



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2010 SEP 22 A 7:51

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

In the Matter of)	PCX 2010-6
)	
MAUI COMMUNITY TELEVISION,)	ERRATA
INC. dba AKAKU MAUI COMMUNITY)	
TELEVISION,)	
)	
Petitioner,)	
)	
vs.)	
)	
DEPARTMENT OF ACCOUNTING AND)	
GENERAL SERVICES, STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

ERRATA

On Page 1, the second paragraph should read as follows:

On September 3, 2010, Respondent filed a Motion to Dismiss or in the Alternative for Summary Judgment ("Motion"). On September 8, 2010, **Petitioner** filed a memorandum in opposition to the Motion.


On Page 7, the Decision should read as follows:

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that Respondent's denial of Petitioner's protest was not improper and grants **Respondent's** Motion for Summary Judgment. Accordingly, Respondent's denial of Petitioner's protest is affirmed.

SEP 22 2010

DATED: Honolulu, Hawaii, _____.



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



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2010 SEP 21 A 9:14

HEARINGS OFFICE

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

In the Matter of)	PCX 2010-6
)	
MAUI COMMUNITY TELEVISION,)	HEARINGS OFFICER'S FINDINGS OF
INC. dba AKAKU MAUI)	FACT, CONCLUSIONS OF LAW AND
COMMUNITY TELEVISION,)	DECISION GRANTING RESPONDENT'S
)	MOTION FOR SUMMARY JUDGMENT;
Petitioner,)	APPENDIX "A"
)	
vs.)	
)	
DEPARTMENT OF ACCOUNTING AND)	
GENERAL SERVICES, STATE OF)	
HAWAII,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On August 11, 2010, Maui Community Television, Inc., dba Akaku Maui Community Television ("Petitioner") filed its request for hearing to contest the Department of Accounting and General Services, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On September 3, 2010, Respondent filed a Motion to Dismiss or in the Alternative for Summary Judgment ("Motion"). On September 8, 2010, Respondent filed a memorandum in opposition to the Motion.

On September 10, 2010, prior to the hearing on the merits, a hearing on the Motion was held by telephone conference. Petitioner was represented by Anthony L. Ranken, Esq. and Jay April, Petitioner's President and CEO was also present. Respondent was represented by Patricia Ohara, Esq. After considering the evidence and arguments on the Motion, the Motion was taken under advisement. The hearing on the merits followed.

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

II. FINDINGS OF FACT

1. Respondent issued Request for Proposals, RFP-10-007-SW, Services to Operate, Maintain, and Manage the Public, Educational, Governmental ("PEG") Access Channels, Funds, Facilities, and Equipment for the State of Hawai'i ("RFP") on behalf of the Department of Commerce and Consumer Affairs ("DCCA") on May 20, 2010.

2. Section 7.05 of the RFP included a pre-proposal meeting that was described as follows:

This informational meeting shall be limited to an overview of the RFP process and cover questions regarding the HePS (Hawai'i Electronic Procurement System)...Questions regarding the content of the RFP, such as the scope of work, etc., will not be addressed at this meeting. Such questions should be submitted in writing by the due date specified in Section 1.03, "RFP Schedule and Significant Dates," or as amended.

3. Petitioner filed a protest on May 27, 2010 which stayed all activity on the RFP. Respondent denied this protest and Petitioner appealed the denial to the Office of Administrative Hearings, DCCA. On July 9, 2010, an order was issued granting Respondent's motion to dismiss or in the alternative for summary judgment. Petitioner appealed the decision to the Second Circuit Court.

4. Addendum C to the RFP was issued on July 21, 2010. The deadline for written questions was August 19, 2010 and the deadline for responses to written

questions was September 21, 2010. Proposals were due on October 12, 2010. Sections 7.05.1 and 7.05.2, "Pre-Proposal Meeting" were deleted in its entirety.

5. Addendum C to the RFP also added Section 5.04 which is entitled "HePS Vendor Instructions." A copy of Section 5.04 is attached hereto and incorporated herein by reference as Appendix "A".

6. By a letter dated July 28, 2010, Petitioner filed a protest against the content of the revised solicitation, as amended by Addendum C, and requested that the pre-proposal meeting be reinstated.

7. By a letter dated August 5, 2010, Respondent denied Petitioner's protest. The letter states in part:

Pursuant to Hawai'i Administrative Rules (HAR) § 3-122-16.05, a pre-proposal conference is not mandatory. It is within the procurement officer's discretion whether to conduct a pre-proposal conference.

A pre-proposal conference was originally included in the RFP, the purpose of which was limited and described in RFP-10-007-SW, Section 7.05, pre-proposal meeting, "*This informational meeting shall be limited to an overview of the RFP process and cover questions regarding the HePS [Hawai'i Electronic Procurement System]...Questions regarding the content of the RFP, such as the scope of work, etc., will not be addressed at this meeting. Such questions should be submitted in writing by the due date[.]*"

...

