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

In the Matter of AON RISK SERVICES, INC., Petitioner, vs. HONOLULU AUTHORITY FOR RAPID TRANSPORTATION Respondent, and WILLIS OF TEXAS, INC., Intervenor.	PDH-2013-011 HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION; EXHIBIT "A" Senior Hearings Officer: David H. Karlen

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION; EXHIBIT "A"

I. INTRODUCTION

Petitioner Aon Risk Services, Inc. ("Aon") filed a Request for Administrative Hearing ("RFAH") in this matter on October 18, 2013. Accompanying this RFAH was a procurement protest bond and a check for $2,000.00. On October 20, 2013, Respondent Honolulu Authority for Rapid Transportation ("HART") filed its Responsive Prehearing Statement.

On November 1, 2013, HART filed a Motion for Summary Judgment. Intervenor Willis of Texas, Inc. ("Willis") filed a Joinder in HART's Motion on November 1, 2013.

Aon filed its Memorandum in Opposition to HART's Motion for Summary Judgment on November 7, 2013.

HART's Motion for Summary Judgment came on for hearing before the undersigned Hearings Officer on November 8, 2013. HART was represented by Joseph A. Stewart, Esq., Maria Y. Wang, Esq., and Amy R. Kondo, Esq. Aon was represented by Jeffery S. Portnoy, Esq., and Jeffrey M. Osterkamp, Esq. Intervenor was represented by Michael L. Biehl, Esq.

At the conclusion of oral argument on the Motion, the Hearings Officer took the matter under advisement. In addition, the Hearings Officer requested that the parties submit supplemental memoranda on specific issues by the close of business on November 13, 2013.

On November 13, 2013, Aon and HART filed their supplemental memoranda.

Pursuant to the stipulation of the parties and an Order filed November 14, 2013, Aon's protest bond was partially released by the amount of $1,000.00 and $1,000.00 of Aon's deposit was to be returned to Aon.

On November 14, 2013, the Hearings Officer sent a letter to all counsel by facsimile informing them of his intention to deny HART's Motion for Summary Judgment. The letter also requested that the parties file briefs responding to the supplemental memoranda previously filed on November 13, 2013.

On November 18, 2013, the Hearings Officer filed his Order Denying HART's Motion for Summary Judgment. A copy of that Order is attached hereto as Exhibit "A" and incorporated by reference herein.

On November 18, 2013, Aon and HART filed their responses to their opponent's supplemental memoranda previously filed on November 13, 2013.

The matter came on for hearing on November 19, 2013. Aon was represented by Jeffery S. Portnoy, Esq., and Jeffrey M. Osterkamp, Esq. HART was represented by Joseph

A. Stewart, Esq., Maria Y. Wang, Esq., and Amy R. Kondo, Esq. Intervenor was represented by Michael L. Biehl, Esq.

Aon presented additional argument in favor of its position and did not call any witnesses. At the close of Aon's case, HART made a motion for a directed verdict on the ground that a determination of nonresponsiveness did not preclude HART's consideration of Willis for inclusion in the of priority listed offerors. This motion was argued by the parties and taken under submission by the Hearings Officer. HART then presented additional arguments in favor of its position and called one witness, Mr. Wes Mott.

During the course of the hearing, the Hearings Officer allowed the parties the option to submit additional citations of authority. Both Aon and HART submitted additional citations of authority by the deadline of November 21, 2013.

Subject to those submissions of additional authority, the matter was taken under submission at the close of the hearing on November 19, 2013.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On June 4, 2013, HART issued Request for Proposals No. RFP-HRT-610235 ("RFP") for "Professional Services Contract HART OCIP Broker Services." The purpose of this RFP was to "obtain information that will enable HART to identify a qualified Insurance Broker to assist in the marketing and placement of its Owner Controlled Insurance Program (OCIP)." RFP Instructions to Offerors, page 5.

2. On July 5, 2013, Aon and Willis submitted proposals in response to the RFP. No other proposals were submitted.

3. These initial offers were reviewed by a HART Evaluation Committee.

4. The Evaluation Committee members all filled out an evaluation form, copies of which were included as Exhibit 6 to Exhibit B of the RFAH. The forms are all dated July 11, 2013.

5. The first section of the evaluation form is entitled "Responsive/Non-Responsive Criteria." The first line of this section has the text: "A) Proposal Responsiveness. Offeror submits all information required in the RFP substantially in the specified format."

6. This first line of text is followed, on the same line, with boxes for "Yes" and "No." All of the evaluation sheets for both proposals have an "X" in the "Yes" box and no markings at all in the "No" box.

7. None of the Evaluation Committee members made a determination that, for Willis' proposal, the "Yes" response would be utilized for the line on the form for "Proposal Responsiveness." Instead, the "Yes" response was determined by a HART administrative staff person who had no technical expertise in evaluating proposals for responsiveness and did not evaluate the responsiveness of the proposals in any substantive manner. All that employee did was check to see whether the proposals physically contained all the required documents, e.g., Exhibits 1 through 11 as listed in Section 6.2 of the RFP. . The "Yes" determination was made by the HART staff person before the Evaluation Committee members reviewed the proposals.[1]

8. On July 10, 2013, Paula Youngling, HART Procurement and Contract Officer, sent a memorandum to Daniel A. Grabauskas, HART Executive Director and CEO,

[1] This Finding of Fact is a provisional one based on the testimony of Mr. Wes Mott. The testimony was taken subject to an objection by Aon, with the Hearings Officer reserving a ruling on the objection. A ruling on that objection is included in Section III.C(4) of this Order.

requesting approval of both Aon and Willis as priority-listed offerors. The memorandum stated in relevant part: "All Offerors were evaluated for responsiveness by the Evaluation Committee in accordance with Section 8.0 of the RFP and all were deemed to be acceptable or potentially acceptable to be selected for award pursuant to Section 3-122-53(a)(1), Hawaii Administrative Rules." Exhibit 5 to Exhibit B to the RFAH.

9. The memorandum further stated that Mr. Grabauskas' signature on the memorandum would indicate approval to allow the Evaluation Committee to proceed with possible discussions with the offerors. Someone whose signature is illegible signed the memorandum on behalf of Mr. Grabauskas on July 10, 2013.[2]

10. Thereafter, HART had discussions with both offerors, and, at the request of HART, both offerors submitted three Best and Final Offers ("BAFOs").

11. In a memorandum to Mr. Grabauskas dated August 23, 2013, and after submission of the three BAFOs, the members of the Evaluation Committee stated that they had "determined that Willis of Texas, Inc.'s proposal was the most advantageous offer and was deemed to provide the "best value" to HART." The memorandum recommended that the contract be awarded to Willis. Mr. Grabauskas signed a "Concurrence" on this document on August 23, 2013. Exhibit 7 to Exhibit B to the RFAH.

12. On September 3, 2013, HART sent a letter to Aon stating that HART "has recommended award to" Willis.

13. After receipt of this letter, on September 4, 2013, AON requested a debriefing from HART. The debriefing concluded on September 6, 2013.

14. On September 13, 2013, Aon delivered to HART Aon's written protest of HART's intent to award the contract to Willis.

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[2] Under the circumstances of this case, the Hearings Officer does not consider the discrepancy between the July 10, 2013 date on the memorandum and the July 11, 2013 date on the Evaluation Committee sheets to be material.

