

State of Hawaii  
State Procurement Office  
Honolulu, Hawaii

Procurement Officer Kevin Cronin, chief election officer, (PO) respectfully requests the state procurement officer grant exemption to the Hawaii Leased Voting Equipment System, RFP-06-047-SW, under Haw. Admin. R. §3-120 and Haw. Rev. Stat. §103D-102, to enable the procurement officer to execute a one year contract with Hart InterCivic, Inc., (Hart) to provide the state a voting equipment system for the 2008 election at the cost of \$8,990,811.06, a loss to Hart of \$3,182,487.00 as appears in its confidential proprietary statement shown to the state procurement officer. This cost consists of \$6,599,999.00 to be paid in 2008, funds currently appropriated and available and the \$2,390,812.06 balance to be waived if the pending appeal arising from the RFP's notice of award to Hart is decided in favor of the PO.

The issue here is enabling and granting the state the time necessary to meet its fundamental requirement to prepare and conduct a fair and honest election of integrity consistent with state and federal statutory and constitutional law. The 2008 primary election is September 20, 2008, a date fixed in state statutory and constitutional law and a date immovable except for natural disaster. The time now available to prepare for the 2008 elections is less than five months to implement a new voting equipment system. The cost of the elections is no longer the issue because so much time has been consumed by the protest and appeal by the unsuccessful vendor, Election Systems & Software (ESS), and ensuing stays preventing OE and the county clerks' staff to work with Hart to prepare for the elections. The appeal would have had to have been finally resolved by April 15 for the election preparations to proceed on all the islands under the terms of the RFP generated contract. Hart is reasonably unwilling to work further without a contract at this time. In addition, the appeal hearing today was rescheduled to June 5-6 and June

19, 2008. These rescheduled dates now mean that at this time no decision is likely before June 6 at the earliest and perhaps yet after June 19.

Although the primary election will be held September 20, immovable voting dates and activities must also be achieved before the election date to address absentee voting activity. This activity represents roughly one third of all votes cast in recent Hawaii elections. Assuming work can begin today, May 9, on absentee ballot preparations, the OE and the counties are just three months away from sending absentee mail ballots to overseas voters as required under the U.S. Department of Defense's Voting Assistance Program under the Uniform Overseas Civilian Voting Act's 45 day mail / transit / return guidelines. The absentee ballots and associated voter education materials and instructions and a complaint voting system with all procedures and systems established must be created, established, and implemented well before the critical 45 day milestone ending September 20. Even if work can begin today, which it cannot, the OE and the counties are just four months away from providing Early Voting (a.k.a. "Absentee-Walk"), pursuant to state law. Much preliminary work must be accomplished before the primary election to ensure that ballots, procedures, and a tested system with Americans with Disability Act components are in to ensure that voters who opt to vote via the counties' 16 early voting polling sites can do so.

Exemption from the procurement law at this time is reasonable, necessary, and appropriate to permit the PO to sign a one year contract with Hart now. Given the risk to further delay because of the hearing rescheduling now into June, the exemption would enable the Office of Elections and all the county clerks and election staff around the state to work with Hart and its staff to conduct all reasonable and necessary election preparations. This would also allow the OE's and island clerks' election staff to resume and continue election preparations with minimal

risk of interruption while concurrently the appeal proceeds along its independent course to an unknowable outcome. If required to wait for the appeal's resolution, election preparations consisting of resolving paper for ballots, ballot printing, and voting machine manufacture and delivery to Hawaii issues. These issues must be resolved now. Other no less important preparations include the election procedure and training issues to permit developing the procedures for the new equipment, writing and printing the election manuals, and educating and training the hundreds of election officials and hundreds of thousands of voters timely before the primary election on September 20, 2008. These issues are critical to begin working on at this time to minimize the risk of election administration and voter error issues in voting on the new voting equipment

Hart is the selected vendor. The election officials and Hart's staff have begun election preparations during the two periods not subject to the stay or Agreement to date to prepare and set up what little could be done under the circumstances of ESS's appeal.<sup>1</sup> These preparations include the most important early ballot design and formatting preparations that both ESS and Premier have not done that make Hart the only realistic entity that can provide the voting equipment and services needed for the election at this late date. In addition, Hart, and not ESS or Premier, have worked with the four county clerks to identify and begin to resolve discrete election administration issues unique to each island's circumstances. These include telecommunication issues. The cost and price analysis attached concludes Hart's one year contract is a loss of \$3,182,487.00. This loss and the waived premium to conduct the 2008

---

<sup>1</sup> After the RFP's notice of award issued January 31, 2008, the Office of Elections (OE) staff and Hart had a window to work between February 1, 2008 and February 20 when ESS filed its protest, invoking a stay that closed the window for election preparations. On April 11, the window reopened when the PO's request for waiver of the stay was approved. OE and islands' clerk's staff worked with Hart until May 8 when the window closed again under the Agreement that turns back the clock to January 30 for the PO to perform a cost and price analysis of Hart's proposal. At this time, the work window is closed subject to reissuing a notice of award, signing a contract, and the right of ESS to protest the notice of award that invokes another stay to close the window again.

election if folded into Hart's original proposed contract for the RFP's 10 year fixed term under protest nets Hart a 1.9% profit, a reasonable amount. Hart is willing to forego the 2008 election premium if ESS's protest is denied.

ESS cannot reasonably be expected to provide the state's voting system for 2008. Its system provides significant functional deficiencies that the cost and price analysis attached below describes in detail, rendering ESS's system undesirable for the state in the procurement officer's and chief election officer's judgment. Moreover, ESS which has not been working with any election officials to prepare for the coming elections would have to engage and begin election administrators' retraining, to order ballot paper, to arrange and secure ballot printing, and to obtain and deliver iVotronics or AutoMarks to serve as Americans with Disability Act components of the elections.

Premier is not a reasonable or realistic possibility at this time when the election is less than five months away.

The city and county of Honolulu Clerk is concerned about re-imposition of a stay and further delays due to the protracted appeal that would prevent the city of Honolulu from continuing its coordination work with Hart because of they cannot resolve such issues in time for election preparations.

Attached are the following documents offered to support the PO's claims here:

1. Procurement Officer Cronin memorandum
2. RFP cover sheet;
3. notice of contract award letter to Hart;
4. notice of nonacceptance of ESS proposal;
5. ESS protest;
6. PO protest denial;
7. ESS appeal without above No. 6 PO protest denial attached;
8. state procurement office approval of waiver of stay April 11;
9. Hart two emails concerning preparation deadlines April 29;
10. Agreement May 7;

11. Cost and Price Analysis May 7;
12. Hart proposed one year contract May 7;
13. Hart's schedule to implement the election and timelines May 7;
14. City and County of Honolulu Clerk letter May 7;
15. Notice of rescheduled hearing dates May 7.

Based on this information, an exemption from the procurement law reasonably provides the likelihood election preparations can resume and continue without interruption while the appeal is resolved on its own time schedule.

For these reasons, as procurement officer and chief election officer, I respectfully request authority to enter into the one year contract that Hart offers for the 2008 elections.

Dated: May 9, 2008.

