



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of:	)	PCH-2008-6
	)	
ELECTION SYSTEMS & SOFTWARE,	)	HEARINGS OFFICER'S FINDINGS
INC.,	)	OF FACT, CONCLUSIONS OF LAW,
	)	AND ORDER (1) DENYING
Petitioner,	)	PETITIONER'S MOTION FOR
vs.	)	SUMMARY JUDGMENT AND (2)
	)	GRANTING RESPONDENTS'
KEVIN CRONIN, OFFICE OF	)	MOTION TO DISMISS OR IN THE
ELECTIONS; DESIGNEE OF AARON	)	ALTERNATIVE, FOR SUMMARY
FUJIOKA, ADMINISTRATOR, STATE	)	JUDGMENT
PROCUREMENT OFFICE, STATE OF	)	
HAWAII,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
HART INTERCIVIC,	)	
	)	
Intervenor.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER (1) DENYING PETITIONER'S MOTION FOR  
SUMMARY JUDGMENT AND (2) GRANTING RESPONDENTS'  
MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. INTRODUCTION

On April 30, 2008, Election Systems & Software, Inc. ("Petitioner"), filed a request for administrative review of the substantial interest determination of the Chief

Procurement Officer (“CPO”) of the State Procurement Office, State of Hawaii (“State Procurement Office”) on April 11, 2008. The matter was designated as PCH-2008-6. The CPO’s April 11, 2008 determination was also the subject of a protest filed by Petitioner on April 18, 2008. The parties subsequently agreed to hold PCH-2008-6 in abeyance.

On August 7, 2008, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in PCH-2008-3, and on August 11, 2008, Petitioner filed a request that this matter (PCH-2008-6) be set for hearing. As a result, on September 4, 2008, a Notice of Hearing and Pre-Hearing Conference was duly served on the parties. The parties thereafter requested and agreed to submit this matter to the Hearings Officer for final disposition by way of motions.

Accordingly, on September 29, 2008, Petitioner filed a motion for summary judgment and Respondents Kevin Cronin and the Office of Elections (“Respondents”) filed a motion to dismiss or in the alternative, for summary judgment. On October 15, 2008, Intervenor filed a joinder in Respondents’ motion to dismiss or in the alternative, for summary judgment.

Both motions came on for hearing before the undersigned Hearings Officer on October 24, 2008. Petitioner was represented by Terry E. Thomason, Esq. and Corianne W. Lau, Esq., Respondents were represented by Patricia T. Ohara, Esq., and Intervenor Hart Intercivic (“Intervenor”) was represented by Lisa W. Cataldo, Esq.

Having considered the motions, memoranda, exhibits, affidavits and arguments presented by counsel, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

1. On or about September 3, 2007, Respondent Office of Elections issued Request for Proposals No. RFP-06-047-SW (“RFP”) seeking sealed offers for a new leased voting equipment system for the 2008, 2010, 2012, 2014 and 2016 Primary, General and Special Elections.

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

3. Three proposals were submitted by the October 11, 2007 deadline, including proposals from Petitioner and Intervenor.

4. On or about January 31, 2008, Respondent Office of Elections issued a Notice of Award of the contract to Intervenor.

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

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

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

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

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

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

1. Pursuant to Hawaii Revised Statutes §103D-312 and Hawaii Administrative Rules Chapter 122, Title 3, Subchapter 15, Respondent had a legal duty to perform an analysis of Intervenor's offered price to determine whether the price was reasonable; and the undisputed evidence

established that no such analysis was performed by Respondent prior to the awarding of the contract to Intervenor. To this extent, Petitioner's motion for summary judgment is granted.

2. Petitioner's motion is denied as to all other issues raised in Petitioner's Request for Hearing. All of those issues remain for hearing.

11. On April 4, 2008, Respondent Cronin submitted a Second Amended Waiver of Stay Request to the CPO. On April 8, 2008, Respondent Cronin submitted supplemental information in connection with his Second Amended Waiver of Stay Request. On April 11, 2008, the CPO granted the request:

Based upon the Office of Elections' determination that April 15, 2008 is their drop-dead date to avoid jeopardizing an orderly primary election on September 20 and general election on November 4, 2008, and therefore protecting the substantial interests of the State, the request for a waiver of stay is granted.