15. As of the date of this letter, HART had not yet actually awarded the contract to Willis.

16. The September 13, 2013 letter raised the following issues:

(a) Willis' proposal did not comply with the requirements of the RFP because it did not address the proposed OCIP coverages despite the mandatory requirements of Section 6.5 of the RFP;

(b) In addition, Willis' proposal exceeded twenty (20) pages and therefore did not comply with the requirements of the RFP;

(c) Because of these alleged inadequacies in Willis' proposal, Willis was not eligible to be on the priority list of potential awardees of the HART contract; and

(d) Because Aon was the only offeror eligible to be on the priority list, its proposal was the only acceptable or potentially acceptable proposal, and HART was required to award the contract to Aon.

17. On October 11, 2013, HART delivered a letter to Aon responding to Aon's written protest of September 13, 2013, and denied the protest.

18. In that letter, HART specifically responded to the first and second points of Aon's written protest as set forth immediately above. HART claimed that additional points in Aon's protest letter (that are not listed above) were not reasons for Aon's protest but responded to them nevertheless with an accompanying reservation of HART's position that the additional points did not amount to a protest.

19. With respect to the first and second points of Aon's written protest, HART's October 11, 2013 letter contained a "Summary Response" on page 28, stating:

1. HART properly found Willis' proposal to be responsive to the RFP solicitation because Willis' proposal conformed in all material respects to the solicitation requirements. As such, Willis was properly allowed to participate in discussions and submit BAFOs under this solicitation.

2. HART properly exercised its discretion in waiving any nonresponsiveness when Willis exceeded the page limit set forth in the RFP by two pages since the irregularity was minor, did not prejudice other bidders, and had no effect on price, quality or quantity.

20. In the detailed discussion on page 29 of its letter that followed this Summary Response, HART specifically addressed Aon's contention that the Willis' proposal failed to respond "to the proposed table in the RFP entitled "PROPOSED OWNER CONTROLLED INSURANCE PROGRAM (OCIP)—FOR DISCUSSION PURPOSES."

21. HART's letter at page 29 acknowledged that this section of Exhibit A to the RFP "included the proposed coverages for OCIP, but claimed there was no need to specifically discuss these coverages in Willis' proposal:

> As provided in the RFP, this referred-to section, which included the proposed coverages for OCIP, was "FOR DISCUSSION PURPOSES" only. There were no requirements stated in this section of the RFP. Instead, the information provided were assumptions the offerors were to consider in providing the non-binding estimates of the premiums and deductibles and to advise HART if they believed HART's assumptions should be modified. Aon and Willis providing their estimated premiums and deductibles in Exhibit 10 of their Proposals "addressed" the information provided in this section of the RFP.

22. In response to Aon's related contention that it devoted five full pages of its proposal to the proposed OCIP coverages and Willis did not, the HART letter at page 29 responded that:

> it is not for Aon to make that determination [that Willis' proposal was insufficient], and deference must be given to the Evaluation Committee on the determination as to sufficiency of the preliminary work plan. *See Nilson Van & Storage, Inc. v. United States,* 99 Fed. Cl. 408, 416 (Fed. Cl. 2011) ("Determination of whether a defect in a bid is material is committed to agency discretion.") While it is commendable that Aon provided above and beyond what was required under the RFP, it cannot be a basis on which to deem Willis' proposal nonresponsive.

23. This statement is not clear as to Hart's actual second basis for denial of the protest. One the one hand, it states the alleged general principle that whether or not a proposal is "insufficient," i.e., non-responsive, is a question reserved for the procuring agency. On the other hand, it does not say that Willis' proposal was itself insufficient—it only says that the fact that Aon put more in its proposal than was necessary does not make Willis' proposal nonresponsive. Accordingly, it does not specifically say Willis' proposal was defective or whether any alleged defect was not material.

24. Putting aside the letter of October 11, 2013, there was no evidence in the record that any responsible HART official or officials ever made a determination that Willis' proposal was not completely responsive, that any non-responsive defects in Willis' proposal were not material, or that Willis should be considered a Priority Listed Offeror even though its proposal was nonresponsive..

25. On October 18, 2013, Aon filed its RFAH with the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs. On page two of its RFAH, Aon summarized its protest as follows:

> (a) Willis' proposal was not responsive because it was not, as required, "acceptable or potentially acceptable" under Section 6.5 of the RFP. As expanded on page 5 of the RFAH, Willis' proposal allegedly did not address the proposed OCIP coverages despite the mandatory requirements of Section 6.5 of the RFP, and Willis' proposal also exceeded the twenty (20) page limitation set forth in the RFP;
>
> (b) Because its proposal was non-responsive, Willis was not eligible to participate in post-proposal discussions and to respond to requests for Best and Final Offers. (In other words, Willis was not eligible to be on the priority list of potential awardees.);
>
> (c) HART's stated intent to award the contract to Willis was erroneous and must be rescinded; and
>
> (d) As the only offeror who submitted a responsive proposal, Aon is entitled to an award of the contract.

26. HART's Motion for Summary Judgment was filed on November 1, 2013. In summary, its Motion made the following arguments:

> (a) The OCIP coverages section of the RFP referred to by Aon did not require a response in the offerors' work plans submitted to HART. Instead, the section was provided only as a guide for offerors to complete their estimates in a separate price proposal that was part of their offer;
>
> (b) Even if the RFP required a response to the OCIP coverages section in the offerors' work plan, as opposed to merely being a guide for completing the price proposal, Willis adequately responded to the RFP's requirements in the work plan it submitted;
>
> (c) Willis' price proposal was an adequate response to the OCIP coverages section of the RFP referred to by Aon;

(d) With respect to Willis' proposal, HART properly exercised its discretion to waive any page limitation restrictions in the RFP; and

(e) Based on the above, HART properly selected Willis as a priority listed offeror eligible to participate in subsequent discussions, submit best and final offers, and receive an award of the contract.

27. The arguments by HART summarized above essentially set forth the same contentions made in HART's letter of October 11, 2013, denying Aon's protest.

28. In its opposition to HART's Motion for Summary Judgment, Aon did not assert that HART's arguments in its Motion had not been made previously in HART's October 11, 2013 letter.

29. Prompted by an inquiry from the Hearings Officer at the November 8, 2013 hearing on HART's Motion for Summary Judgment, and first referenced in HART's supplemental memorandum filed November 13, 2013, at the Hearings Officer's request, at the November 19, 2013 hearing HART made a new argument for dismissal of Aon's procurement protest. This argument, which was the subject of HART's motion for a directed verdict, can be summarized as follows:

(a) Under Hawaii's procurement law, responsiveness is not required of offers made in response to the RFP unless the RFP itself makes responsiveness a requirement;

(b) HART's RFP did not make responsiveness a requirement applicable to Willis' and Aon's first offer in order to determine if Willis and Aon were priority-listed offerors; and

(c) under the terms of the RFP, HART had the discretion to lower Willis' score if Willis' offer was nonresponsive and was not required to reject a nonresponsive offer.

30. Aon objected to HART's new argument on the following bases: (1) HART was precluded from raising a new argument for dismissal of Aon's procurement protest that had not been raised in HART's protest denial letter of October 11, 2013; (b) even if HART could raise a new argument, HART's arguments and actions here were contrary to the terms of the RFP; and (c) in actual fact, HART did not act in accordance with the RFP provisions

allegedly supporting HART's theoretical argument and did not decide to score Willis' proposal rather than reject it as nonresponsive.