Respectfully Submitted,



Kevin B. Cronin  
Kevin B. Cronin  
Procurement Officer  
Chief Election Officer



## OFFICE OF ELECTIONS

LEGAL AD DATE: September 3, 2007

REQUEST FOR PROPOSAL  
No. RFP-06-047-SW  
SEALED OFFERS  
FOR  
A New Leased Voting Equipment System  
for the  
2008, 2010, 2012, 2014 and 2016  
Primary, General, and Special Elections  
Department of Accounting and General Services,  
Office of Elections

WILL BE RECEIVED UP TO AND OPENED AT 2:00 P.M. (HST) ON

OCTOBER 11, 2007

IN THE OFFICE OF ELECTIONS, 802 LEHUA AVENUE, PEARL CITY, HAWAII 96782.  
DIRECT QUESTIONS RELATING TO THIS SOLICITATION TO MR. SCOTT NAGO,  
TELEPHONE (808) 453-8683, FACSIMILE (808) 453-6006 OR E-MAIL AT  
[scott.nago@hawaii.gov](mailto:scott.nago@hawaii.gov).

Rex Quidilla  
Procurement Officer

RFP-06-047-SW

\_\_\_\_\_  
Name of Company

File



STATE OF HAWAII  
OFFICE OF ELECTIONS  
802 LEHUA AVENUE  
PEARL CITY, HAWAII 96782

REX QUIDILLA  
INTERIM CHIEF ELECTION  
OFFICER

January 31, 2008

Mr. Gregg Burt  
President and Chief Executive Officer  
Hart InterCivic, Inc.  
Post Office Box 80649  
Austin, Texas 78708-0649

RE: NOTICE OF AWARD

Dear Mr. Burt:

This is to inform you that you are awarded a contract for the subject solicitation. The award is conditioned upon your executing the attached *Contract for Goods or Services Based Upon Competitive Sealed Proposals* and bond(s) per the accompanying instructions. Should you have any questions on the execution of the contract and bond(s), please contact Mr. Scott Nago at (808) 453-8683.

Please return the agreement and bond(s), fully executed, to the State Procurement Office within ten (10) days from receipt of this notice.

After the contract is signed by the State, you will receive a "Notice to Proceed" that will designate the official starting date. This notice of award is issued as the first step in the award process. For a variety of reasons, the State may find cause for cancellation of the award, thus the State of Hawaii is not liable for any work, contract, costs, expenses, loss of profit, or any damages whatsoever incurred by your company until the contract has been fully executed by the State of Hawaii and the Notice to Proceed issued.

Very truly yours,

Rex M. Quidilla  
Interim Chief Election Officer

File



STATE OF HAWAII  
OFFICE OF ELECTIONS  
802 LEHUA AVENUE  
PEARL CITY, HAWAII 96782

REX QUIDILLA  
INTERIM CHIEF ELECTION  
OFFICER

January 31, 2008

Mr. Matthew E. Nelson  
Senior Vice President  
Election Systems & Software, Inc.  
11208 John Galt Boulevard  
Omaha, Nebraska 68137

Dear Mr. Nelson:

**RE: REQUEST FOR PROPOSALS NO. RFP-06-047-SW SEALED OFFERS FOR A NEW LEASED VOTING EQUIPMENT SYSTEM FOR THE 2008, 2010, 2012, 2014 AND 2016 PRIMARY, GENERAL AND SPECIAL ELECTIONS DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES, OFFICE OF ELECTIONS**

The evaluation of the proposals received in response to the subject solicitation is completed. This is to inform you that your offer was not selected and that award has made to another Offeror.

Pursuant to § 3-122-60, a debriefing is provided to the non-selected Offerors to inform them of the basis for the source selection decision and contract award.

A written request for debriefing shall be made within three (3) working days after the posting of the award of the contract. The procurement officer or designee shall hold the debriefing within seven (7) working days to the extent practicable from the receipt date of written request.

If you any questions, please contact me by phone at (808) 453-8683, by fax (808) 453-6006, or by e-mail at [rex.m.quidilla@hawaii.gov](mailto:rex.m.quidilla@hawaii.gov).

Very truly yours,

Rex M. Quidilla  
Interim Chief Election Officer



Attorneys at Law - A Law Corporation

February 20, 2008

**VIA HAND-DELIVERY,**  
**CERTIFIED MAIL and EMAIL**

Mr. Rex Quidilla  
Procurement Officer  
Office of Elections  
State of Hawaii  
802 Lehua Ave.  
Pearl City, Hawaii 96782

Re: **Protest of Award** on Request for Proposal No. RFP-06-047-SW; Sealed Offers For A New Leased Voting Equipment System for the 2008, 2010, 2012, 2014 and 2016 Primary, General and Special Elections, Department of Accounting and General Services, Office of Elections.

Dear Mr. Quidilla:

On behalf of our client, Election Systems & Software, Inc. ("ES&S"), we submit this Protest of Award pursuant to HAR § 3-126-4.

A. **ES&S Address And Contact Information.**

ES&S' business address is:

11208 John Galt Blvd.  
Omaha, Nebraska 68137

For the purposes of this Protest, all correspondence, instructions, and inquiries related to ES&S should be directed through this firm to:

Terry E. Thomason, Esq.  
Corianne W. Lau, Esq.  
Alston Hunt Floyd & Ing  
ASB Tower, Suite 1800  
1001 Bishop Street  
Honolulu, HI 96813

American Savings Bank Tower  
18th Floor  
1001 Bishop Street  
Honolulu, Hawai'i 96813  
Phone: (808) 524-1800  
Fax: (808) 524-4591

Palani Court  
Suite 104  
74-5620 Palani Road  
Kailua-Kona, Hawai'i 96740  
Phone: (808) 326-7979  
Fax: (808) 326-4779

One Main Plaza  
Suite 521  
2200 Main Street  
Wailuku, Hawai'i 96793  
Phone: (808) 244-1160  
Fax: (808) 442-0794

www.ahfi.com

670202-3 / 7530-5

08 FEB 20 P 3:01

OFFICE OF ELECTIONS

Phone: (808) 524-1800  
Facsimile: (808) 524-5976  
Electronic: [tthomason@ahfi.com](mailto:tthomason@ahfi.com)  
[clau@ahfi.com](mailto:clau@ahfi.com)

**B. Identification of Procurement.**

This Protest is asserted against the award to Hart InterCivic ("Hart") of the contract solicited through Request for Proposal No. RFP-06-047-SW; "Sealed Offers For A New Leased Voting Equipment System for the 2008, 2010, 2012, 2014 and 2016 Primary, General and Special Elections, Department of Accounting and General Services, Office of Elections."

**C. Action and Remedy Requested.**

For the reasons addressed below, ES&S should have received award of the contract competed under the subject RFP. In accordance with HAR § 3-126-7(d) and related authority, ES&S requests that the Chief Procurement Officer:

1. Stay all further action on this procurement pending resolution of this protest pursuant to HRS § 103D-701(f);
2. Rescind the notice of award to Hart;
3. Reject Hart's offer as unreasonably priced; and
4. Award the contract to ES&S.

