibit 77; Exhibit QQ. At the close of their review, the evaluators handed their worksheets to Ms. Eddy who took them back to her office. Tr. at 595-596. Intervenor's Proposed Findings of Fact No. 164.

227. The evaluation team scored the two proposals in favor of Intervenor over Protestor by a total of 443.5 to 327 points. Exhibit XX, at 3. Intervenor's Proposed Findings of Fact No. 165, modified.

228. Mr. Kane accepted the recommendation of the evaluation team and awarded the Contract to Intervenor. Exhibit XX, at 3. Intervenor's Proposed Findings of Fact No. 166.

229. On or about December 18, 1995, Mr. Kane informed Mr. Whittle by telephone that Intervenor had been awarded the contract for the automation system under RFP-96-4. Tr. at 900. Protestor's Proposed Findings of Fact No. 130, modified.

230. On or about December 18, 1995, Intervenor informed MHPCC that Intervenor had been awarded the contract under RFP-96-4. Exhibit 131.

231. By letter dated December 19, 1995, Mr. Kane notified Intervenor that it had been selected as the winning response. The award letter noted that the award was conditioned upon Intervenor executing the contract which would be forwarded at a later date. Exhibit QQ. Intervenor's Proposed Findings of Fact No. 167.

232. Mr. Kane provided further notice of Intervenor's selection by telephone to Mr. Whittle on December 19, 1995. Tr. at 900. Intervenor's Proposed Findings of Fact No. 168.

233. By letter dated December 19, 1995, Mr. Kane notified Protestor that another vendor's proposal had been chosen. Exhibit 77. Intervenor's Proposed Findings of Fact No. 161.

234. After receiving notice of the award from Respondent, Intervenor took a contract which it had recently entered into for similar services with Harris County, Texas and prepared a draft contract for Respondent's consideration. Tr. at 902. Intervenor's Proposed Findings of Fact No. 170.

235. Intervenor's vice president for sales, Mr. Arthur Brady, was to be in Hawaii on business later in December, so he assumed the responsibility for negotiating the final version of the contract on behalf of the Intervenor. Tr. at 903. Intervenor's Proposed Findings of Fact No. 171.

236. Mr. Brady visited Hawaii during the period of December 21 and 22 and met with certain of Respondent's personnel. Tr. at 908-913. Intervenor's Proposed Findings of Fact No. 172.

237. When Mr. Brady returned to Utah, he met with Mr. Whittle who, together with Mr. Brady's assistant, Tamara Ulima, revised the contract to reflect Mr. Brady's discussions with the Respondent. Tr. at 913. Intervenor's Proposed Findings of Fact No. 173.

238. On December 28, 1995, Mr. Brady executed an original of the contract and forwarded it to Respondent for review. Tr. at 913. Intervenor's Proposed Findings of Fact No. 174.

239. On January 25, 1996, Mr. Whittle received a telephone call from Mr. Kane advising that he was executing the contract. Tr. at 915-916. A copy of the fully executed contract was subsequently received by Intervenor. Exhibit RR; Tr. at 913. Intervenor's Proposed Findings of Fact No. 175.

240. Based on the general practice involving library computer automation selection, the review of proposals for a library automation system generally take weeks to months to complete the review and analysis. Tr. at 451-452. Purchasers of such systems usually require a demonstration of the automation system. *Id.* The purchaser and the vendors usually engaged in a dialogue to discuss the proposal and any questions. *Id.* Protestor's Proposed Findings of Fact No. 132, modified.

241. Respondent did not have a demonstration of the Dynix automation system prior to awarding the contract to Intervenor. Tr. at 1049, 1053-54. No library or consortium of libraries has ever purchased an automation system from Intervenor, like the system eventually sold under RFP-96-004-0, without an demonstration of the system. Tr. at 1052. It is possible, to the knowledge of Intervenor's representatives, that Respondent eventually entered into a contract with Intervenor under RFP-96-4 without first seeing the actual system. Tr. at 1055-56. Protestor's Proposed Findings of Fact No. 133, modified.

H. Protest Review Process

242. The same day (January 2, 1996) that Protestor alleges that it received Kane's letter of December 19, 1995, advising that another vendor's system had been selected, Protestor sent a letter of protest to the CPO. Exhibit 81. Intervenor's Proposed Findings of Fact No. 177.