Regardless of the issuance of Addendum C and the deletion of the pre-proposal conference, ample opportunity to submit questions about the RFP is maintained. Further, the questions in the protest that Akaku states it intended to raise at the pre-proposal conference could not have been addressed at the pre-proposal conference because such questions are beyond the scope of Section 7.05. Such questions could be submitted during the period provided in the RFP.

Additionally, valuable time on this procurement had been lost due to the automatic stay imposed by Akaku's May 27, 2010 protest. Considering that the primary purpose of the pre-proposal conference had been met and the time lost, it

was a reasonable exercise of discretion to delete the pre-proposal conference from the RFP.

8. Petitioner filed its request for hearing with the Office of Administrative Hearings on August 11, 2010.

9. Ruth Yamaguchi, Assistant Administrator of the State Procurement Office (“SPO”), and the Procurement Officer for the RFP, stated that the purpose of the pre-proposal meeting was to provide instructions to prospective offerors about HePS and not to address any questions about the content of the RFP. She also stated that in order to have an accurate record of what transpired, and because of the litigious history of this procurement, she concluded it would be more appropriate to receive written questions than to respond to oral questions at a pre-proposal meeting.

10. Jay April, Petitioner’s President and CEO stated that he would have attended the pre-proposal meeting initially scheduled for June 8, 2010, and believed that a face-to-face meeting with Respondent and DCCA staff would have done a great deal to foster a complete understanding of the RFP and the RFP process.

11. Mr. April intended to use the pre-proposal meeting to understand confusing and contradictory procedural issues and ground rules not explained in the SPO Conditions and HePS documents, including specific SPO and DCCA interpretations of Hawai’i Revised Statutes Chapter 103D.

12. Mr. April also wanted to ask: (1) what research, state studies, expertise and models were used to draft the RFP and whether community ascertainment studies were conducted in local franchise areas prior to drafting the RFP; (2) about a realistic time estimate of preparing a response to the RFP and going through the procurement process in order to properly estimate its cost; (3) whether or not “best value at lowest price” would apply to the successful offeror, and if and to what extent an offeror would be allowed to subsidize the PEG contract in order to reduce franchise fee contributions that are to be paid by the cable company out of the subscriber revenue, which Mr. April described as a “complicated issue” which could only be addressed effectively in the context of a meeting and not through written questions; (4) how bids would be evaluated, the composition of the evaluation committee, who would choose its members, what kind of background would they have, and what relationship the committee members would

have to the SPO or DCCA and to what extent would the Director of DCCA be bound or otherwise influenced by the recommendations of the committee; (5) about the mechanics of the HePS system and the RFP process, including how to submit multiple questions through HePS and what to do in case of HePS system unavailability; (6) why evaluation criteria such as “social capital” and “community building” were omitted in the RFP and (7) why “PEG access management experience” was not listed in the evaluation criteria and whether such criteria would be considered as aspects of other criteria contained in the RFP.

13. Ms. Yamaguchi stated that Respondent would not have been able to provide complete answers to Mr. April’s questions at a pre-proposal meeting and would have asked that the questions be written down so that she could consult with SPO and DCCA personnel in drafting responses. The final responses would have been in written form and issued as an addendum to the RFP. Accordingly, it was Ms. Yamaguchi’s opinion that there would not have been the kind of “group dynamic” and “shared discussion” Mr. April anticipated.

14. Ms. Yamaguchi also stated that even if there were some discussion at the pre-proposal meeting, the offerors present would have been instructed to wait for and rely on the official written response and not on what was said or not said at the pre-proposal meeting, as a written response would minimize confusion and challenges to the RFP by allowing everyone to work off the same written questions and responses and not rely on their respective memory.

III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the law is viewed in the light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH 96-9 (November 20, 1996).

Respondent’s Motion is based on the assertion that cancellation of the pre-proposal meeting is not an abuse of discretion or a violation of the procurement process. Petitioner contends that cancellation of the pre-proposal meeting was not based on any sound reason and was therefore unreasonable, arbitrary and capricious.

Hawai'i Administrative Rules § 3-122-16.05 provides:

§ 3-122-16.05 Pre-bid or pre-proposal conference. (a)

The purpose of a pre-bid or pre-proposal conference is to explain the procurement requirements and allow potential offerors to ask questions.

(1) An agency may hold a pre-bid or pre-proposal conference and require or not require attendance by all prospective bidders as a condition for submitting an offer for solicitations that have special or unusual requirements, e.g., requiring physical inspection.

...

(e) Unless a change is made by written addendum as provided in section 3-122-16.06, nothing stated at the pre-bid or pre-proposal conference shall change the solicitation.

Petitioner agrees that the initial decision of whether to hold a pre-proposal meeting is a discretionary one, and that a determination not to hold such a meeting should not be interfered with unless there has been an abuse of that discretion or the decision is unreasonable, arbitrary or capricious. *See*, page 1 of Petitioner's memorandum in opposition to the Motion.

It is clear that the pre-proposal meeting, as described in the RFP, was limited to an overview of the RFP process and questions regarding HePS, and was not intended to cover substantive questions regarding the content of the RFP. As such, Petitioner's substantive questions about the RFP would not have been covered in the pre-proposal meeting and accordingly, the Hearings Officer finds that Petitioner did not show that Respondent's cancellation the pre-proposal meeting, as it relates to those questions, was an abuse of discretion or unreasonable, arbitrary or capricious.