**D. Request For Change In Deciding Official.**

ES&S further requests that this protest be reviewed and decided by an official superior to and outside the Office of Elections ("OE") and the State Procurement Office ("SPO"). As discussed below, the OE and SPO have repeatedly and inexplicably mishandled past procurements for the voting machines and election services requirement. Their actions demonstrate they are willing to squander taxpayer funds to ensure Hart receives the competed contract, regardless of the merits of ES&S' proposals.

The SPO Administrator has informed ES&S that he delegated to Rex Quidilla both the authority to award the contract and to decide this protest. See letter dated February 5, 2008 at Ex. A. By delegating both the authority to award and the authority to decide the protest to the same person, the Administrator has abused his authority and created a clear, direct, and improper conflict of

interest. The Administrator's unreasoned actions have established a protest review structure that causes what the Hawaii Supreme Court has described as:

[T]he absurd result . . . where the [procurement officer] has awarded a contract in violation of law, even if the action was in bad faith, he or she has the exclusive jurisdiction to fashion the remedy for his or her own wrongdoing.

Carl Corp. v. State of Hawaii, 85 Hawai'i 431, 455 , 946 P.2d 1, 25 (1997); (discussing assignment of levels of authority to grant remedies under the Procurement Code); emphasis added.

For the same reasons noted by the Hawaii Supreme Court in Carl, neither the public nor the protestor can have any confidence that there will be full and fair consideration of this protest unless a change in the deciding official is made. Here, the SPO Administrator has orchestrated through his delegation the "absurd" circumstance where the same official who made the challenged award is the official who will consider the protest.

As outlined in ES&S' protest, the SPO and the OE have both engaged in actions that show bad faith in their consideration of matters related to competition between Hart and ES&S. They have both disregarded requirements of the Procurement Code and willingly expended taxpayer funds unnecessarily, solely to prevent ES&S from prevailing in any competition between ES&S and Hart.

To assure the public and ES&S that the matters raised in this protest are fairly addressed and resolved, ES&S requests that this protest be assigned for resolution to an independent and impartial state government official superior to both the SPO Administrator and the OE.

#### **E. Timeliness.**

The State conducted a debriefing in this procurement on February 12, 2008. Pursuant to HAR § 3-126-4(b), a protest of an award is timely if it is submitted to the chief procurement officer within five (5) working days after the debriefing is completed.

In this case, February 16 and 17, 2008 were Saturday and Sunday respectively. February 18, 2008 was a state holiday. The fifth working day after the debriefing was completed is February 20, 2008. Accordingly, this Protest is timely if submitted to the chief procurement on or before February 20, 2008.

**F. Reasons For Protest Of Award.**

ES&S' Protest is asserted on the grounds that the procurement officer should have found Hart's price was unreasonable, rejected Hart's proposal in accordance with applicable rules, and awarded the contract to ES&S as the next highest ranked offeror that proposed a reasonable price.

Instead of awarding to ES&S, the procurement officer justified awarding the contract to Hart by (1) ignoring his duty to protect the taxpayers' pecuniary interests and (2) conducting an evaluation that evidenced a continuation of the State's systematic and long-term bad faith effort to ensure Hart received the contract. Specifically:

- (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 evaluations calculated to favor Hart.

**G. Background, Evidence, and Legal Grounds For Protest – OE's Failure to Reject Hart's Unreasonably High Priced Proposal.**

The issues raised in this protest are simple and direct. The OE selected the Hart proposal for contract award despite the fact that Hart's proposal price was \$ 52,875,944. See Hart proposal excerpts at Ex. B, p. 9. Hart's offered price was nearly three times more than the \$18,126,865 price ES&S (the next highest ranked offeror) proposed to perform the same work. See ES&S proposal excerpts at Ex. C, p. 10.

(1) Summary of Grounds.

ES&S contends that Hart's price is exorbitant and unreasonable. The OE's award to Hart at this price was the improper result of the OE ignoring its legal duty to make a cost and price analysis to confirm that Hart's proposed price was reasonable. By ignoring its duty to perform a cost and price analysis, the OE wrongly failed to comply with the Procurement Code and rule provisions designed to prevent squandering of Hawaii taxpayer funds.

If the OE had fulfilled its legal obligations, the OE would have determined Hart's offered price of \$ 52,875,944 was not reasonable. The OE would have also determined that ES&S' offered price was reasonable. Consequently, the

OE should have determined that award to Hart at an unreasonable price would waste public funds and would be contrary to the interests of the State.

As provided in Hawaii Revised Statutes (“HRS”) §103D-308, the OE should have then rejected Hart’s proposal because it is unreasonably high. Under the applicable rules, the OE should then have made award to ES&S as the next highest ranked offeror who proposed a reasonable price.

(2) The OE Evaluated ES&S As The Second Highest Ranking Offeror In The Scoring.

The OE elected to weight price as only 15% of the total proposal evaluation score. RFP, p. 18.<sup>1</sup> Because the weight assigned price was so low, Hart was not disadvantaged in the scoring by its extraordinarily high price. Hart received 5 points from each evaluator for its offered price of \$52,875,944. In contrast, ES&S’ offered price of \$18,126,865 was the lowest price in the competition. However, the minimal weighting of 15%, caused ES&S to receive only 15 points per evaluator for its score on the price evaluation factor. Although the price evaluation was properly calculated in accordance with the applicable procurement rule, the resulting differential in score was minimal because of the 15% weighting of price in the overall evaluation scheme.<sup>2</sup>

Although ES&S’ offered price was approximately \$35 million dollars less than Hart’s price for the full 12 year/6 election cycle contract term, Hart was scored as the highest-ranking offeror. ES&S was scored as the second highest-ranking offeror. See point totals for offerors at Ex. F.

---

<sup>1</sup> ES&S does not contest the state’s authority to decide for itself how best to weight evaluation factors. ES&S also does not contest that minimizing the importance of cost in an RFP is appropriate where costs may be uncertain and contractor risks may be high, such as when contracting for the design and construction of a lunar landing module or for the performance of research and development requirements. However, this contract is for machines and services routinely leased and purchased by every political subdivision of the United States for the purpose of counting votes accurately and providing sufficient documentation to certify the results of elections. Under the circumstances, ES&S cannot conceive of a valid government reason for ignoring the importance of cost to the taxpayer and assigning contract price the *de minimus* value of only 15% when the purchase is for goods and services routinely procured by such a large number of government entities.

<sup>2</sup> In this case, there are discrepancies in the government announced contract price. The OE posted notice of award on its website and announced the price to be \$43.4 million. See Ex. D. The SPO website refers to the contract price as \$6,599,999 (the amount Hart charged for the initial election cycle only). See Ex. E. Neither posting accurately reflects the contract price for all the solicited election cycles from Election Year 2008 through Election Year 2016 with an additional option for Election Year 2018.

These postings serve only to mislead the public as to the actual cost of the contract awarded. Under the provisions of HAR § 3-122-1, “contract price” refers to the amount designated “... for the performance of the work including allowances for extras, if any.” (emphasis added). Because the work solicited was for five election cycles from 2008 through 2016, with an extra priced option for Election Year 2018, the actual contract price was the total price Hart offered, \$52,875,944. Accordingly, ES&S will refer to the actual “contract price” the government accepted in ES&S’ discussion here.

(3) The Procurement Code And Its Implementing Rules Specifically Require the Procurement Officer To Protect The Taxpayer from "Gouging."