243. Protestor's January 2, 1996 protest alleges that RFP 96-4 was pre-determined because (1) the evaluation period of one day was inadequate to permit a fair evaluation, (2) Protestor was not permitted the opportunity to demonstrate its product, and (3) the called-for implementation schedule was unrealistic. Exhibit 81. Intervenor's Proposed Findings of Fact No. 178.

244. The factors identified in Protestor's January 2, 1996, protest were known to Protestor before January 2, 1996. Exhibit D. Intervenor's Proposed Findings of Fact No. 179, modified.

245. The factors identified in Protestor's January 2, 1996, protest would have applied to the process adopted for evaluation of RFP 96-1. Exhibit D. Intervenor's Proposed Findings of Fact No. 180.

246. On January 4, 1996, the CPO instructed Mr. Kane not to award the contract to Intervenor pending Protestor's protest, unless Mr. Kane issued a determination of substantial interest. Ex. 211 at 71013300011. Mr. Kane and his staff continued working with Intervenor after Protestor submitted its protest and the CPO instructed Respondent not to make any award. Tr. at 1154. The CPO requested documents and a draft response to the protest from Respondent by January 10, 1996. Ex. 211. Protestor's Proposed Findings of Fact No. 140, modified.

247. On January 9, 1996, Mr. Kane replied to Protestor's January 2, 1996, letter, and informed Protestor that Protestor's protest was rejected as being untimely. Exhibit 85. However, the CPO subsequently informed Mr. Kane that the January 9, 1996 letter was improper. Exhibit 211 at 71013300023. Intervenor's Proposed Findings of Fact No. 182, modified, and Protestor's Proposed Findings of Fact No. 144, modified.

248. On January 31, 1996, pursuant to HAR § 3-122-55(b) and HRS Chapter 92F, Protestor requested information from Mr. Kane relevant to RFP-96-004-0 and its protest. Exhibit 110. The CPO advised Mr. Kane to produce this information on January 30, 1996. Exhibit 211 at 71013300023, 71013300037. However, Mr. Kane did not produce documents and information in response to this request or as directed by the State Procurement Office.

249. On January 11, 1996, Intervenor represented to Mr. Kane that it has already spent \$500,000 on Respondent's automation project. Exhibit 90; Tr. at 1106, 1147. The \$500,000 figure was not accurate, and was significantly inflated to pressure Respondent into executing the contract with Intervenor. Tr. at 1148-49. The word "spent" was also not accurate, and instead, certain resources and hardware purchases were committed to the project, but \$500,000.00 was not actually expended as of January 11, 1996. Tr. at 1150. Protestor's Proposed Findings of Fact No. 148, modified.

250. On or about January 12, 1996, MHPCC and Respondent's staff met to discuss the various tasks and responsibilities of Respondent and MHPCC were to perform for the installation of the Dynix automation system. Vol. I at 145 (Lum); Exhibit 191.

251. By letter dated January 22, 1996, Protestor's counsel wrote to the CPO asking for an "identification of clear objective criteria such as a significant difference in price" which "would go a long way toward providing [Protestor] with assurance that the bid was a bona fide competitive bid." Exhibit 98. Intervenor's Proposed Findings of Fact No. 183.

252. On or about January 25, 1996, Mr. Kane and Intervenor prepared a press release announcing its partnership for the installation and operation of a new automation system for Respondent. Ex. 100. Protestor's Proposed Findings of Fact No. 152, modified.

253. By letter dated January 26, 1996, the CPO wrote to Protestor's counsel advising that counsel's letter of January 22, 1996, would be discussed with Mr. Kane in order to prepare a response at the earliest possible date. Exhibit 102. Intervenor's Proposed Findings of Fact No. 184.

254. On January 27, 1996, Ms. Sterrett orally advised Mr. Whittle that Protestor had filed a protest against the award of the Contract to Intervenor, that the Contract could not be awarded until a final determination of the protest had been issued, and that Intervenor could proceed with providing goods and services to Respondent only at its own risk. Exhibit 119. Intervenor's Proposed Findings of Fact No. 185.

255. By letter dated January 30, 1996, the CPO forwarded counsel's letter of January 22, 1996, to Mr. Kane and requested that Mr. Kane treat the letter as a request for reconsideration of his decision of January 9, 1996. Exhibit 211 (71013300023-24). Intervenor's Proposed Findings of Fact No. 186.