12. On April 18, 2008, Petitioner protested the CPO's April 11, 2008 decision to grant the waiver of the stay, and on April 30, 2008, Petitioner filed a request for hearing in connection with the April 18, 2008 Protest. Petitioner's request for hearing was designated as PCH-2008-6.

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

\* \* \* \*

a. The Award of Contract to Hart is terminated as of the Effective Date of this Agreement.

b. The OE has until **May 14, 2008** to perform its duties pursuant to Hawaii Revised Statutes ("HRS") § 103D-312, Hawaii Administrative Rules ("HAR") Chapter 122, Title 3 and Subchapter 15 to perform a cost and/or price analysis

as required by applicable law, of Hart's offered price to determine whether the price was reasonable.

c. The evaluations and ranking of the proposals shall stand undisturbed and are subject only to the required cost and/or price analysis as required by applicable law, to be performed by the OE in accordance with this Agreement.

d. OE shall perform a cost and/or price analysis pursuant to methods and means required by applicable law. Upon completion and notice of award or rejection of the proposal price as "clearly unreasonable," the documentation of the cost and/or price analysis shall be delivered to all Parties, along with contents of contract file on **May 14, 2008**.

\* \* \* \*

14. Pursuant to the Agreement, Respondent Cronin began work on a cost and/or price analysis of Intervenor's offered price.

15. On or about May 14, 2008, Respondent Cronin issued the cost and/or price analysis ("COPA").

16. On May 14, 2008, following the issuance of the COPA, Respondent Cronin wrote to Intervenor and said in part:

\* \* \* \*

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

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

17. Respondent Cronin executed the contract with Intervenor on May 14, 2008 (“Contract”).

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

1. The procurement officer ignored his affirmative duty to confirm the reasonableness of Hart’s proposal price as mandated by applicable procurement rules; and

2. The procurement officer continued the long-term mishandling of election services through unfair and improper cost and price analysis and other procurement actions calculated to favor Hart.

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

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

21. On May 29, 2008, Petitioner filed a request for hearing in connection with Respondent Cronin’s May 22, 2008 denial of the May 21, 2008 protest.

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

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

24. The parties subsequently agreed to have Petitioner’s June 4, 2008 request for hearing heard and decided before the hearing in connection with the May 29, 2008 request for hearing.

25. On June 10, 2008, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in connection with Petitioner’s June 4, 2008 request for hearing in PCH-2008-3. The decision vacated the CPO’s May 30, 2008 waiver of the stay.

26. On August 7, 2008, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in connection with the May 29, 2008 request for hearing in PCH-2008-3.

### III. CONCLUSIONS OF LAW

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

Petitioner contends in its motion that it is entitled to an award of attorneys' fees because, among other things, the undisputed evidence shows that Respondents awarded the Contract to Intervenor on May 14, 2008 in violation of Hawaii Revised Statutes ("HRS") §103D-701(f)<sup>1</sup>. Petitioner points out that as a result of the Hearings Officer's decision in PCH-2008-3, it has already proven that Respondents' award of the Contract to Intervenor violated HRS Chapter 103D ("Code") and that the award to Intervenor on May 14, 2008 was made in bad faith. In this proceeding, Petitioner alleges that the undisputed evidence shows that the Contract was awarded on May 14, 2008 in violation of the stay imposed by its April 18, 2008 protest and, as such, Petitioner is entitled to recover its attorneys' fees under the test enunciated in *Carl Corp. v. State Dept. of Educ.*, 85 Hawaii 431 (1997). Respondents, on the other hand, argue that the issues as to whether Respondents violated the stay and whether Petitioner is entitled to its attorneys' fees have already been litigated and decided in PCH-2008-3, and, that therefore, Petitioner is precluded from relitigating those issues in this proceeding.

In its May 29, 2008 request for hearing, Petitioner sought to recover its attorneys' fees. In that action (PCH-2008-3), Petitioner argued that it was entitled to an award of attorneys' fees because of Respondents' bad faith. As a result of that claim, the Hearings Officer considered whether the evidence had established a violation of HRS §103D-701(f) with respect to the protest filed on April 18, 2008, as well as the May 21, 2008 protest, and concluded in his August 7, 2008 decision that the evidence was insufficient to prove that such a violation had occurred.