Nothing in the Procurement Code compels the OE to make award to an offeror, such as Hart, whose proposal offers an unreasonably high price, even if its evaluation score may be the highest of the competitors. To the contrary, the Procurement Code and rules were designed to prevent such an occurrence by providing "increased economy . . . and maximizing best value to the fullest extent practicable." HAR § 3-120-1(a)(5); *see also* Carl, 85 Hawai'i at 456, 946 P.2d at 26 (stating the Code was intended to ensure "accountability, fiscal responsibility, and efficiency in the procurement process."; emphasis added).

To protect the taxpayer from payment of unreasonably high prices, HRS § 103D-312 and its implementing rules require the procurement officer to analyze the cost and pricing of specific types of solicitations where the danger of predatory pricing is high. The rule requires that the procurement officer determine in writing that the proposal selected represents the "best value"<sup>3</sup> to the government AND directs the procurement officer to refer to the relevant section of the rules governing the methods for ensuring price reasonableness. The rule states:

Award of contract. (a) 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 . . . .

(b) Refer to . . . subchapter 15 for cost or pricing data requirements.

HAR § 3-122-57 (emphasis added).

---

<sup>3</sup> "Best value" means the most advantageous offer determined by evaluating and comparing all relevant criteria in addition to price . . . ." HAR § 3-122-1; emphasis added. Accordingly, the "best value" determination requires consideration of price, even if price was not among the RFP evaluation factors or was a minor factor such as in this case.

If the procurement officer obeyed the rule's instructions and referred to HAR Title 3, Subchapter 15, he would have seen instructions to obtain from Hart its cost or pricing data to evaluate whether Hart's offered price represents the "best value" to the state. The rule states that:

Requirement for cost or pricing data. The procurement officer shall require cost or pricing data or both in support of the following . . .

(1) Any contract, resulting from competitive sealed proposals . . . expected to exceed \$100,000;

HAR § 3-122-123; emphasis added.

Because this procurement used competitive sealed proposals as the selection procedure and because the resulting contract is clearly expected to exceed \$100,000, the OE procurement officer was obligated to require cost and pricing data.

The rules further instruct the procurement officer that there is an exception to the mandatory requirement to obtain cost and pricing data, if the award will have resulted from "adequate price competition." However, this exception applies only when the award will go to the offeror submitting the lowest contract price. The provision governing exceptions to the requirement to obtain cost and pricing data states:

Exceptions to the requirement for cost or pricing data.

(a) Cost or pricing data need not be submitted or certified where the contract price is based on:

(1) Adequate price competition which means at least two responsible offerors independently compete for a contract to be awarded to the offeror submitting the lowest evaluated price . . .

HAR § 3-122-124; emphasis added.

Because the circumstances here involved award to Hart and not to ES&S (who submitted the lowest price), the procurement officer would have seen that the exception did not apply. Accordingly, he was legally obligated to obtain cost and pricing data related to Hart's proposed price.

The purpose of requiring the procurement officer to obtain cost and pricing data here is specifically “to evaluate . . . the reasonableness of the total [contract] cost or price.” HAR § 3-122-128; emphasis added.<sup>4</sup> In making this evaluation, the rules direct the procurement officer as follows:

Evaluation of cost or pricing data. Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent state price and cost estimates. They shall also include consideration of whether the costs are reasonable and allocable under the pertinent [Cost Principles provided in the] provisions of [HAR] chapter 3-123.

HAR § 3-122-130; emphasis added.

Where the procurement officer conducts the mandatory cost and price analysis and determines the offered price is unreasonable, the procurement officer is required to reject the proposal from consideration in the competition. The procurement officer's duty to eliminate unreasonably priced proposals is contained in HRS § 103D-308. The implementing rule explains the procurement officer's duty as follows:

Rejection of bids and proposals. (a) . . .

(b) . . .

~~(2) A proposal shall be rejected for reasons including but not limited to . . .~~

(C) The proposed price is clearly unreasonable.

HAR § 3-122-97; emphasis added.

The preceding cost and price analysis procedures are mandatory. They are imposed to ensure the procurement officer does not waste or abuse taxpayer funds to pay for a contract where the price offered is unreasonably high. These are simply common sense requirements that any person or business would follow to protect against predatory pricing. They are especially important in public contracting where procurement officers are expending the public's funds

---

<sup>4</sup> Similarly, pricing data analysis focuses on determining whether the offered price is “reasonable and acceptable.” HAR § 3-122-129 states:

(a) Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services...

on large and expensive contracts that will bind the taxpayers for many years. In this case, the contract will run for at least 8 years, with an option for another 2 years (2008 through 2018).

(4) The Procurement Officer Failed To Perform His Duty To Determine Price Reasonableness.

Contrary to the above legal obligations to the taxpayer, the procurement officer failed to take the required cost and price analysis steps to determine whether Hart's offered price was reasonable. At the debriefing in this matter, OE representatives acknowledged that there had been no effort to determine if Hart's \$52,875,944 price was reasonable. See excerpts of debriefing transcript at Ex. G, p. 16:20-23.

When questioned about whether any cost or price analysis was done, OE representatives stated that they were uncertain what the term meant. See excerpts of debriefing transcript at Ex. H, p. 12:16-23. However, lack of experience and unawareness of a basic procurement law requirement does not excuse the procurement officer's failure to perform his assigned duties. The Hawaii Supreme Court has previously held that a procurement officer "with authority to enter into contracts . . . is certainly chargeable with knowledge of the regulations applicable to public procurement." Carl, 85 Hawai'i at 451, 946 P.2d at 21.<sup>5</sup>

In this case, the need for a cost or price analysis was clear and unmistakable. The highest ranked offeror (Hart) had proposed a price that was nearly three times more than the price proposed by the second ranking offeror (ES&S). ES&S was the incumbent contractor with presumably good knowledge of the costs it had experienced while performing the expired vote counting and election services contract. The price differential here unmistakably indicated that something was wrong with Hart's price.

Regardless of the mandatory cost and price analysis procedures outlined above, the dramatic difference in price between the top two competitors would have been seen by even the most casual observer as a signal that Hart's price should be checked. Despite these circumstances, the procurement officer apparently did not inquire or research the procurement rules to determine what steps should be taken to ensure public funds were not wasted by accepting Hart's offered price.

---

<sup>5</sup> The delegation here is another indication of the SPO Administrator's abdication of his duties to ensure the quality of State procurements and his obligation to protect contractors, such as ES&S, from the caprice of unqualified procurement officials. The SPO Administrator is supposed to consider qualification factors in any delegation and should not delegate procurement authority to an official who lacks "expertise ... in terms of procurement knowledge ...." HAR § 3-121-16(a)(1).

The facts here show an indifference to the procurement officer's obligation to know his duties and to prevent waste of public funds. For whatever reason, the procurement officer failed to evaluate whether the Hart price was reasonable and appropriate in accordance with HRS §103D-312 and all of the implementing rules outlined in the preceding section of this protest.

(5) The Procurement Officer Was Duty Bound To Find Hart's Price Unreasonable, To Reject Hart's Proposal, And To Award The Contract To ES&S.