256. On January 31, 1996, Protestor filed a Request for Hearing with the OAH in which Protestor sought a hearing on Mr. Kane's determination of January 9, 1996. Exhibit 109. Intervenor's Proposed Findings of Fact No. 187.

257. On January 31, 1996, Protestor's counsel wrote to Mr. Kane advising of the aforementioned Request for Hearing and requesting inspection of certain of Respondent's records. Exhibit 110. Intervenor's Proposed Findings of Fact No. 188.

258. On February 1, 1996, the CPO advised Protestor's counsel that the January 31, 1996 Request for Hearing was premature, and that counsel's January 22, 1996 letter was being considered as a request for reconsideration pursuant to section 3-126-8, HAR. Exhibit 111. Intervenor's Proposed Findings of Fact No. 189.

259. By letter dated February 2, 1996, from Mr. Harris to Mr. Pong, Protestor purported to make an additional protest pursuant to section 3-126-3, HAR, on the basis that the Respondent and Intervenor were allegedly performing work related to RFP 96-4 regardless of Protestor's protest and in conflict with section 103D-701(f), HRS, and section 3-126-5, HAR. Exhibit 112. Intervenor's Proposed Findings of Fact No. 190.

260. By letter dated February 6, 1996 to the CPO, Protestor advised the CPO of the argument advanced in its February 2, 1996 letter to Mr. Pong. Exhibit 113. Intervenor's Proposed Findings of Fact No. 191.

261. By memorandum dated February 6, 1996 to the CPO, Mr. Kane requested the CPO's approval to award the Contract under RFP 96-4 to Intervenor. Specifically, Mr. Kane argued that: (1) the contract with the current vendor expired on June 30, 1995, and that service might cease at any time without significant notice; (2) fifteen library employees with combined salaries of \$500,000 were required to maintain the old system and could be redeployed into public service positions once the new system was implemented; (3) without the immediate award of the Contract, Respondent would soon not be able to provide certain critical library functions including the provision of services under the two other vendor contracts (on-line serial services and collections) which were let simultaneous with the automation RFP; (4) Respondent would be required to pay for the new frame relay system as soon as it was completed whether the automation services were available or not; (5) Respondent's new services and user fees which went into effect depended on the new automation system to implement them; and (6) the new automation system was necessary for the Respondent to conduct internal business. Exhibit 211 (71013300025-27). Intervenor's Proposed Findings of Fact No. 192.

262. By letter dated February 8, 1996, Respondent told Intervenor that it should immediately cease any action that would result in providing any goods and services to Respondent under RFP 96-4. Exhibit 119. Intervenor's Proposed Findings of Fact No. 193.

263. By memorandum dated February 9, 1996 to the CPO, Mr. Kane supplemented his memorandum request of February 6, 1996 by noting that: (1) an independent evaluation team of non-Hawaii State Public Library System employees evaluated the proposals; (2) the evaluation team scored the two proposals as 441.5 to 325 in favor of Intervenor; and (3) the approximate gross costs of the two systems in the first year of the five and one-half year contract were \$1,900,000.00 (Protestor) and \$600,000.00 (Intervenor). Exhibit 211 (71013300028). Intervenor's Proposed Findings of Fact No. 194.

264. By e-mail dated February 12, 1996, and sent throughout the Respondent's system, Mr. Kane's office advised personnel of Protestor's protest and stated that any work being performed related to the implementation of a new automation system must immediately cease. Exhibit 122. Intervenor's Proposed Findings of Fact No. 190.

265. On February 12, 1996, Protestor filed a Motion for Order Stopping Work With Vendor On RFP No. 96-004-0 with the OAH. Case Pleading File; Tr. at 592. By letter of that same day, Protestor's counsel requested that Mr. Pong acknowledge the fact that work had stopped on the project, in return for which counsel would withdraw the motion filed that morning. Mr. Pong provided the requested acknowledgment. Exhibit 125. Intervenor's Proposed Findings of Fact No. 196.

266. By memorandum to the CPO dated February 16, 1996, Mr. Kane reiterated its February 6, 1996 request that the CPO approve the award of the Contract under RFP 96-4 to Intervenor and allow action to be taken on the contract despite the protest filed by Protestor. Exhibit 211 (71013300032-36). Intervenor's Proposed Findings of Fact No. 197.