III. CONCLUSIONS OF LAW

A. General Considerations

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

The Conclusions of Law in the Order Denying HART's Motion for Summary Judgment, a copy of which is attached hereto as Exhibit "A", are adopted herein and incorporated by reference.

B. Offerors Were Required to Address the Proposed Coverages Set Forth in the "FOR DISCUSSION PURPOSES Section of Exhibit A in Their Proposals—Willis' Offer Failed to Meet that Requirement

The Decision of November 18, 2013 on HART's Motion for Summary Judgment established that all offers were required to address the proposed coverages set forth in the FOR DISCUSSION PURPOSES Section of Exhibit A, Scope of Services. This legal issue was definitively decided in that Decision, and there was no basis to re-litigate the issue at the hearing on November 19, 2013.

The Decision of November 18, 2013 also held that HART's Motion for Summary Judgment failed to establish that Willis' offer met the above-referenced requirement either through its preliminary work plan or its separate price proposal. While HART's Motion was unsuccessful in this regard, there was no cross-motion by Aon on these points. Accordingly, the Hearings Officer's decision on HART's Motion did not preclude HART from submitting evidence at the November 19, 2013 hearing that would attempt to show that Willis' proposal had met the requirement in question in either its submitted preliminary work plan or in its

submitted filled-out price proposal in Exhibit 10 to the RFP. HART chose to not submit any such evidence at the November 19, 2013 hearing.

There is no denying that the information missing from Willis' proposal, as detailed in the Order denying HART's Motion for Summary Judgment, Exhibit "A" hereto, would have a material effect on the scope of insurance coverage, and the price thereof. The absence of such information would mean the insurance broker would not be providing HART with the information necessary to determine what type of coverage and what price HART would want to obtain through that broker's services. This information was required before Willis could proceed to the next stage in the procurement process as a Priority Listed Offeror.

Accordingly, the Hearings Officer concludes that Willis' proposal did not meet the requirement to discuss in its proposal the coverages set forth in the FOR DISCUSSION PURPOSES Section of Exhibit A, Scope of Services, to the RFP.[3]

C. Alternative Arguments

The entire context of this procurement protest was concerned, at its initiation, with whether or not Willis' proposal was non-responsive. Aon asserted, of course, that it was non-responsive and thus HART should not have allowed Willis to be a Priority Listed Offeror. HART, on the other hand, asserted that Willis' proposal was responsive.

At the hearing on HART's Motion for Summary Judgment, the Hearings Officer suggested that both parties were viewing this protest in the incorrect legal context. As stated by the Hearings Officer, the Department of Transportation of the State of Hawaii had made a persuasive case that the concept of responsiveness was not automatically pertinent to an RFP so that a different method of evaluation should be employed when an RFP is the basis of a procurement protest. The Hearings Officer cited the parties to Exhibit A to Kiewit

[3] As with the Order Denying HART's Motion for Summary Judgment, there is no need to decide HART's other contention that exceeding the page limitation set forth in the RFP rendered Willis' proposal non-responsive.

Infrastructure Co. v. Department of Transportation, State of Hawaii, PCX-2011-2 (June 6, 2011).

Thereafter, in their supplemental briefs and responses thereto, Aon and HART debated the applicability of the Kiewit decision in general and how it specifically applied to the language of the RFP herein.

1. The Hearings Officer Has the Power to Consider in This Proceeding Legal Arguments Not Made by HART When It Administratively Denied Aon's Protest in Its Letter of October 13, 2013.

Before considering the merits of Aon's new arguments in its supplemental brief, it must be determined whether the Hearings Officer has the power to consider these new arguments. During the hearing on November 19, 2013, the Hearings Officer posed a "devil's advocate" question to the parties: Does a hearings officer's *de novo* powers of review allow a procuring agency to assert, and prevail upon, grounds for denial of a procurement protest during an appeal of a prior agency decision when those grounds were not asserted by the agency in that prior decision denying the protest?

Needless to say, at the hearing, the parties offered conflicting answers on this issue. The Hearings Officer allowed the parties to subsequently submit citations of authorities on this issue and both Aon and HART did so on November 21, 2013.

The basic starting point of the analysis here should be the language of the statute. Under the State Procurement Code, the Hearings Officer engages in a *de novo* review of the claims in the RFAH. HRS §103D-709(a) states:

> 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 person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

As authoritatively interpreted in the case of Carl Corp. v. State Dept. of Education, 85 Haw. 431, 451, 946 P.2d 1, 21 (1997):

> [H]earings officers have jurisdiction to review determinations made pursuant to HRS §103D-701 de novo. 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.

In essence, the hearings officers act as if they were the initial contracting officials resolving the protest, "in the same manner and to the same extent" as if they were those initial contracting officials. The hearings officers are to decide whether "to uphold or deny the protest." They would not be bound solely to the reasons utilized by those initial contracting officials because, in that case, there would not be a de novo decision—the hearings officers would not be acting as if they were the initial contracting officials.

Aon cites two previous hearings officer's decisions as support for the contrary position. However, those two decisions do not provide authority helpful to Aon in this situation.

In Marsh USA, Inc. v. Rix Maurer III, Dept. of Budget & Fiscal Services, PCX-2010-1 (February 11, 2010). the procuring agency denied a protest as untimely, and its denial did not discuss the substantive basis of the protest. On appeal, the hearings officer found that the protest was indeed timely. The agency then wanted a remand in order to make a decision on the substantive issues. The hearings officer warned procuring agencies that, in the future, they should not expect to be able to have a subsequent chance to deny a protest after an untimeliness determination was overturned on appeal because that would unduly prolong the procurement dispute process in contravention of the principles behind the Procurement Code and might constitute a waiver of the procuring agency's arguments. Here, however, there will be no second round of agency consideration of the merits of the protest that would prolong the procurement dispute process. The question of whether new substantive reasons

for denying a protest can be raised on appeal after the agency first denied the protest on a different, but erroneous, substantive basis was not at issue in the Marsh USA case.[4]

Aon also relies upon Paul's Electrical Contracting, LLC v. City & County of Honolulu, PCY-2012-018 (June 27, 2012). The statement therein relied upon by Aon, however, pertains to a protestor exhausting its administrative remedies such that all of the protestor's claims must be subject to a prior determination by the procuring agency. The case does not deal at all with the situation herein.

A similar situation in Hawaii law involving appeals supports the Hearings Officer's decision herein. It is well established that, on appeal, where *de* novo review of legal issues is involved, the reviewing court can uphold the decision of the lower court on any basis established by the record even if the basis for upholding the decision was not cited or utilized by the lower court and/or the lower court's decision was erroneous. Kiehm v. Adams, 109 Haw. 296, 304, 126 P.3d 339, 344 (2006); McCarthy v. Yempuku, 5 Haw. App. 45, 52, 678 P.2d 11, 16 (1984); Waianae Model Neighborhood Area Association v. City and County of Honolulu, 55 Haw. 40, 43, 514 P.2d 861, 864 (1973) (Following federal precedents).

When a reviewing court upholds a decision on a basis different from that utilized in the decision below, the basis of the reviewing court's decision does not even have to be initially advocated by the parties. It can arise, similar to the case herein, from a suggestion from the tribunal made during oral argument.