If the Procurement Officer had performed his duty under HRS § 103D-312, he would have recognized that the fundamental requirements of this contract are fairly consistent with past requirements. The contractor is being engaged to (a) provide equipment and services to count votes accurately and (b) to provide documentation to certify election results. Under HAR § 3-122-129 an analysis of the State's past cost experience for the same services would have been appropriate.

In the short time available for the preparation of this protest, ES&S cannot duplicate the detailed cost or price analysis that the Procurement Code and rules require of the procurement officer. To the extent data is available to ES&S representatives, ES&S submits the following price analysis.

- These election service requirements are critical to the State. However, the critical need does not mean that they are as expensive as Hart's pricing would make them appear. ES&S successfully performed the State's requirements in three election cycles from 2000 to 2006 at a total contract price of \$10,098,000. Therefore, ES&S' cost to the State per Election Year for three election cycles was approximately \$3.4 million.
- In 2004 and 2006, the OE engaged Hart to provide additional voting equipment and services to assist persons with disabilities or impairments in casting their votes ("the ADA requirement"). During this period, ES&S provided voting equipment for use by the other voters. For both the primary and general election in 2004 and 2006, the following number of voters used the voting equipment provided by ES&S and Hart:

2004

Voters using ES&S equipment	650,393
Voters using Hart equipment	<u>30,054</u>
Total voters	680,393

Hart's price for counting less than 5% of the voters in 2004 was nearly \$2,580,000.

2006

Voters using ES&S equipment	584,561
Voters using Hart equipment	<u>41,120</u>
Total voters	625,681

Hart's price for counting less than 6.6% of the voters in 2006 was \$3,099,199

- For Election Years 2004 and 2006, Hart's average price was slightly less than \$3 million. By adding ES&S' average price of \$3.4 million, the State's average cost experience was approximately \$6.4 million for the combined regular vote and the ADA requirement.
  - In this solicitation, the competitors were required to propose a price for the performance of both the regular vote count and the ADA requirement for 6 Election Years. The evaluation of both the ES&S and Hart proposals indicated that both proposals were technically acceptable to perform the regular vote count and ADA requirements. The major difference was price.
  - ES&S proposed to perform the 6 election cycles for \$18,126,865 or slightly less than \$3.1 million per election cycle.
- 
- Hart proposed to perform the same work for the same 6 election cycle period for \$52,875,944. Therefore, the Hart price equates to approximately \$8.8 million per election cycle over the 6 election cycles covered.
  - Hart's present offer of \$8.8 million per election cycle is approximately \$2.4 million per year in excess of the average costs for all services to the State in 2004 and 2006. Hart's price is also approximately \$5.6 million more per election cycle than the price ES&S offers. Hart's price represents nearly a 40% increase in costs to the State over the last two election cycles.

Under the circumstances, the procurement officer would have been compelled to determine the Hart price was unreasonable. In accordance with HAR § 3-122-97(b)(2)(C), the procurement officer was legally required to reject the Hart proposal as unreasonable. Because ES&S was the next highest ranked offeror, the procurement officer would have been obligated to make award to ES&S.

(6) Conclusion As To Remedy Based Upon Pricing.

Based on the foregoing, the Hart proposal was unreasonably priced and should have been rejected. If the Procurement Officer had complied with his legal duties, ES&S should have received award. The official deciding this protest should remedy the procurement officer's errors by rejecting Hart's proposal and awarding the contract to ES&S.

**H. Background, Evidence, and Legal Grounds For Protest – OE Mishandled This Procurement to Favor Contract Award To Hart**

(1) Summary of Grounds

The OE committed numerous errors in the evaluation of proposals which operated to favor Hart over ES&S. Because of the scope of errors committed, ES&S cannot list all errors. However, a representative sampling of these errors include those listed below.

(2) Evaluation Committee members were permitted to (and apparently did) consult with persons outside the evaluation committee. The evaluations were therefore not performed by qualified and appointed committee members.

On September 12, 2007, Contract Administrator Rex Quidilla appointed the following individuals to the Evaluation Committee for RFP -06-047-SW: Anthony Akamine, Denise De Costa, Roy Hiraga, Judy Paik, Casey Jarman, Peter Nakamura and Interim Chief Elections Officer Rex Quidilla. See appointment letter at Ex. I. HAR § 3-122-45.01 requires that the evaluation committee members "selected in writing by the procurement officer shall evaluate the proposals." Hawai'i procurement law does not allow committee members or the procurement officer to substitute other individuals to conduct the evaluation in whole or in part. The seriousness with which an evaluation committee is constituted is underscored by the requirement that committee members sign an affidavit "(i) Attesting to having no personal, business, or any other relationship that will influence their decision in the evaluation process; (ii) Agreeing not to disclose any information on the evaluation process to other than an employee of a governmental body; and (iii) Agreeing that their names will become public information upon award of the contract." HAR § 3-122-45.01(2)(c).

In this procurement, the individuals appointed to the evaluation committee were improperly allowed to consult other individuals and substitute other persons in the evaluation of the proposals. The following are examples of misconduct in the evaluation process:

- Procurement officer Rex Quidilla admitted that he allowed committee members who were election administrators to obtain comments and advice on the evaluation process from their staff. In the debriefing, Mr. Quidilla stated that:

MR. THOMASON: May I ask a question?  
Was it your intent that Casey Jarmon be  
the evaluator?

MR. QUIDILLA: Yes, but we also  
understand that she would be asking assistance of her  
staff for technical assistance

MR. THOMASON: That's authorized? As the  
chair of the committee you authorize the evaluators to  
go and obtain comments and advice from people  
outside the evaluation committee?

MR. QUIDILLA: An election administrator  
within their office under the direction -- supervisory  
direction, yes.

See excerpts of debriefing transcript at Ex. J, p. 36:7-20.

- Denise DeCosta was out of town during the proposal evaluation dates of October 12-16, 2007. Instead, non-committee member, Glenn Takahashi sat in on the evaluations on her behalf. Mr. Takahashi and Ms. De Costa consulted with each other before she did her final scoring. See emails at Ex. K.
- Casey Jarman was not available during the October 12-16, 2007 "Proposal Evaluation" dates. See emails at Ex. L. In fact, the evaluation sheets from Hawaii County demonstrate that Ms. Jarman worked with others to complete her evaluation. The evaluation was not submitted under Casey Jarman's name but as Hawaii County. "We divided the Technical Criteria into 5 categories: . . .;" "We sold divided the onsite demonstration into 7 criteria . . ." (emphasis added). See evaluation excerpts at Ex. M.

(3) The appointed evaluation committee members applied evaluation factors not announced in the RFP

HRS §103D-303(g) requires that "[a]ward 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 Hawaii County evaluators considered factors under “Technical Criteria” (worth 50 points) that were not contained in the RFP.

The RFP requires that the evaluators evaluate under “Technical Criteria,” the probability of success of and risks associated with each of the following areas: System Design, Software Design and Development, System Support, Ancillary Services, Design Features and Security. Instead of evaluating the proposals in those areas, Hawaii County instead divided the Technical Criteria into 5 categories: “ballot, ADA, support, ease of use, and other.” See evaluation excerpts at Ex. M

Likewise, in the “On-Site Demonstration” evaluation criterion, HI County utilized sub-areas not contained in the RFP. HI County instead applied the following areas: (1). equipment verification; (2). accuracy and consistency with reading paper ballot; and (3) support/ training. Compare RFP, pp. 19-20 to Ex. M.