267. The February 16, 1996 memorandum, in addition to the arguments addressed in the February 6, 1996 memorandum, contended that Respondent would likely suffer irreparable harm and prevail on the merits of Protestor's protest because: (1) Protestor was accorded fair and equal treatment in light of the fact that Intervenor's proposal was determined to have been less expensive than Respondent's; (2) the RFP clearly provided that time was of the essence and that no product demonstrations would be permitted due to that constraint; (3) the independent evaluation team (consisting of experts in the field of library automation through training and/or experience) relied on its experience to completely and fully consider the two proposals and scored the proposals as 443.5 points to 327 points in

Intervenor's favor; (4) Kane relied only upon the factors provided in the RFP and accepted the recommendation of the independent evaluation committee to award the Contract to Intervenor; (5) the RFP specifications were prepared and based on general knowledge of available automation systems; (6) in order to ensure that the process was unbiased, the original proceeding under RFP 96-1 had been canceled and renoticed as RFP 96-4; (7) Respondent neither provided any information relating to the implementation of the system to any vendor that was not also provided in the RFP, nor did it request that any vendor initiate any action regarding the implementation of the system prior to notice of the award; (8) no decision was made as to which vendor would be selected prior to the completion of the RFP process. Exhibit 211 (71013300032-36). Intervenor's Proposed Findings of Fact No. 198.

268. By letter to the CPO dated February 17, 1996, Protestor filed an additional protest pursuant to section 3-126-3, HAR, on the basis that Intervenor allegedly did not comply with the material terms of the RFP inasmuch as there were alleged to be unspecified material deviations in Intervenor's proposal from the RFP, and that these deviations affected the Contract's price, quantity and quality. Exhibit 132.

269. By letter dated February 20, 1996 to the CPO, Protestor identified eight items which it contended amounted to material deviations from the RFP:

- (1) the proposed contract called for Intervenor to support 500 or 515 terminals on the system;
- (2) the proposed contract called for the Respondent to provide phone lines for use by Intervenor's system;
- (3) the proposed contract requires the Respondent to provide Intervenor with the use of space for its automation center;
- (4) the proposed contract permits Intervenor to use MHPCC;
- (5) the proposed contract permits Intervenor to provide substandard authority control processing;
- (6) the proposed contract permits Intervenor's system sizing to not cover growth;
- (7) the proposed contract does not require Intervenor to provide an acquisitions subsystem; and
- (8) the proposed contract permits Intervenor to complete the contract by March 20, 1996.

Exhibit 133. Intervenor's Proposed Findings of Fact No. 200.

270. By letter dated February 22, 1996, the CPO advised Mr. Harris that there would likely be a delay in responding to Protestor's January 22, 1996 request for reconsideration in light of Protestor's subsequent protests and communications. Exhibit 134. Intervenor's Proposed Findings of Fact No. 201.

271. By letter dated March 1, 1996 to the CPO, Protestor enclosed the Affidavit of Donald Kaiser which provided further detail concerning Protestor's charges. Intervenor-1. Intervenor's Proposed Findings of Fact No. 202.

272. By letter to Mr. Harris dated March 12, 1996, Mr. Kane denied Protestor's request for reconsideration of his January 9, 1996 decision, and further denied the protests dated February 6 and February 17, 1996 (as supplemented on February 20, 1996). Exhibit XX. Intervenor's Proposed Findings of Fact No. 203.

273. Mr. Kane denied Protestor's request for reconsideration of his January 9, 1996 decision on the basis that:

- (1) the independent evaluation team only considered evaluation factors that were provided in the RFP;
- (2) Kane did not participate in the selection of the committee members;
- (3) the selection of the committee was made by Respondent's Reengineering Team on the basis of their background and experience;
- (4) the committee relied upon its expertise to completely and fully consider the two proposals and applied the scoring criteria provided in the RFP;
- (5) the RFP clearly provided that time was of the essence and that product demonstrations would not be possible;
- (6) the committee scored the two proposals as 443.5 points to 327 points in favor of Intervenor;
- (7) Kane relied only upon the factors provided in the RFP and accepted the recommendation of the committee to award the Contract to Intervenor;
- (8) the RFP specifications were prepared and based on general knowledge of available automation systems;

- (9) Respondent neither provided new information to any potential vendor that was not provided in the RFP, nor did it request or authorize any vendor to initiate any action regarding the implementation of the system prior to notice of the award; and
- (10) no decision as to a specific vendor was made prior to the RFP process.