Petitioner argues that the issue of Respondents' alleged violation of the stay imposed by the April 18, 2008 protest was not properly before the Hearings Officer in PCH-2008-3 because the parties had agreed to hold the issues in PCH-2008-6 in abeyance until

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<sup>1</sup> In *Carl Corp. v. State Dept. of Educ.*, 85 Hawaii 431 (1997), the court held that a protestor is entitled to recover its attorney's fees incurred in prosecuting its protest if: (1) the protestor has proven that the solicitation was in violation of the Code; (2) the award of the contract was in bad faith; and (3) the contract was awarded in violation of HRS §103D-701(f).

after PCH-2008-3 was completed. The issue involved in PCH-2008-6, *as alleged in the April 18, 2008 protest*, however, was whether the CPO had properly granted Respondents' request for a waiver of the stay that had been imposed by the filing of the February 20, 2008 protest. As such, the April 18, 2008 protest could not<sup>2</sup> and did not involve the issue Petitioner now raises - whether Respondents violated the stay resulting from the filing of that protest. Therefore, the agreement to hold PCH-2008-6 in abeyance did not prevent the Hearings Officer from considering and deciding that issue in PCH-2008-3.

In addressing that issue in PCH-2008-3, the Hearings Officer considered that on May 7, 2008, the parties had entered into an Agreement whereby Respondents agreed to "perform a cost and/or price analysis", and that "[u]pon completion and notice of award or rejection of the proposal price as "clearly unreasonable," the documentation of the cost and/or price analysis shall be delivered to all Parties, along with contents of contract file on **May 14, 2008.**"<sup>3</sup> Pursuant to the Agreement, Respondents completed the COPA and, on May 14, 2008, issued the COPA and awarded the Contract to Intervenor. The completion and issuance of the COPA by Respondents resolved the claim presented in the February 20, 2008 protest that Respondents failed to perform a cost and/or price analysis of Intervenor's price<sup>4</sup>. The remaining claims alleged in the February 20, 2008 protest, including the claim that Respondents had engaged in a long-standing course of conduct favoring Intervenor to the detriment of Petitioner were reserved, subsequently realleged in the May 21, 2008 protest and May 29, 2008 request for administrative review, and addressed and decided in the Hearings Officer's final decision in PCH-2008-3. Thus, any stay that may have been imposed by the April 18, 2008 protest necessarily expired upon the issuance of the COPA on May 14, 2008 and was not reinstated until the filing of the May 21, 2008 protest. These considerations led

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<sup>2</sup> Obviously, the April 18, 2008 protest could not have included a claim that Respondents had violated the stay imposed by the filing of that protest when it awarded the contract on May 14, 2008.

<sup>3</sup> Respondents accurately note that the Agreement provided for the award of a new contract after the analysis was submitted and "did not provide that once the analysis was made, there could be no award because the stay that existed prior to the Agreement would resume and be in place to prohibit any further action."

<sup>4</sup> Instead, Petitioner alleged that the COPA was improper and that Intervenor's offered price was unreasonable. Those issues formed the basis of Petitioner's May 21, 2008 protest and were addressed and disposed of in the Hearings Officer's Findings of Fact, Conclusions of Law, and Decision in PCH-2008-3.



the Hearings Officer to conclude that, “the evidence does not support a finding that HRS §103D-701(f) was violated by Respondents”.

Having fully considered Petitioner’s claim for attorneys’ fees in the August 7, 2008 decision, the Hearings Officer concludes that Petitioner is precluded from relitigating that claim here. Moreover, based on these considerations, the Hearings Officer finds and concludes that there are no genuine issues of material fact and that Respondents are entitled to the dismissal of this action as a matter of law.

IV. ORDER

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

1. Petitioner’s Motion for Summary Judgment is denied; and
2. Respondents’ Motion to Dismiss or in the alternative, for Summary

Judgment is granted and this matter is hereby dismissed.

Dated at Honolulu, Hawaii: JAN - 2 2009

/s/ CRAIG H. UYEHARA

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