> As indicated above, an appellate court may consider any argument or theory that finds support in the record and will serve to sustain a correct lower court decision. Although authority is sparse, this rule obtains even when the appellate court raises the decisive theory sua sponte.

Arlinghaus v. Ritenour, 622 F.2d 629, 638 (2d Cir. 1980) (Citations omitted)

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[4] To the extent that inferences or dicta in the Marsh USA case are to the contrary to the decision herein, based upon the discussion in this Order, the Hearings Officer respectfully declines to follow them. See Kiewit Infrastructure West v. Department of Transportation, PCX-2011-001 (June 6, 2011) Exhibit A at page 12.

Aon objects that allowing HART to raise arguments in this proceeding that were not raised in HART's letter of October 11, 2013 violates due process. After considering all of the circumstances, however, the Hearings Officer concludes, however, that there are no such due process considerations in this particular case insofar as the legal issues are concerned.

Aon's due process concerns have been addressed before in a similar situation. There are occasions when legal issues arise during the course of a procurement protest that could not have been raised prior to the protest and were not raised in the RFAH or the response to the RFAH by the procuring agency. Those occasions occur when the parties fail to adequately address jurisdictional issues. However, jurisdiction cannot be conferred by the stipulation of the parties or the parties' failure to recognize jurisdictional defects.

In that situation, the Hearings Officer has the power, and the duty, to raise jurisdictional issues *sua sponte*. Decisions on jurisdictional issues raised by the Hearings Officer on those occasions, however, are not made until the parties receive "fair warning" and have an opportunity to submit arguments and have a hearing on those issues. A good example of procedures governing such a situation, which are based upon Hawaii Supreme Court case law, can be found in Kiewit Infrastructure West. Co. v. Department of Transportation, PCX-2011-2 (June 6, 2011), Exhibit "B" at pages 4-5. See also Arlinghaus v. Ritenour, supra, 622 F.2d at 638 ("[T]he appellate court should have the benefit of thorough briefing before considering a decisive issue or rationale.")

In the present case, Aon was given adequate notice of HART's new position by the Hearings Officer's comments at the November 8, 2013 hearing and HART's supplemental memorandum filed November 13, 2013. Aon had no problem briefing its position regarding the Hearings Officer's comments in its supplemental memorandum filed November 13, 2013 or replying to HART's supplemental memorandum in Aon's response filed November 18, 2013, or in its argument at the hearing on November 19, 2013.

Accordingly, there is no impediment in this case to considering the legal[5] basis of the new theory now asserted by HART as justifying denial of Aon's procurement protest.

3. Under the RFP, HART Has the Discretion to Consider Willis to be a Priority Listed Offeror Even if Willis Proposal Was Nonresponsive

Procurement through competitive sealed proposals is initially governed by HRS §103D-303. which provides in relevant part:

> (g) 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. (Emphasis supplied.)

See also HAR §3-122-57(a), which states in relevant part:

> The award shall be issued in writing to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals...Other criteria may not be used in the evaluation.

In contrast, the statute and administrative regulation pertinent to procurement by competitive sealed bids specifically use the word "responsive," a word that is conspicuously absent from the statute and regulation cited above pertinent to procurement by competitive sealed proposals.[6]

The Procurement Code defines a "responsible bidder or offeror" in HRS §103D-104 as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." On the other hand, in HRS §103D-104 the Procurement Code defines a "responsive bidder" as "a person who has submitted a bid which conforms in all material respects to the invitation for bids." It is important to note that the Procurement Code has no definition for "responsive offeror,"

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[5] Later in this decision, the Hearings Officer will consider this question again in terms of any new factual basis for upholding the denial of Aon's procurement protest.

[6] For procurement by competitive sealed bids, HRS §103D-302(h) and HAR §3-122-33(a) both use the term "responsive" as well as the term "responsible."

thus reinforcing the conclusion that the concept of "responsive" or "responsiveness" has no place in the statutes governing competitive sealed proposals.

The term "responsive" was deliberately omitted by the Legislature from the standard for determining the award in this procurement as set out in HRS §103D-303(g). The factors set forth in HRS §103D-303(g) are the exclusive factors to be considered ("No other factors or criteria shall be used in the evaluation") and "responsive" or "responsiveness" are pointedly not included as one of the recognized exclusive factors.

This statement, however, does not conclude the analysis. One of the evaluation factors specifically mandated in the evaluation of competitive sealed proposals by HRS §103D-303(g) is "the evaluation factors set forth in the request for proposals." Consistent with that statute, HAR §3-122-57(a) also says that "the evaluation criteria in the request for proposals" should be taken into account.

In its Supplemental Brief filed on November 13, 2013, Aon relied on Section 9.0 of the RFP, which provides that: "Award shall be made to the responsible and responsive Offeror whose Proposal is determined in writing to provide the best value to HART taking into consideration price and the evaluation criteria set out in Section 8 of this RFP."[7] This section, however, refers to the ultimate award of the contract and would appear to refer to the potential awardee's final BAFO. The issue in this case, however, pertains to Willis' initial offer and whether the non-responsiveness of its initial offer disqualified it from becoming a Priority Listed Offeror entitled to participate in discussions with HART and subsequently submit BAFOs.[8]

Aon's Supplemental Brief also relies on certain portions of Sections 6 and 8 of the RFP as they relate to initial proposals. In that regard, the RFP provides as follows:

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[7] A "Responsive Offeror" is defined as a "person who has submitted an offer which conforms in all material respects to the RFP." RFP Instructions to Offerors at page 8

[8] The situation would be different if HART accepted an initial proposal without discussions or further offers. However, HART did not follow that course of action in this procurement.

a. "The proposals must address all of the requirements of this RFP and provide a complete and concise description of how the Offeror will perform the required work." RFP Section 6.1(E). (Emphasis supplied)

b. "The Proposal shall not require additional explanation, clarification, or interpretation. Submittals that fail to be precise factual and complete will be rejected." Section 6.1(I). (Emphasis supplied)

c. "In order to be found acceptable or potentially acceptable, the Offeror's proposal must provide a preliminary work plan addressing the Offeror's proposed approach to complete each of the items of the Scope of Work, Exhibit A of the Special Provisions." Section 6.5 (A). (Emphasis supplied)

d. "HART has identified the following Evaluation Criteria. All Evaluation Criteria must be addressed in the Offeror's Proposal in order for HART to deem the Proposal to be acceptable or potentially acceptable. *Any Proposal that does not include complete responses to all of the Evaluation Criteria will result in the Proposal being scored down or the Proposal may be deemed to be unacceptable, at the sole discretion of HART.*[9] Offerors who submit acceptable or potentially acceptable Proposals are eligible for inclusion on the Priority List. Proposals that are deemed to be non-responsive may not be considered for the Priority List and may not be further evaluated. RFP Section 8.0 (Italics and emphasis supplied)

HART, on the other hand relies on several provisions it asserts allows it discretion to recognize or reject a non-responsive proposal:

a. "Solicitations or proposals may be canceled or rejected in whole or in part, if HART finds there is a cogent and compelling reason to so do. Reasons for rejecting proposals include, but are not limited to, the following: The Offeror that submitted the proposal is deemed non[sic] responsive." RFP Section 5.4 (emphasis supplied)

b. A proposal may be deemed non-responsive if the offeror's qualifications statement, financial data, or price proposal are deficient. RFP Sections 6.4 and 6.5.[10]

c. "HART has identified the following Evaluation Criteria. All Evaluation Criteria must be addressed in the Offeror's Proposal in order for HART to deem the Proposal to be acceptable or potentially acceptable. Any Proposal that does not include complete responses to all of the Evaluation Criteria will