Exhibit XX, at 2-4. Intervenor's Proposed Findings of Fact No. 204.

274. Mr. Kane denied Protestor's protest of February 6, 1996 regarding performance of work under RFP 96-4 despite Protestor's first protest on the basis that:

- (1) Kane was not aware of Protestor's request for reconsideration until receiving the January 30, 1996 memorandum from the CPO on February 1, 1996;
- (2) any work performed by Intervenor was at Intervenor's own risk; and
- (3) various work alleged to have been related to the Contract (e.g., ICSD cabling) was non-vendor specific that Respondent was obligated to provide pursuant to the RFP. In sum, Kane concluded that no significant action requiring the expenditure of public funds was taken on the award of the Contract after Respondent became fully aware of Protestor's request for reconsideration.

Exhibit XX, at 5. Intervenor's Proposed Findings of Fact No. 205.

275. Mr. Kane denied Protestor's protest of February 17 and 20, 1996, primarily on the basis of his conclusion that Protestor failed to accurately compare Intervenor's proposal with RFP 96-1. Specifically, Mr. Kane concluded that:

- (1) the RFP did not require that the vendor support 550 terminals;
- (2) Intervenor's proposal properly responded to the RFP by including a provision to supply phone lines;
- (3) the RFP made no reference to whether or not the automation system vendor could use library facilities for its automation center;
- (4) the RFP made no reference to whether or not the vendor could use the MHPCC;
- (5) Intervenor's proposal indicated that all items requested in the Authority Control section of the RFP were available and the

- independent evaluation team expressed no reservation over that portion of Intervenor's proposal;
- (6) the RFP made no reference to a requirement that the automation system vendor's sizing must accommodate growth;
 - (7) Intervenor's proposal provided an acquisition subsystem that was reflected in the Contract; and
 - (8) Intervenor's proposal indicated that it could meet the February 20, 1996 operational date.

Exhibit XX, at 6-8. Intervenor's Proposed Findings of Fact No. 206.

276. By memorandum to Mr. Kane dated March 13, 1996, the CPO determined that the award of the Contract to Intervenor without delay was necessary to protect the substantial interests of the State. Exhibit 211 (71013300037). Intervenor's Proposed Findings of Fact No. 207.

277. By letter dated March 18, 1996 to the CPO, Protestor protested the CPO's decision of March 13, 1996, pursuant to section 3-126-3, Hawaii Revised Statutes, and argued that no further action should be taken on the Contract until the controversy was resolved. Exhibit 137. Intervenor's Proposed Findings of Fact No. 208.

278. On March 19, 1996, Protestor filed with OAH a Request for Hearing concerning Kane's decision of March 12, 1996. Case Pleading File; Tr. at 592. Intervenor's Proposed Findings of Fact No. 209.

279. By letter dated March 20, 1996 to Mr. Harris, the CPO responded to Protestor's letter of March 18, 1996, and noted that the CPO's authorization to proceed with the Contract was not subject to protest under section 103D-701, Hawaii Revised Statutes. The CPO advised that the appropriate course for review of his determination would be found in section 103D-709, Hawaii Revised Statutes. Exhibit 138. Intervenor's Proposed Findings of Fact No. 210.

280. On March 21, 1996, Protestor filed with OAH a Request for Hearing concerning the CPO's decision of March 13, 1996, that further action on the contract under RFP 96-4 was needed to protect substantial State interests. Case Pleading File; Tr. at 592. Intervenor's Proposed Findings of Fact No. 211.

281. On March 22, 1996, the OAH, Rodney A. Maile, Senior Hearings Officer, filed and subsequently served a Notice of Hearing and Pre-Hearing Conference. Case Pleading File; Tr. at 592. Intervenor's Proposed Findings of Fact No. 212.

282. On March 22, 1996, Protestor filed with OAH an Emergency Motion For Order Stopping Work On RFP 96-4. Protestor moved for an order directing that all work related to the Contract be stopped pending the hearing called for in the Notice of Hearing. Upon consideration of the memoranda and arguments submitted, Protestor's motion was orally denied on April 2, 1996. Case Pleading File; Tr. at 592. Intervenor's Proposed Findings of Fact No. 213.