- Committee members evaluated devices not offered in the Best and Final Offer (“BAFO”)(apparently as a result of what they saw and heard during the demonstration and not what was in the BAFO).

Committee members Rex Quidilla, Roy Hiraga and Judy Paik deducted points from ES&S for features on ES&S’s Ivotronic, a voting machine that ES&S did not include in its BAFO proposal. This resulted in wrongful reduction of points from ES&S’s scores. See Exs. N-Quidilla, O-Hiraga and P-Paik.

(4) The evaluation committee erroneously deducted points from ES&S.

- Committee member Judy Paik evaluated and scored only ES&S’ Ivotronic voting machine. Not only was the machine not in ES&S’s BAFO, but Ms. Paik deducted points for ES&S based on the evaluation of Ivotronic. Moreover, the two visually impaired committee members, Ms. Paik and Mr. Akamine were not given the offerors’ written proposals in any format for the visually impaired, so may not have reviewed proposals. Despite only evaluating limited (and incorrect) parts of the proposals, Ms. Paik’s scores were given the same weight as other committee members. See excerpts of debriefing transcript at Ex. Q, p. 42-45.
- RFP requires the vendor to provide the State with primary and general ballots to serve 800,000 to 900,000 voters. Ms. De Costa wrongly deducted points from ES&S stating ES&S would provide only 750,000

ballots for years 2010 to the end of the contract. In fact, in the BAFO, ES&S increased the number of ballots offered from 750,000 to 1,050,000 for the period 2010 to 2018. See Ex. R, Pg 11 BAFO and Pg 15 original proposal. Ms. De Costa's evaluation was dated October 17, 2007, prior to submission of the BAFO on November 28, 2007.

- The RFP requires paper stock to be of sufficient weight to prevent "bleed". See RFP Section 6.12, p.B-10. The RFP does not require the paper to be of a certain weight. Despite this, Mr. Hiraga deducted 1 point from ES&S, stating ES&S equipment requires use of ES&S certified 80 lb. paper. See Ex. S. Hart received no deduction of points, although its equipment uses similar weight paper.
- Ms. De Costa gave Hart full 5 points for understanding the project, noting "[v]endor has first hand experience in Hawaii and understands both basic requirements and nuances of servicing the various islands." De Costa failed to credit ES&S for its many years of experience actually counting more than 90% of all votes in Hawaii. (1998-2006).
- Mr. Hiraga deducted 1 point from ES&S, stating the M100 units were reconditioned subsequent to 2006 elections, which was not correct and not stated anywhere in the ES&S BAFO.
- Ms. De Costa reduced ES&S' score, stating it failed to notify/communicate service practices for replacement of machines components that has impact on election process. This is untrue. ES&S has provided preventative maintenance logs to the State during it previous contracts.
- The RFP states the offeror shall perform preventative maintenance. See RFP p. C-3. Mr. Hiraga deducted 1 point from ES&S stating ES&S requires a service contract after 1st year. This is untrue. Preventative maintenance is included in ES&S' offer. See ES&S BAFO p. 11 and ES&S original proposal p.15 at Ex. R.
- De Costa and Quidilla both deducted points from ES&S stating ES&S's technology uses zip drives. De Costa stated this "nearly guarantees obsolescence due to unavailability of zip devices and or media within ten years." Zip drives provide an efficient transfer of files and the ES&S proposal provided for spare parts and supplies. See excerpts of ES&S original proposal at Ex. T, pp. 44 and 340.
- Quidilla deducted points from ES&S over concerns about the M100's durability over the length of the 10 year lease and whether the machine would comply with 2005 VVSG. It was improper for Quidilla to deduct

points, as ES&S is not proposing to use the M100's for the full 10-year period. ES&S' proposal offered plans to replace the M100s with the DS200 in 2010. See ES&S Dec. 13, 2007 Post BAFO Response at Ex. U, p. 2.

- Ms. Paik deducted points from ES&S for stating that preparing voter education materials in Braille would be an additional cost to the State. Paik gave Hart points, stating Hart is the only vendor offering voter education materials in alternative formats such as Braille and audio at no extra cost, "which embraces the inclusion and integration of voter education of voters with disabilities." This is incorrect. Hart's response to Question 2.4.6 states Hart can offer Braille materials. (See excerpts of Hart original proposal at Ex. V, p. 257). Hart's itemized list of voter education materials does not include Braille or audio materials in its price proposal. See excerpts of Hart original proposal, Ex. W, p. 194. Therefore, Hart would also charge the State for these materials but was not penalized in points.
  - Addendum A to the RFP states the OE would accept voting equipment for 2008 certified under the 2002 VVSG guidelines, with equipment later recertified under the 2005 guidelines. Mr. Nakamura deducted 7 points, stating the ES&S DS 200 is a major component of the proposal and is not yet certified or successfully deployed in any jurisdiction. This is not true. Florida certified and deployed DS 200 in September 2007. See excerpts of ES&S original proposal at Ex. X, p.148.
  - ~~De Costa also deducted points from ES&S, stating the DS200 is not certified under any standard recognized in Hawaii. Despite noting ES&S has applied for certification, she still docked ES&S on equipment which will not be deployed until 2010. See evaluation excerpts at Ex. Y.~~
  - Hiraga deducted 2 points from ES&S for upgrading the system between 2008 and 2010. The deduction related to upgrading equipment from the M100 to the DS 200 in 2010 at no cost to the State. The deduction was improper because ES&S equipment meets current industry standards and ES&S will provide the upgrade at no charge to the State. See evaluation excerpts at Ex. O.
- (5) Hart's proposal fails to meet the criteria in the RFP or had obvious deficiencies yet the evaluation committee failed to deduct points from Hart
- Hart was not deducted points even though its proposal clearly stated Hart will not guarantee that parts for its voting machines will be available for more than six years. (See Hart original proposal p.81). This

adds significant undisclosed and additional costs to the contract if the State must purchase new equipment when replacement parts are no longer available.