[9] This italicized sentence is the basis of HART's position that it has the discretion to find a non-responsive proposal acceptable or potentially acceptable and will be discussed further later in this Decision.
[10] In light all of the other portions of the RFP relied upon by the parties that pertain to responding to Exhibit A, Scope of Work, these two sections of the RFP pertaining to other portions of the proposal carry less weight in the analysis of what discretion, if any, is allowed for non-responsiveness concerning Exhibit A.

result in the Proposal being scored down or the Proposal may be deemed to be unacceptable, at the sole discretion of HART. Offerors who submit acceptable or potentially acceptable Proposals are eligible for inclusion on the Priority List. Proposals that are deemed to be non-responsive may not be considered for the Priority List and may not be further evaluated. RFP Section 8.0 (Emphasis supplied)

d. HART also relies on Section 8.2(A)(2) of the RFP, but, in terms of the question herein, that section does not add anything not already covered in Section 8.0 discussed above.

The parties debate the significance of the phrase "may not" which is prominently featured, for example, in the last sentence of Section 8.0 of the RFP, and Aon devotes a considerable portion of its Response Brief filed November 18, 2013 to an attempt to define the term as "mandatory, not permissive." See Aon's Response to HART's Supplemental Brief at pages 2 through 5. However, what Aon fails to recognize is that its authorities are based on use of the term "may not" by a legislature or other authority as applied to others, e.g., a government agency that is the object of the legislation. Here, however, the agency is itself utilizing the term "may not" in a context where the agency is allowing itself to exercise discretion to do or not do something.

At oral argument, Aon used the analogy of a teacher telling a student or a mother telling a child that they "may not" do something. Clearly, that is a mandatory term when the speaker is imposing "may not" on someone else. However, when the speaker is applying the term to himself or herself, the term takes on a different meaning. When a speaker says he or she "may not" take a certain action, it means the speaker has options, i.e., the speaker may or may not take that action.

For example, if a parent tells a child he or she "may not listen to music during a family dinner," the child is being restricted. However, in the absence of any restriction by the parent, if the child says he or she "may not listen to music during a family dinner," the speaker means he or she has an option—they may or may not listen to music.

Here, there is no legislation or other outside source directing HART that it may not consider non-responsive proposals. In an RFP, HART can define its own method of considering non-responsive proposals. HART has stated that it may not consider them, but because HART is the speaker applying "may not" to itself, the term is one of discretion, and HART may or not consider a non-responsive proposal.

While not expressed as well as it could be, a consistent reading of the RFP, giving full consideration to the proper understanding of the discretionary aspects of Section 8.0, is that initial proposals must be responsive, for if they are not responsive they run the risk, at HART's discretion, of being deemed unacceptable such that the offeror does not become a Priority Listed Offeror entitled to engage in discussions and submit BAFOs.

Aon asserts that the RFP must be read so that no portion is rendered inoperative. However, Aon's reading would itself read completely out of the RFP the significant sentence in RFP Section 8.0 allowing HART to score down incomplete responses or deem an incomplete proposal unacceptable at HART's discretion. When the words "sole discretion of HART" are used in the RFP. the Hearings Officer cannot conclude that no discretion is allowed. In addition, Aon has not taken into account the discretionary aspect of the last sentence of Section 8.0 where, properly read, the term "may not" provides discretionary power to HART.

4. HART Did Not Properly Exercise its Discretionary Authority to Accept Willis' Nonresponsive Proposal

While HART therefore had the discretion to accept Willis' non-responsive proposal by scoring it down, rather than deeming it unacceptable, for the purpose of establishing Willis' as a Priority Listed Offeror, the question becomes whether HART properly exercised that discretion. The only documentary evidence in the record, however, established that HART never exercised that discretion.

As noted in Findings of Fact Nos. 4-6, the scorings sheets of all members of the Evaluation Committee all stated Willis' proposal was responsive. There is no documentary evidence that Willis' proposal was scored lower after its proposal was found to be nonresponsive. The documentary evidence establishes that HART failed to exercise the discretion potentially afforded to it by the terms of the RFP and thus abused that discretion. Cf. Weinberg v. Dickson-Weinberg, 121 Haw. 401, 438, 220 P.3d 264, 301 (2009), affirmed in part, vacated in part, 123 Haw. 68, 229 P.3d 1133 (2010), citing with approval Maddox v. Stone, 174 Md. App. 489, 921 A.2d 912, 919-920 (Md. Ct. Spec. App. 2007) and cases cited therein (Failure to exercise discretion in a situation calling for choice is an abuse of discretion).

At the November 18, 2013 hearing, the only testimony on this issue was from Mr. Wes Mott, a HART witness. His testimony was that a determination of "responsiveness" as indicated on the Evaluation Committee score sheets was not in fact made by the Evaluation Committee. Instead, that portion of the score sheet was filled in for the Evaluation Committee based upon a review of the proposals by a HART administrative employee who had no technical or professional expertise and was not qualified to make a responsiveness evaluation as to whether Willis' proposal covered all of the items in Exhibit A, Scope of Services. All that employee did was determine all of the required documentary items were included as part of the proposal package. See Finding of Fact No. 7.

Aon objected to Mr. Mott's testimony on the ground that it pertained solely to a reason for denying the protest that was not expressed by HART in its denial letter of October 11, 2013. More fundamentally, in the circumstances of this case, the Hearings Officer agrees with Aon's earlier due process objection. No pre-hearing discovery is allowed in these proceedings. However, without advance notice of HART's factual contentions here, Aon

had no way to prepare for Mr. Mott's testimony, and, importantly, without any advance notice it was unable to subpoena witnesses or documents relevant to this testimony. Cf. Arlinghaus v. Ritenour, supra, 622 F.2d 629, 638 ("Any issue injected into the appeal by the court itself must have been adequately presented below, and the parties must have had a full opportunity to develop the relevant facts.") Accordingly, the Hearings Officer sustains Aon's objection to Mr. Mott's testimony and strikes it from the record.

Moreover, even if Mr. Mott's testimony is considered, the facts do not support an argument that HART exercised its allowable discretion to accept a non-responsive proposal in the early part of this procurement. Instead, at most, the facts demonstrate that HART accepted a non-responsive proposal because it did not properly check to see if it was responsive, and, as asserted in its Responsive Pre-Hearing Statement and its Motion for Summary Judgment, it incorrectly believed that Willis' proposal did not have to fully respond to Exhibit A to the RFP.

Even when HART's new arguments for denying Aon's procurement protest are considered, HART's decision to accord Willis the status of a Priority Listed Offeror was therefore contrary to "the terms and conditions of the solicitation." See HRS §103D-709(h).

IV. REMEDIES

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702. The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f). In the present case, the Hearings Officer has decided that the determinations of HART's designated procurement official are not in accord

with the terms and conditions of the solicitation. Accordingly, the Hearings Officer must determine an appropriate remedy.