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

III. CONCLUSIONS OF LAW

Protestor has raised a number of allegations concerning violations of the 1993 Hawaii Public Procurement Code (HRS Chapter 103D) and the subsequently adopted administrative rules (Title 3, Subtitle 11, Chapters 122 [October 11, 1994] and 126 [December 15, 1994]) by Respondent throughout the entire time frame relevant to RFP 96-4. These allegations have been evaluated in light of the requirement in section 103D-709(c), Hawaii Revised Statutes, that the Protestor has the burden of proof to establish its allegations by a preponderance of the evidence.

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.

1. The Department of Commerce and Consumer Affairs, Office of Administrative Hearings, has jurisdiction over this matter. HRS §103D-709(a). Intervenor's Proposed Conclusions of Law No. 1.

2. Protestor has the burden of proof, including the burden of producing evidence as well as the burden of persuasion. HRS §103D-709(c). Intervenor's Proposed Conclusions of Law No. 2.

3. Protestor must prove by a preponderance of the evidence that Respondent's conduct was not in accord with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §§103D-709(c), 103D-709(f). Intervenor's Proposed Conclusions of Law No. 3.

4. In reviewing a contracting officer's determination resulting from a competitive sealed proposal process, the Hearings Officer cannot substitute his judgment for that of the business and technical judgment exercised by the contracting officer unless his judgment was not exercised in good faith and was arbitrary, capricious, fraudulent, or malicious. *Marshall Co. v. Bigelow*, 29 Haw. 48, 56 (1927). Intervenor's Proposed Conclusions of Law No. 4.

5. The contracting officer's discretion will not be interfered with even if his decision is erroneous, provided that the determination is founded on facts and exercised in good faith, without collusion, fraud, corruption, personal favoritism, or ill will. *Id.* Intervenor's Proposed Conclusions of Law No. 5.

6. A contracting officer is presumed as a matter of law to have acted faithfully and honestly and for the public good. *In re Lord*, 25 Haw. 76 (1919); *Cycad Corporation*, Comp. Gen. No. B-255870, 10 CGEN ¶ 108,253 (April 12, 1994). Intervenor's Proposed Conclusions of Law No. 6.

7. The telephone call placed by two of the independent evaluation team members to Intervenor's office on December 15, 1995, in which the team members queried whether there were any additional charges not reflected in Intervenor's cost proposal, was not a prohibited "discussion" under the rules governing procurement practice in Hawaii. F 135 - 136; HAR § 3-122-1. Intervenor's Proposed Conclusions of Law No. 7.

8. By the question posed in the December 15, 1995 telephone call from the two independent evaluation team members to Intervenor, the Intervenor was not provided an opportunity to, and in any event did not, revise or modify its proposal. F 141 - 142. Intervenor's Proposed Conclusions of Law No. 8.

9. Respondent's decision to base its award solely on the proposals submitted, without engaging in subsequent "final and best offer" or other "discussions" with the vendors submitting proposals, is appropriate under the principle that proposals may be accepted on

evaluation and without discussion. HRS §103D-303(f). Intervenor's Proposed Conclusions of Law No. 9.

10. Respondent's decision to close the proposal opening to the public was appropriate under state law which requires that "proposals shall not be opened publicly, but shall be opened in the presence of two or more procurement officials." HAR § 3-122-51. Intervenor's Proposed Conclusions of Law No. 10.

11. Respondent's decision to proceed by way of a request for proposal was appropriate under state law which provides that competitive sealed proposals may be most appropriate when an "award may need to be based upon a comparative evaluation as stated in the request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State." HAR § 3-122-43(6). Intervenor's Proposed Conclusions of Law No. 11.

12. In light of the nature of the submission, the contracting officer's discretion in reviewing proposals in response to RFPs is greater than his discretion upon reviewing bids in response to invitations for bid ("IFB"). Intervenor's Proposed Conclusions of Law No. 12.

13. Whereas incomplete contract specifications may be fatal to an IFB, they are inherent in the nature of an RFP where the agency is seeking guidance from the bidders as to how the general service it seeks can be provided. Intervenor's Proposed Conclusions of Law No. 13.

14. Respondent's numerical evaluation process was derived from point totals set out in RFP 96-4 and was therefore appropriate under state law which provides that "[n]umerical rating systems may be used, but are not required. When used, the evaluation shall be based only on the evaluation factors set out in the request for proposals." HAR § 3-122-52(b). Intervenor's Proposed Conclusions of Law No. 14.