With respect to questions Petitioner had regarding the RFP process and HePS that the pre-proposal meeting was to cover, the Hearings Officer finds that the information provided in Addendum C and the fact that there is a provision for written questions to be submitted, with no limitation as to its subject matter, to be sufficient so that it was not an abuse of discretion or unreasonable, arbitrary or capricious for Respondent to cancel the pre-proposal meeting.

Respondent justified the cancellation of the pre-proposal meeting in favor of receiving written questions by citing the "litigious history" of this procurement. In reviewing the questions Petitioner stated that it planned to ask at the pre-proposal meeting, the Hearings Officer finds that Respondent was justified in requiring the questions to be in writing given the complex nature of Petitioner's questions. Regardless of Respondent's motivation for requiring written questions, the Hearings Officer finds it prudent for Respondent to require questions to be in writing so that an accurate response can be given and an accurate record of the RFP can be maintained.


With respect to the last reason Respondent cited for the denial of Petitioner's protest, namely, making up for lost time, the Hearings Officer concludes that, based on the evidence presented, this reason is weak at best, but does not change the conclusion that Respondent's cancellation of the pre-proposal meeting was not an abuse of discretion or arbitrary, capricious or contrary to law.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that Respondent's denial of Petitioner's protest was not improper and grants Petitioner's Motion for Summary Judgment. Accordingly, Respondent's denial of Petitioner's protest is affirmed.

SEP 21 2010

DATED: Honolulu, Hawaii, _____.



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

4. Delete Sections 7.05.1 and 7.05.2, "PRE-PROPOSAL MEETING" on page 51 of the RFP in its entirety.
5. Add Section 5.04, HePS VENDOR INSTRUCTIONS" to the RFP.

"HePS VENDOR INSTRUCTIONS

REGISTRATION

Vendors must register their company in HePS. Registration instructions and other information for vendors are available at: <http://hawaii.gov/spo> click **Hawaii eProcurement System and HePS for Vendors, Contractors and Service Providers**. It is the vendor's responsibility to read all information and become familiar with how to do business with the State. Vendors should use the exact legal name of their company when registering with HePS.

For information on how to search for bidding opportunities and how to submit responses, refer to the HePS Vendor Quick Reference, available at <http://hawaii.gov/spo> click **Hawaii eProcurement System and HePS for Vendors, Contractors and Service Providers**.

MAINTENANCE

Vendors are responsible for maintaining their company profile in HePS to keep all information current, especially email addresses. The HePS system uses email notifications extensively for solicitation announcements, addendums, and award information.

EMAILS

Vendors should add *sicomm.net* to their address book to ensure they receive notification emails. The email notification system is for convenience purposes only.

SOLICITATIONS

Vendors are responsible for reading and understanding all aspects of the solicitation, including: special instructions, specifications, pre-bid meetings, and other items pertaining to the solicitation which may be found in the attachments. It is the vendor's sole responsibility to follow all instructions regarding the solicitation. If the vendor does not understand any portion of the solicitation, the vendor must contact the State buyer listed on the solicitation for clarification.

RESPONDING TO A SOLICITATION

All HePS solicitations require an electronic response via the HePS system. Faxing, mailing, or emailing a response is not allowed and such response will not be considered for award. If documents, forms, brochures, special worksheets, licenses, etc. are required to be submitted, they shall be uploaded in HePS at the same time as the response.

UPLOADING FILE ATTACHMENTS

Each attachment in HePS shall be no larger than 4 MB (file must be under 4 MB). This restriction may require the vendor to split documents into smaller files and attach them separately. There is no limit to the number of files that may be uploaded to HePS.

Technical support is not available 24/7. It is the vendor's sole responsibility to ensure that their offer is submitted in entirety by the due date and time.

CONFIRM RESPONSE

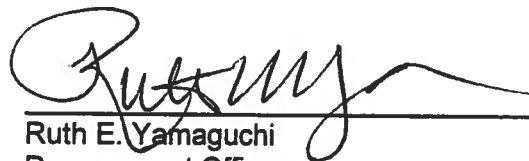
As soon as a response is submitted in HePS the vendor will see a confirmation page confirming and showing all details of the response, including links to the uploaded files. A email confirmation is also sent to the vendors email address detailing the response. Vendors should review the confirmations to verify that pricing is correct and files have been uploaded in entirety. Responses are submitted only after the submit button is selected and the vendor receives the confirmation notices.

NOTICE OF AWARD

If selected for award, a vendor will receive an email notification with a link to view the award. The award is stored in the vendor's HePS account for future reference. Vendors are advised to read the award carefully. In most cases it is only a notice of award and an official purchase order or contract will be issued by the State to complete the award process. Award can be made only to the vendor name who submitted the response.

WEBSITE

<http://hawaii.gov/spo> click **Hawaii eProcurement System and HePS for Vendors, Contractors and Service Providers.**"



Ruth E. Yamaguchi
Procurement Officer