- Hiraga deducted 1 point from ES&S for inability to transmit election results in ANPA format to the media on election day. Hart also cannot transmit election results in ANPA format but received no deduction. (See Hart original proposal p. 241).
- RFP -C-6 requires written materials, video graphic aids and system demonstrators. Mr. Hiraga deducted 1 point from ES&S, stating ES&S offered no detailed methods used to educate public about voting system. This is not correct. ES&S provided detailed information regarding its voter education program. No points were deducted from Hart although Hart will provide only PDF template of voter materials. Hart's materials are only in English. (See Hart original proposal p. 194). Hart also states its Voter Education and Outreach Training "TBD per contract." (See Hart original proposal p.75). This is an undisclosed additional cost to the state of an unknown amount of money.
- The OE posed the following additional question on December 6 for response by December 13: "With the Election Assistance Commission reviewing the next iteration of the Voluntary Voting System Guidelines, which of your voting equipment would need to be upgraded to meet these requirements? What would be the cost to the State?" ES&S responded that it would provide a free upgrade to meet federal standards. Ms. De Costa did not give ES&S points for providing upgrade free to the State. Yet she praised Hart for providing an upgrade to the VVSG 2005, stating, "Vendor is well positioned to accommodate changes to voting system standards and is highly professional in provision of services." This is because Hart's upgrade was included in its price proposal in the amount of \$2.5 million. (See Hart Dec 13, 2007 Post BAFO p. 3). Mr. Quidilla gave Hart points for Hart's system meeting current industry standards and anticipating enhancements to meet future standards. Mr. Quidilla did not give ES&S points although its system also meets industry standards and ES&S will provide the upgrade.
- Appendix A Question 2.3.22 Paper Jams – asks, "How does your system address "Voter Verifiable Audit trail jams?" ES&S was not given points for the ease of clearing a paper jam in its system. ES&S system allows the paper jam to be cleared by the poll worker. (See ES&S original proposal p. 264). Mr. Hiraga gave an additional point to Hart although its system resolves the paper jam by replacing the unit. Hart's method would disrupt the polling station because if a paper jam occurs, the eSlate unit shuts down and the unit must be removed. (See Hart original

proposal p. 243). Hart's system will not even allow replacement of the paper roll without removing the unit from the polling place. (See Hart original proposal p.49).

- Candidate Filing System (CFS) The RFP states the system shall be capable of automatically and electronically integrating the candidate data with the Ballot Preparation function and databases. Mr. Quidilla deducted points from ES&S, stating its system did not provide a "direct drop of candidate filing into ES&S CFS system, therefore requiring extensive proofreading." This is untrue. ES&S specifically developed this program for Hawaii to meet Hawaii's specifications. ES&S representatives demonstrated this system during the on-site demonstration. ES&S can import data from the CFS into the Unity Election System and Election Management System. ES&S has successfully used Hawaii's CFS's database to program election equipment, format ballots and configure election reports for the past 10 years. No ES&S system proposed would require replacement of the State's CFS software. (See ES&S original proposal pgs 274-275). ES&S also would not charge the State for modifications due to changes in the CFS structure. Mr. Quidilla did not deduct points from Hart although Hart uses a similar process for the CFS called InFusion. Hart also will charge the State for any changes to the CFS data structure as an additional cost to the State. (See Hart original proposal p.69). ES&S' proposal offers these modifications at no cost.
- Evaluation committee members gave points to Hart for the demonstration phase for features not in the demonstration criteria For example, Mr. Quidilla gave Hart points, stating Hart "demonstrated a cooperative team effort in their System Demonstration with an attitude that they would work with the state to accomplish whatever was necessary to run a successful election." See evaluation excerpts at Ex. N.
- Roy Hiraga gave Hart 1 point for its presentation "in a logical and orderly fashion and explained in detail." This was not in the criteria for the demonstration criteria. See evaluation excerpts at Ex. O.
- Hart's ballots fail to ensure vote secrecy. Hart's ballot contains a ballot identifier barcode on the upper left corner of the ballot. This barcode tracks the ballot to the individual voter, compromising secrecy of the ballot. See excerpt of Hart BAFO at Ex. Z, p. 5.
- The RFP requires the primary ballot to detect and prevent multi-party (cross-party) voting. (See RFP App B Section 6.6.1, p. B-8). However, HRS § 12-31 prohibits the State from requiring that a voter state a party

preference as a condition of voting. Despite this, Hart's primary party ballot requires that a voter select a party prior to being able to cast an acceptable ballot. This requirement also will cause voter confusion and many invalidated ballots, as the ballot will not be counted if the voter indicates a party affiliation different from candidate selected on the ballot. Importantly, the public will not be educated on use of the machines in the primary election, leading to many invalidated ballots. See Ex. Z-1. Mr. Nakamura was the only committee member to note these deficiencies, See Ex. Z-2.

- Hart's system can not print the watermarks required by the RFP. See RFP pgs. F-4 and F-6 and Ex. Z-3, Hart's proposal. Hart's proposal is for printing a black and white ballot although the RFP requires ballots with identifying codes or marks associated with the proper ballot type. ital. RFP sections 6.3, 6.6.1 and 6.6.2, pp. B-5, B-8, B-9, description of the required colors and watermarks. Ms. De Costa was the only one who noted Hart would charge additional amounts (not included in the proposal) for colored ink. See evaluation excerpts at Ex. Y.

(6) The evaluation committee's indifference to information submitted by ES&S was demonstrated by the procurement officer's failure to accord each offeror fair and equal treatment with respect to any opportunity for discussion and revision of proposals required by HRS §103D-303(f).

Ms. De Costa's evaluation score sheets, were dated October 17, 2007. Therefore, her evaluation was prior to the BAFO due date of November 28, 2007. All but one of the other evaluation score sheets were dated prior to the dates on which Scott Nago requested and received additional information from the three offerors. Score sheets from Mr. Akamine were dated November 29, 2007, Ms. Paik's were dated December 3, 2007, Mr. Hiraga's, Mr. Nakamura's and Mr. Quidilla's were dated December 5, 2007 (Hiraga).

Mr. Nago sent out additional and diverse questions to offerors after the BAFO was submitted, in violation of HAR § 3-122-54 (b) which prohibits discussion of or changes in the best and final offers. See Ex. AA.

It is apparent from the evaluation score sheet dates that several evaluation committee members did not evaluate the BAFOs.

**I. Background, Evidence, and Legal Grounds For Protest – OE Has Engaged in a Documented and Longstanding Course of Conduct Favoring Hart to the Detriment of ES&S**

The OE and SPO have demonstrated a pervasive pattern of systematic favoritism toward Hart and against ES&S. Evaluation committee members and officials involved in the selection process have clearly and historically favored Hart in the award of contracts.

As the chronology below shows, ES&S was forced to protest a wrongful award to Hart in August, 2004. The SPO Administrator issued a decision denying ES&S's protest. The SPO Administrator's decision was overturned on appeal to an administrative hearings officer. The hearings officer specifically found that ES&S should have received award if the SPO and OE had complied with the RFP criteria. She awarded costs to ES&S, which ultimately totaled over \$132,000 of taxpayers' dollars.

ES&S had been willing to waive its entitlement to these costs and offered to perform the work under the original price it offered.<sup>6</sup> In order to prevent award to ES&S of the work under a contract modification, however, the SPO, with concurrence of the OE, preferred to spend more public funds to recompet the "DRE" contract to make award to Hart. The SPO's favoritism of Hart included the willingness to pay ES&S over \$132,000 in taxpayer funds that would have been avoided by simply awarding ES&S the contract the administrative law judge found ES&S should have received.

The detailed history of bad faith actions against ES&S includes the following:

- |                 |   |
|-----------------|---|
| July 14, 2004   | A month before the contract is awarded on the Direct Recording Electronic ("DRE") voting systems contract ("DRE Contract"), an article appears in the Honolulu Advertiser describing Hart devices that disabled voters will be able to use at the polls in the next election. Dwayne Yoshina, OE chief, is quoted as commenting on the new machines. The article describes "[t]he sip and puff system [which] uses a pneumatic switch rather than a keyboard or punchcard to make a selection." This describes a voting machine unique to Hart - although the contract had not yet been awarded. See newspaper article at Ex. BB. |
| August 13, 2004 | The OE, through the SPO, awards the DRE Contract to Hart  |
| August 19, 2004 | The SPO holds a debriefing at the request of ES&S. Some of the same individuals involved in the 2008  |

---

<sup>6</sup> The cost claim awarded to ES&S was solely for costs of preparation of proposal. ES&S did not recover attorneys fees and costs for having to challenge the SPO's wrongful actions.

procurement at issue (Judy Paik, Glenn Takahashi, Scott Nago) were also on the evaluation committee for the DRE Contract. See SPO debriefing notes at Ex. CC.