15. The fact that Respondent implemented its numerical evaluation process by breaking categories into subcategories derived again from the RFP, and giving weighted totals to those subcategories not found in the RFP, did not violate state law when those weighted subcategories summed to the totals provided in the RFP, and otherwise served simply as a device by which to implement the intent of the RFP and the law requiring reliance thereon. *Id.* Intervenor's Proposed Conclusions of Law No. 15.

16. Respondent's numerical rating system for the parties' cost proposals was appropriate under state law which required that "the points allocated to higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price," if the actual costs compared were appropriate measures of comparison, or all cost options computed in the same fashion. HAR § 3-122-52(d). Intervenor's Proposed Conclusions of Law No. 16, modified.

17. The RFP did not require that vendors submit their proposals on the basis of 550 terminals. Intervenor's Proposed Conclusions of Law No. 20.

18. Respondent's preference as stated in the RFP for an automation system which runs a UNIX operating system is not arbitrary or unreasonable, nor does it amount to an abuse of discretion. Intervenor's Proposed Conclusions of Law No. 53.

19. Respondent's preference as stated in the RFP for an automation system which runs a UNIX operating system did not significantly favor Intervenor over Protestor in the evaluation of the competing proposals inasmuch as the Worksheets awarded one point out of 200 for a proposal offering a UNIX system. F 131. Intervenor's Proposed Conclusions of Law No. 54.

20. When Mr. Kane denied Protestor's protest on January 9, 1996, it was not unreasonable for him to believe that pursuant to section 103D-701(e), his decision was final and conclusive. Intervenor's Proposed Conclusions of Law No. 56.

21. It was also not unreasonable for Mr. Kane to believe that after his final decision was issued on January 9, 1996, and before any administrative proceeding was commenced under HRS §103D-709, there was no pending protest under HRS §103D-701(a) that would require that no action be taken on the award of the Contract. Intervenor's Proposed Conclusions of Law No. 57.

22. The scope of the Hearings Officer's ability to fashion a remedy in the instant case is governed by section 103D-707, concerning remedies after an award. HRS §103D-707. Intervenor's Proposed Conclusions of Law No. 59.

23. The determination that substantial State interests were involved allowed Respondent and Intervenor to proceed under the Contract despite the pendency of Protestor's protests. Intervenor's Proposed Conclusions of Law No. 61.

24. Protestor did not meet its burden of proving by a preponderance of evidence that the CPO's decision of March 13, 1996, finding that the award of the Contract to Intervenor without delay was necessary to protect the substantial interests of the State despite Protestor's protest was in violation of the law or violated the Constitution, statutes, regulations, or the terms and conditions of the solicitation. Intervenor's Proposed Conclusions of Law No. 62.

25. Should the Hearing Officer find that the solicitation or award of the Contract was in violation of the law or that Respondent violated the Constitution, statutes, regulations, or the terms and conditions of the solicitation, in the absence of any evidence or claim that Intervenor acted fraudulently or in bad faith in securing the Contract, the remedies available are limited to ratification or termination of the contract. HRS §103D-707(1)(a). Intervenor's Proposed Conclusions of Law No. 63.

26. Should any remedy be appropriate, in order to determine whether the remedy should be ratification or termination, "the best interests of the State" must be considered. If "the best interests of the State" require ratification, the contract may be ratified notwithstanding a solicitation or award of contract in violation of law. HRS §103D-707(1)(a). Intervenor's Proposed Conclusions of Law No. 64.

27. It is beyond the Hearings Officer's authority to award the Contract to Protestor. HRS §103D-707. Intervenor's Proposed Conclusions of Law No. 65.

28. It is beyond the Hearings Officer's authority to determine "the best interests of the State"; consequently, should the solicitation or award of the Contract be determined to be in violation of the law, or should it be determined that Respondent violated the Constitution, statutes, regulations, or the terms and conditions of the solicitation, the Hearings Officer must remand the matter back to the contracting officer for a determination of "the best interests of the State." *Niu Construction, Inc. v. County of Kauai*, PCH-96-1. Intervenor's Proposed Conclusions of Law No. 66.

29. The law limits the Hearings Officer's remedy-related authority to "decid[ing] whether the determinations of the chief procurement officer or the head of the purchasing agency . . . were in accordance with the Constitution, statutes, regulations, and the terms and

conditions of the solicitation." HRS §103D-709(f). Intervenor's Proposed Conclusions of Law No. 67.