A. The Hearings Officer Declines to Order that Aon be Awarded the Contract

The parties agree that HART announced its intent to award the contract to Aon but did not in fact issue an award. In that case, the remedies set forth in HRS §103D-706, which refers to a "proposed award," and not HRS §103D-707, which refers to an "award," apply. Aon asserts that since it was the only proper Priority Limited Offeror, the contract should be awarded to it. The Hearings Officer, however, declines to issue such an order.

In referring to pre-award remedies, HRS §103D-706 states:

> **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.

The decision in Arakaki v. State of Hawaii, 87 Haw. 147, 952 P.2d 1210 (1998) interpreted the term "revise" to include remand by the hearings officer to the procuring agency for reconsideration and an opportunity to correct errors in the bid where appropriate within the context of the legislative objective in the Procurement Code of providing fair and equitable treatment. In addition, by its citation to dicta in the Carl Corp. case, the Arakaki decision included within the term "revise" the ability to order the disqualification or elimination of a proposal resulting upon remand to the procuring agency in a possible award of the contract to another bidder or offeror.

The Hearings Officer concludes that in the present situation it would not be appropriate to order a "revision" of the solicitation by remanding the matter to the City with a direction to award the contract to Aon. While Aon is the sole possible awardee at this point

in time, this solicitation was not an invitation for bids where, in the usual case, the only variation between bidders is price. Here, we have an RFP which allows HART to accept or reject any offer even if it meets all criteria for initial consideration.

Under the standards of the Arakaki decision, the remand order must be made in a context where the objectives of the Procurement Code can be met. The Hearings Officer cannot determine if Aon's final offer must be accepted because the record does not demonstrate that such an outcome is mandated.

Section 9.0 of the RFP states as follows:

> Award shall be made to the responsible and responsive Offeror whose Proposal is determined in writing to provide the best value to HART taking into consideration price and the evaluation criteria set out in Section 8 of this RFP. Other factors and criteria shall not be used in the evaluation and determination.

While Aon's initial proposal is in the record, its final proposal in response to the third and final BAFO is not in the record. There is no way to determine on this record whether its last proposal was responsive.

In addition, there is no way for the Hearings Officer to determine if Aon's price, one of the mandated considerations, is acceptable. It is not for the Hearings Officer to say that Aon's proposal must be accepted at any price because it is now the only offeror left.[11]

Applying HRS §103D-706 to these proceedings, the Hearings Officer finds and concludes that the remedy of a remand to HART for consideration of Aon's final proposal is appropriate. The Hearings Officer declines to order that HART automatically award the contract to Aon.

B. The Hearings Officer Declines to Order Further Relief to Aon

Aon has also made a general request for all further relies available, including an award of attorney's fees. The Hearings Officer declines, however, to make any such award.

[11] This proposition is also supported by Section 5.4 of the RFP which allows HART to reject any proposal in whole or in part if there is a "cogent and compelling reason to do so." These reasons are not limited to

The first possible type of additional relief potentially available to Aon is the cost of preparation of its proposal. HRS §103D-701(g) provides:

> In addition to any other relief, when a protest is sustained and the protestor should have been awarded the contract under the solicitation but is not, then the protestor shall be entitled to the actual costs reasonably incurred in connection the solicitation, including bid or proposal preparation costs but not attorney's fees.

In this case, the protest is being sustained, but there is no decision that the protestor should have been awarded the contract. In addition, it is still possible for Aon to be awarded the contract, in which case the statue would preclude Aon from recovering its proposal preparation costs. Accordingly, it is premature to decide this issue, and Aon's request for proposal preparation costs is denied at this time without prejudice. See the decision on remand in Okada Trucking Co., Ltd. v. Department of Education, State of Hawaii, PCH-2009-18 (October 30, 2012).

The attorney's fees award requested by Aon is not expressly authorized by statute. Attorney's fees could be awarded upon findings that the solicitation was in violation of the Procurement Code, the contract was awarded in violation of the Procurement Code, and the award of the contract was in bad faith. Carl Corp. v. Department of Education, supra, 85 Haw. at 461, 946 P.2d at 30. Here, Aon did not present evidence sufficient to find bad faith and the contract has not yet been awarded. Further, if awarded pursuant to this solicitation, it will be awarded to Aon. The prerequisites to an award of attorney's fees have not been met in this case. Cf. the decision on remand in Okada Trucking Co., Ltd. v. Department of Education, State of Hawaii, PCH-2009-18 (October 30, 2012).

Accordingly, Aon's request for an award of attorney's fees is denied with prejudice.

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nonresponsive. It is conceivable that an outrageously high price would be a "cogent and compelling reason" to reject a proposal from the only party to make an otherwise qualifying offer.

V. DECISION

Based upon the foregoing Findings of Fact, Conclusions of Law, and discussion of remedies, as well as the Order attached hereto as Exhibit "A," the Hearings Officer concludes and decides as follows:

1. HART's motion for a directed verdict is denied.

2. Aon's objection to the testimony of Mr. Wes Mott is sustained.

3. HART's denial of Aon's procurement protest, in HART's letter of October 11, 2013, is vacated. Aon's procurement protest is sustained.

4. The matter is remanded to HART for rescission of the proposed award to Willis and for consideration of an award to Aon based upon Aon's final offer.

5. Aon's request for proposal preparation costs is denied without prejudice.

6. Aon's request for an award of attorney's fees and costs is denied with prejudice, and all parties are to bear their own attorney's fees and costs incurred in pursuing this matter.

7. Aon's $1,000.00 bond shall be returned to Aon upon the filing of a declaration by Aon attesting that the time to appeal to Circuit Court has lapsed and that no appeal has been timely filed. In the event of a timely application for judicial review of the decision herein, the disposition of the bond shall be subject to determination by the Circuit Court.

DATED: Honolulu, Hawaii, November 27, 2013.

DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs

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 AON RISK SERVICES, INC., Petitioner, vs. HONOLULU AUTHORITY FOR RAPID TRANSPORTATION Respondent.	PDH-2013-011 ORDER DENYING RESPONDENT HONOLULU AUTHORITY FOR RAPID TRANSPORTATION'S MOTION FOR SUMMARY JUDGMENT Senior Hearings Officer: David H. Karlen

ORDER DENYING HONOLULU AUTHORITY FOR RAPID TRANSPORTATION'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Petitioner Aon Risk Services, Inc. ("Aon") filed a Request for Administrative Hearing ("RFAH") in this matter on October 18, 2013.

On November 1, 2013, Respondent Honolulu Authority for Rapid Transportation ("HART") filed a Motion for Summary Judgment. Intervenor Willis of Texas, Inc. ("Willis") filed a Joinder in HART's Motion on November 1, 2013. Aon filed its Memorandum in Opposition to HART's Motion for Summary Judgment on November 7, 2013.

HART's Motion for Summary Judgment came on for hearing before the undersigned Hearings Officer on November 8, 2013. HART was represented by Joseph A. Stewart, Esq., Maria Y. Wang, Esq., and Amy R. Kondo, Esq. Aon was represented by Jeffery S. Portnoy,

EXHIBIT A

Esq., and Jeffrey M. Osterkamp, Esq. Intervenor was represented by Michael L. Biehl, Esq. Also present was Mr. Chet Mitrani of Willis.