- August 27, 2004 ES&S files protest arguing Hart's lack of experience renders it a non-responsible offeror in the DRE Contract competition. See protest at Ex. DD.
- September 13, 2004 ES&S writes to SPO to complain about delay in decision on protest, which is required to be made "as expeditiously as possible after reviewing all relevant information." All relevant information was on the face of the RFP and Hart proposal. See letter at Ex. EE.
- September 16, 2004 After delay that favored Hart due to impending election date, ES&S' protest is denied by SPO See decision at Ex. FF.
- September 23, 2004 ES&S files appeal & request for administrative hearing
- September 30, 2004 ES&S files motion for summary judgment on the appeal
- October 8, 2004 SPO filed its motion for summary judgment
- ~~October 12, 2004 Administrative hearings officer conducts hearing on both motions~~
- October 15, 2004 Hearings officer denies both motions; rescheduled hearing for October 18, 2004; both parties subsequently agreed to allow decision on written submissions
- October 21, 2004 Hearings officer finds in favor of ES&S, ruling that Hart did not possess three years of actual experience required by the RFP so was therefore not a responsible offeror. Costs of proposal preparation awarded to ES&S. See Findings of Fact, Conclusions of Law and Decision at Ex. GG.
- October 26, 2004 ES&S' attorneys confer with SPO attorney P. Ohara to request award of contract to ES&S with ES&S

potentially waiving cost claim. No action taken by SPO.

- December 14, 2004 ES&S' Cost Claim for \$128,853.04 filed.
- February 3, 2005 ES&S amends cost claim to add claim for interest as the State is required to wait for legislative approval to pay the cost claim. See Ex. HH.
- March 10, 2005 legislation pending that includes ES&S' cost claim in the total amount of \$132,860.59 (including interest).
- March 31, 2005 ES&S' attorneys meet with SPO attorney Pat Ohara to discuss ES&S' request that the SPO award ES&S' existing vote count contract to incorporate the DRE contract requirements. No action taken by SPO.
- April 27, 2005 Letter to Pat Ohara following up on earlier conversations and requesting modification of ES&S contract. See letter at Ex. II.
- May 5, 2005 Letter from Pat Ohara (received May 12, 2005) saying they are "studying the issues." See letter at Ex. JJ.
- May 12, 2005 Letter from acting SPO Administrator, Ruth Yamaguchi, rejecting ES&S request for contract modification ("~~... DRE is outside the scope of the contract with ES&S. . .~~") See letter at Ex. KK.
- August 5, 2005 Pat Ohara delivers a check for ES&S for its costs in the amount of \$132,860.59
- November 8, 2005 Letter to SPO chief Aaron Fujioka requesting reconsideration of ES&S's request to modify existing contract See letter at Ex. LL (some attachments omitted).
- November 8, 2005 ES&S writes to Dwayne Yoshina re ES&S' ability to meet State's needs re HAVA contract. See letter at Ex. MM.
- December 1, 2005 Letter from A. Fujioka rejecting ES&S's request to reconsider modification of the existing contract and announcing the SPO will issue a new solicitation for the DRE contract. See letter at Ex. NN.

On or around December 4, 2005	OE puts out new RFP just before holiday season.
December 12, 2005	Letter to Ruth Yamaguchi submitting exceptions and inquiries to RFP. See letter at Ex. OO.
Between 12/12/05 and 12/21/05	Numerous calls to SPO to attempt to get answers to questions
December 21, 2005	Ruth Yamaguchi says staff working on an addendum to respond to all questions.
December 22, 2005	SPO's response to questions.
1 <sup>st</sup> quarter 2006	Various inquiries from ES&S attorneys to SPO re SPO's required posting of award on website, etc.; extension of deadlines for proposals, etc.
May 1, 2006	Protest by ES&S against content of the solicitation. See letter at Ex. PP (attachments omitted).
May 11, 2006	(received May 12, 2006) ES&S' protest granted The RFP eliminates the requirement that voting machines must be DRE-type devices. See decision at Ex. QQ. Addendum F issued
May 18, 2006	BAFOs submitted per new deadline in Addendum F.
May 19, 2006	Letter (obtained by ES&S on a much later date) sent from OE chief Dwayne Yoshina to SPO chief Aaron Fujioka stating selection was made by the evaluation committee. Within a 24 hour period, all BAFOs were supposedly distributed to committee members for review, all evaluations completed and collected from committee members scattered throughout islands, scoring calculated and award made. Suspicious time frame suggests decision was predetermined to select Hart. BAFOs were not even considered by the committee.
June 9, 2006	By chance, ES&S' attorney sees Hart machines being demonstrated at Convention Center Expo featuring technology for persons with disabilities. He called Ruth Yamaguchi, who first denied that award had

been made. When told about the demonstration, she laughed and said, "tentative award" had been made, and the notices and posting of award would probably go out today.

- June 9, 2006 Award made; ES&S informed it did not get the contract.
- June 13, 2006 ES&S requests to inspect contract file. When evaluations reviewed, many noted to say: "[ES&S's] Automark does not comply with DRE requirements". The criterion requiring a DRE had been protested and thrown out, but the criterion was noted as having been applied nonetheless.
- June 15, 2006 ES&S submits request for debriefing.
- June 23, 2006 ES&S' attorneys and representatives attend debriefing where evaluation committee members admit they made notations on score sheets critical of non-DRE machines even though being a DRE device was not a condition.
- June 28, 2006 ES&S made a business decision not to protest.
- September 3, 2007 New RFP posted for RFP-06-047-SW; Sealed Offers For A New Leased Voting Equipment System for the 2008, 2010, 2012, 2014 and 2016 Primary, General and Special Elections, Department of Accounting and General Services, Office of Elections, the contract award at issue.

## **J. Conclusion**

This protest must be granted to prevent the OE and the SPO from squandering more taxpayer dollars to steer a contract to Hart. The discussion above shows Hart's price is clearly unreasonable and must be rejected under applicable procurement law and rules. The discussion above shows the OE's evaluation process was a sham, skewed, to favorite Hart. The discussion above also shows that the OE and SPO are willing to pay out over \$132,000 unnecessarily, simply to redo a procurement and steer the contract award to Hart.

The protest system is intended to prevent abuses of taxpayer interest such as has occurred here. The interests of the State demand that the award

to Hart be rescinded and the contract awarded to ES&S as the next-highest-ranked offeror

Please give this Protest your immediate attention and issue a prompt decision all matters raised herein.

Very truly yours,



Terry E. Thomason  
Corianne W. Lau

cc: Aaron Fujioka, CPO, SPO  
Russell Saito, Comptroller, DAGS