30. The rules adopted by the CPO in accord with the legislative directive provide only that:

the chief procurement officer or the head of a purchasing agency may ratify or affirm the contract or terminate it in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.

HAR § 3-126-38 (emphasis added). Intervenor's Proposed Conclusions of Law No. 69.

31. Protestor did not prove by a preponderance of the evidence that Respondent had determined to select Intervenor's proposal under RFP 96-4 at any time prior to receiving the independent evaluation team's report of December 15, 1995. Intervenor's Proposed Conclusions of Law No. 71.

32. Protestor did not prove by a preponderance of the evidence that, in light of the performance and recommendation of the independent evaluation team, any alleged preference of Mr. Kane for Intervenor had any bearing on Respondent's selection of Intervenor's proposal under RFP 96-4. F 132 - 144. Intervenor's Proposed Conclusions of Law No. 72

33. Protestor did not prove by a preponderance of the evidence that Mr. Kane "rigged" RFP 96-4 so as to make Respondent's selection of Intervenor's proposal more likely. Intervenor's Proposed Conclusions of Law No. 73.

34. Protestor proved by a preponderance of the evidence that the evaluation process and the concomitant award of the contract to Intervenor, did not comply with HRS §103D-303(g).

IV. DISCUSSION

The Hearings Officer concludes that the Protestor proved by a preponderance of the evidence that the evaluation process and the concomitant award of the contract to Intervenor, did not comply with HRS §103D-303(g).

First, although there were numerous meetings and discussions between Mr. Kane, Respondent's staff, and Intervenor representatives, such meetings and discussions in and of themselves, were not prohibited by HRS Chapter 103D. The real focus in this case is whether

the evaluation of the proposals from Intervenor and Protestor were in accordance with the procedures outline in RFP-96-4 and the applicable statutes and rules.

As to the independent evaluators, the Hearings Officer determined that their respective education, experience, and backgrounds qualified them to be experts in the area of library science. As such, the independent evaluators were appropriate choices to serve on the evaluation team. Moreover, the evidence clearly established that the independent evaluators performed their evaluations to the best of their abilities and as objectively as possible, notwithstanding the nature of the instructions provided, and the time constraints placed on the independent evaluators to accomplish their tasks.

However, the evidence is also very clear that in the final analysis, Respondent's staff and the evaluators did not have a definitive grasp on what was actually being evaluated. Respondent's staff, quite understandably, believed that the evaluation process had been sufficiently explained to the evaluators, and consequently, any determinations made the evaluators would be conclusive.

The evaluators, on the other hand, had made a number of understandable assumptions, including: 1) that their work had to be completed in the course of one working day; 2) that their evaluations would be reviewed by Respondent's staff for accuracy and appropriateness; 3) that they could draw on their own experiences in evaluating the two proposals; and 4) that they did not have to review each and every detail of the proposals from Intervenor and Protestor.

One measure of how complex the proposals were, is the considerable amount of evidence presented by the Intervenor and Protestor at the hearing to clarify the details of their proposals, and to critique what they perceived to be flawed or inappropriate in the competing proposals. Given the nature and extent of the evidentiary presenations by the Intervenor and Protestor regarding the details of their proposals, it would have been unrealistic and unfair to expect the evaluators to understand such details without being provided additional explanations and time.

Even though the efforts of the independent evaluators and Respondent's staff were undertaken in good faith, as a result of the compounding of misunderstandings between the evaluators and Respondent's staff, the entire evaluation process became irretrievably flawed.

Accordingly, the Hearings Officer concludes that Protestor proved by a preponderance of the evidence that Protestor's proposal submitted in response to RFP-96-4, did not receive a complete evaluation in comparison with Intervenor, as required by HRS §103D-303(g), and consequently, the award of the contract to Intervenor was also not in compliance with HRS §103D-303(g).

V. **ORDER**

Based upon the findings of fact and conclusions of law set forth above, the Hearings Officer orders that the proposals submitted by Intervenor and Protestor in response to RFP-96-4 be remanded back to Respondent for proper evaluation, after which Respondent shall ratify and affirm the contract, or terminate the contract as provided for in HRS §103D-707(1)(A) and (B).

AUG 15 1996

DATED: Honolulu, Hawaii, _____.

Rodney A. Maile
RODNEY A. MAILE
Senior Hearings Officer
Department of Commerce
and Consumer Affairs