At the conclusion of oral argument on the Motion, the Hearings Officer took the matter under advisement. In addition, the Hearings Officer requested that the parties submit supplemental memoranda on specific issues by the close of business on November 13, 2013.

On November 13, 2013, Aon and HART filed their supplemental memoranda.

On November 14, 2013, the Hearings Officer sent a letter to all counsel by facsimile informing them of his intention to deny HART's Motion for Summary Judgment.

This Order, based on the record as of the conclusion of oral argument on November 8, 2013, is the formal order with respect to HART's Motion for Summary Judgment. It is not based upon any of the matters discussed in the supplemental memoranda filed November 13, 2013.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On June 4, 2013, HART issued Request for Proposals No. RFP-HRT-610235 ("RFP") for "Professional Services Contract HART OCIP Broker Services." The purpose of this RFP was to "obtain information that will enable HART to identify a qualified Insurance Broker to assist in the marketing and placement of its Owner Controlled Insurance Program (OCIP)." RFP Instructions to Offerors, page 5.

2. On July 5, 2013, Aon and Willis submitted proposals in response to the RFP. No other proposals were submitted.

3. On September 3, 2013, HART sent a letter to Aon stating that HART "has recommended award to" Willis.

4. After receipt of this letter, on September 4, 2013, AON requested a debriefing from HART. The debriefing concluded on September 6, 2013.

5. On September 13, 2013, Aon delivered to HART Aon's written protest of HART's intent to award the contract to Willis.

6. The September 13, 2013 letter raised the following issues:

(a) Willis' proposal did not comply with the requirements of the RFP because it did not address the proposed OCIP coverages despite the mandatory requirements of Section 6.5 of the RFP;

(b) In addition, Willis' proposal exceeded twenty (20) pages and therefore did not comply with the requirements of the RFP;

(c) Because of these alleged inadequacies in Willis' proposal, Willis was not eligible to be on the priority list of potential awardees of the HART contract; and

(d) Because Aon was the only offeror eligible to be on the priority list, its proposal was the only acceptable or potentially acceptable proposal, and HART was required to award the contract to Aon.

7. On October 11, 2013, HART delivered a letter to Aon responding to Aon's written protest of September 13, 2013, and denied the protest.

8. In that letter, HART specifically responded to the first and second points of Aon's written protest as set forth immediately above. HART claimed that additional points in Aon's protest letter (that are not listed above) were not reasons for Aon's protest but responded to them nevertheless with an accompanying reservation of HART's position that the additional points did not amount to a protest.

9. On October 18, 2013, Aon filed its RFAH with the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs. On page two of its RFAH, Aon summarized its protest as follows:

(a) Willis' proposal was not responsive because it was not, as required, "acceptable or potentially acceptable" under Section 6.5 of the RFP. As expanded on page 5 of the RFAH, Willis' proposal allegedly did not address the proposed OCIP coverages despite the mandatory requirements of Section 6.5 of the RFP, and Willis' proposal also exceed the twenty (20) page limitation set forth in the RFP;

(b) Because its proposal was non-responsive, Willis was not eligible to participate in post-proposal discussions and to respond to requests for Best and Final Offers. (In other words, Willis was not eligible to be on the priority list of potential awardees.);

(c) HART's stated intent to award the contract to Willis was erroneous and must be rescinded; and

(d) As the only offeror who submitted a responsive proposal, Aon is entitled to an award of the contract.

10. HART's Motion for Summary Judgment was filed on November 1, 2013. In summary, its Motion made the following arguments:

(a) The OCIP coverages section of the RFP referred to by Aon did not require a response in the offerors' work plans submitted to HART. Instead, it was provided only as a guide for offerors to complete their estimates in a separate price proposal section of their offer;

(b) Even if the RFP required a response to the OCIP coverages section in the offerors' work plan, as opposed to merely being a guide for completing the price proposal, Willis adequately responded to the RFP's requirements in the work plan it submitted;

(c) Willis' price proposal was an adequate response to the OCIP coverages section of the RFP referred to by Aon;

(d) With respect to Willis' proposal, HART properly exercised its discretion to waive any page limitation restrictions in the RFP; and

(e) Based on the above, HART properly selected Willis as a priority listed offeror eligible to participate in subsequent discussions, submit best and final offers, and receive an award of the contract.

III. CONCLUSIONS OF LAW[1]

A. General Considerations

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

[1] The following portion of this Order discusses the first three issues in HART's motion, identified in Finding of Fact Nos. 10(a) through (c), albeit in a different order.

1. Standards for Summary Judgment Motion

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. Reed v. City & County of Honolulu, 76 Haw. 219, 225, 873 P.2d 98, 104 (1994).

2. Scope of Review

Under the State Procurement Code, the Hearings Officer engages in a *de novo* review of the claims in the RFAH. HRS §103D-709(a) states:

> 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 person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.[2]

B. Offerors Were Required to Address the Proposed Coverages Set Forth in the "FOR DISCUSSION PURPOSES Section in Their Proposals

The RFP required that offerors provide a "preliminary work plan" in their proposals to address their "proposed approach to completing each of the items of the Scope of Work, Exhibit A of the Special Provisions." RFP Section 6.5(A).

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[2] On page 8 of its Memorandum in support of the Motion, HART asserts that a different standard applies in determining whether a bid is responsive, citing one federal decision and a decision from Delaware. However, those decisions do not state the law in Hawaii.

Exhibit A of the Special Provisions is entitled "SCOPE OF SERVICES." It contains three numbered items. The first, which is untitled, describes the scope of services to be provided by HART's consultant, Marsh USA, Inc., in order to make offerors aware of those services so the offeror and to notify the offeror that it would not be expected to provide services already provided by Marsh. This first section noted that the selected offeror would then hold discussions with Marsh USA, Inc., "to identify the interface of services" provided by the two companies." Nothing in the first paragraph called for any response or preliminary work plan on the part of an offeror because the work described therein was to be done by another party and the determination of the interface of services with that third party would not be done until after HART's selection of an offeror.

Section 2 of Exhibit A, Scope of Services, is entitled "OCIP SERVICES" and refers to the design and development of an OCIP for HART. It includes subsections (a) through (j) detailing the OCIP Services expected from a successful offeror.

Section 3 of Exhibit A, Scope of Services, is entitled "GENERAL BROKERAGE SERVICES" to be provided by the OCIP broker. It includes subsections (a) through (l) detailing the General Brokerage Services expected from a successful offeror.

Immediately following subsection (l) of Section 3 of Exhibit A, Scope of Services, is a section with a heading in capital letters, but not identified by number, entitled "PROPOSED OWNER CONTROLLED INSURANCE PROGRAM (OCIP) – FOR DISCUSSION PURPOSES."[3] It is followed by a list of six (6) coverages and their limits that are to be discussed. This list of coverages is then followed by "Notes on proposed coverages" that contains subsections (a) through (f). With respect to these notes, Exhibit A states: "HART requests that the Workers' Compensation and primary CGL coverages be

[3] The word "only" often comes up in HART's discussion of "FOR DISCUSSION PURPOSES." Aon correctly points out that the heading in this section of Exhibit A does not contain the word "only." For convenience, the entire section will be referred to as the "FOR DISCUSSION PURPOSES" section.

quoted on the following bases." Concluding this section, which also concludes Exhibit A, Scope of Services, is the following sentence: "The scope of services may be refined, to include possible additions and deletions."

HART asserts at page 9 of its Memorandum in support of its Motion that the section identified as "FOR DISCUSSION PURPOSES" did not require a response in any offeror's work plan for Section 3, "GENERAL BROKERAGE SERVICES." Instead, according to HART, the list of six (6) coverages and the accompanying six (6) notes were "provided solely as a guide for offerors in completing the table of estimates to be included in their Section IV price proposals as set forth in Exhibit 10 to the RFP."

Exhibit 10 to the RFP is not contained in Exhibit A, Scope of Services. There is no reference to either Exhibit 10 or Section IV price proposals in Exhibit A, Scope of Services.

Instead, the section "FOR DISCUSSION PURPOSES" is clearly within the scope of services identified in Exhibit A. The Section's placement follows Section 3 of Exhibit A and precedes the concluding sentence of Exhibit A that the scope of services may be modified in the future. Whether or not it is part of Section 3 or comprises its own unnumbered section is irrelevant because it is still part of Exhibit A and thus must be addressed in a preliminary work plan pursuant to Section 6.5(A) of the RFP.

It should be noted that under Section 8.2 (A) of this RFP, "discussions" could be held with priority list offerors. These discussions were not limited to the price proposal submitted under Section IV. The discussions could thus cover that portion of the preliminary work plan responding to the section "FOR DISCUSSION PURPOSES" in Exhibit A, Scope of Services.

For these reasons, HART's Motion for Summary Judgment on the basis that a response in the offeror's preliminary work plan to the "FOR DISCUSSION PURPOSES" section in Exhibit A, Scope of Services, was not necessary is denied.

C. HART Has Not Established that Willis Sufficiently Addressed the Proposed Coverages and Notes in the "FOR DISCUSSION PURPOSES" Section of Exhibit A in its Section IV Price Proposal

An offeror's price proposal was to be included only in Section IV of the proposal and submitted in a sealed envelope separate from the rest of the proposal. RFP Sections 6.1(G) and 6.1(H). The format of the price proposal was established by Exhibit 10 to the RFP. The instructions for preparing the Price Proposal are in Section 6.6 of the RFP, pages 18-19.

Exhibit 10 to the RFP has two tables to be filled in, with a line in each table to cover one year. Figures for the years 2013 through 2019 were to be provided. The first table is for the offeror's "Firm Fixed Price." There is no space for a breakdown by type of coverage. The second table required listings by year of the insurance premiums to be expected by HART as well as the deductibles HART should be expecting to pay.

Exhibit 10 does not provide an offeror with an area in which to provide information on the facets of certain coverages requested by HART in the "Notes for proposed coverages" that conclude the "FOR DISCUSSION PURPOSES" section of Exhibit A, Scope of Services. The following points on coverages contained in the Notes for proposed coverages" are not set forth or discussed on Willis' Exhibit 10:

(a) Whether or not there is a guaranteed cost for each coverage;

(b) Input on the appropriate per loss limit for the deductible for Workers' Compensation and primary CGL coverages plus a recommendation on the aggregate amount for losses included in a deductible plan to be negotiated with the insurer;

(c) Discussion of time periods for completion of a closeout of the deductible plan;

(d) Whether there is coverage to third parties for professional liability;

(e) An opinion on the cost and feasibility of an Owner's Protective Professional Insurance; and

(f) Whether CGL and excess policies are amended to include coverage for liability for defective construction.

The redacted copy of Exhibit 10 that was filled out and submitted by Willis is the last page of Exhibit 4 to Exhibit B to the RFAH. Nothing filled in on that Exhibit 10 by Willis provides information on individual coverages or on the topics in the "Notes for proposed coverages" set forth above.

At the hearing on November 8, 2013, HART argued that Willis' Exhibit 10 implicitly evidenced that Willis satisfactorily addressed the factors in the FOR DISCUSSION PURPOSES section of Exhibit A, Scope of Services. However, it cannot be determined from reviewing Willis' Exhibit 10 that Willis did in fact address all of those factors.

The Hearings Officer will assume for the purposes of argument that a response to the FOR DISCUSSION PURPOSES section of Exhibit A, Scope of Services, could be included in an offeror's Part IV Price Proposal instead of the preliminary work plan. Then, assuming for purposes of argument that it might be possible to ultimately demonstrate that the figures on Willis' Exhibit 10 did substantially address the factors in the FOR DISCUSSION PURPOSES section of Exhibit A, Scope of Services, HART has failed to do so in this motion. HART's motion for summary judgment on the ground that the FOR DISCUSSION PURPOSES portion of Exhibit A is adequately discussed in Willis' Exhibit 10 should therefore be denied.

D. Willis Did Not Adequately Address the FOR DISCUSSION PURPOSES Section of Exhibit A in its Preliminary Work Plan

According to HART, even if the table of coverages and the notes on coverages in the FOR DISCUSSION PURPOSES section of Exhibit A, Scope of Services, had required a response in Willis' preliminary work plan, Willis is claimed to have provided responsive information "throughout" its overall work program. HART, however, specifically points to

only pages 18, 22, and 23 of Willis' work plan (which is included in Exhibit 4 to Exhibit B to the RFAH). HART Memorandum at page 10.

With respect to the aspects of coverage set forth in the "Notes on proposed coverages" in the FOR DISCUSSION PURPOSES section of Exhibit A, Willis' proposal provides the following:

(a) Whether or not there is a guaranteed cost for each coverage. The Hearings Officer located comments on guaranteed premium rates on page 23 of Willis' proposal.

(b) Input on the appropriate per loss limit for the deductible for Workers' Compensation and primary CGL coverages plus a recommendation on the aggregate amount for losses included in a deductible plan to be negotiated with the insurer. The Hearings Officer located a discussion of deductibles on page 23 of the Willis' proposal, although it is not really focused on the specific factors set forth in this portion of the Notes.

(c) Discussion of time periods for completion of a closeout of the deductible plan. The Hearings Officer did not locate a discussion of this factor.

(d) Whether there is coverage to third parties for professional liability. The Hearings Officer did not locate a discussion of this factor.

(e) An opinion on the cost and feasibility of an Owner's Protective Professional Insurance. The Hearings Officer did not locate a discussion of this factor.

(f) Whether CGL and excess policies are amended to include coverage for liability for defective construction. The Hearings Officer did not locate a discussion of this factor.[4]

[4] Instead of merely citing to entire pages, it would have been potentially helpful for HART to cite specific passages on those pages that HART contends refer to information requested by the FOR DISCUSSION PURPOSES section of Exhibit A. The Hearings Officer should not be required to search the record for specifics that support a party's position. In addition, the Hearings Officer found no particular relevant text on pages 18 and 22 of Willis' proposal even though those pages were cited by HART as supportive of its position.

HART's motion for summary judgment on the ground that the FOR DISCUSSION PURPOSES section of Exhibit A is adequately discussed in Willis' preliminary work plan should therefore be denied.

IV. ORDER

In view of the discussion herein, there is no reason at this time to reach the additional argument in HART's Motion regarding Willis' preliminary work plan exceeding page limitations set forth in the RFP.

For the reasons set forth above, Respondent Honolulu Authority for Rapid Transportation's Motion for Summary Judgment, and Willis' joinder therein, is hereby denied.

DATED: Honolulu, Hawaii, November 18, 2013.

DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce and Consumer Affairs