UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

STATE OF HAWAII, DEPARTMENT OF HUMAN SERVICES, DIVISION OF VOCATIONAL REHABILITATION, HOOPONO-SERVICES FOR THE BLIND, Plaintiff, vs. UNITED STATES MARINE CORPS, BY AND THROUGH GENERAL ROBERT B. NELLER, INCUMBENT COMMANDANT OF THE MARINE CORPS, IN HIS OFFICIAL CAPACITY; Defendant.	CIV. NO. 18-00128 LEK

ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION

On March 8, 2019, Plaintiff State of Hawai`i, Department of Human Services, Division of Vocational Rehabilitation, Ho`opono - Services for the Blind ("Ho`opono"), filed its "Supplemental Memorandum in Support of Its Motion for Declaratory and Injunctive Relief," which is construed as its amended motion for a preliminary injunction ("Amended Motion").[1] [Dkt. no. 61.] On April 12, 2019, Intervenor the Severson Group, LLC ("TSG") and Defendant United States Marine Corps, by

[1] Ho`opono filed its original Motion for Declaratory and Injunctive Relief on April 3, 2018 ("4/3/18 Motion"). [Dkt. nos. 2 (4/13/18 Motion), 3 (mem. in supp. of 4/3/18 Motion).]

and through General Robert B. Neller, Incumbent Commandant of the Marine Corps, in his official capacity ("Marine Corps"), filed their respective memoranda in opposition to the Amended Motion. [Dkt. nos. 62 ("TSG Opp."), 63.] On May 10, 2019, Ho`opono filed its reply memoranda. [Dkt. nos. 76, 77.] The Marine Corps' April 12, 2019 memorandum in opposition was withdrawn and replaced by an amended memorandum, filed on May 29, 2019. [Dkt. nos. 85 (notice of withdrawal), 86 ("Marine Corps Opp.").]

The Amended Motion came on for an evidentiary hearing on June 14, 2019. [Minutes, filed 6/14/19 (dkt. no. 91).] The parties filed their closing briefs on June 28, 2019. [Dkt. nos. 96 (Marine Corps' brief), 97 (TSG's brief), 98 (Hoopono's brief).] On July 16, 2019, this Court issued an entering order informing the parties of its ruling on the Amended Motion. [Dkt. no. 99.] The instant Order supersedes that entering order. Hoopono's Amended Motion is hereby granted, and a preliminary injunction is hereby entered, pending the resolution of the arbitration between the Marine Corps and Ho`opono.

BACKGROUND

The relevant background is set forth in this Court's May 11, 2018 Order Granting Plaintiff's Motion for Temporary

Restraining Order ("TRO Order"). [Dkt. no. 32.[2]] It will only be briefly restated here.

Ho`opono is the state licensing agency ("SLA") for purposes of the Randolph-Sheppard Vending Stand Act ("RSA"), 20 U.S.C. § 107, *et seq.*, in Hawai`i. TRO Order, 2018 WL 2187977, at *1. Hoopono's licensed blind vendor and teaming partner Blackstone Consulting, Inc. ("BCI" and collectively "Ho`opono Contractor") operated the food service facilities at the Marine Corps Base Hawai`i ("MCBH") pursuant to a five-year contract that commenced on March 1, 2013 and was worth approximately $14 million.[3] Id. at *1-2. The contract ran through the end of February 2018, but the Marine Corps exercised the extension clause to extend the contract through May 15, 2018. Id. at *2. Hoopono's "services . . . consistently received satisfactory ratings, with one excellent rating." Id. at *1.

The instant case arises from a dispute concerning Hoopono's bid for the subsequent contract period. On September 25, 2017, the Marine Corps issued Solicitation number M003-18-17-R-0003 for a new MCBH food services contract,

[2] The TRO Order is also available at 2018 WL 2187977. The TRO Order addressed Hoopono's Motion for Temporary Restraining Order ("TRO Motion"), filed on April 17, 2018. [Dkt. nos. 12 (TRO Motion) & 13 (mem. supp. of TRO Motion).]

[3] At the time of the TRO Order, Hoopono's licensed blind vendor was Stanley Young. 2018 WL 2187977, at *1.

with a base term of one year and four option years ("Solicitation"). On October 24, 2017, the Marine Corps issued an amendment to the Solicitation, adding certain minimum staffing requirements ("Amendment 1"). Two further amendments were issued thereafter, but they are not relevant to the instant case. Id. at *2-3.

Ho`opono submitted its response to the Solicitation ("Ho`opono Proposal") on November 17, 2017, but it was rated as unacceptable as to its food services operations plan and its staffing and transition plan. Thus, the Ho`opono Proposal was given an overall technical rating of unacceptable, meaning that Hoopono's past performance and the price in the Ho`opono Proposal were not considered, and the RSA priority was not applied. The Ho`opono Proposal was excluded from the competitive range, and the contract was ultimately awarded to TSG, a private vendor that submitted the only proposal found to be in the competitive range ("TSG Proposal"). Id. at *3 & n.10. The amount of the contract awarded to TSG was $18,419,014.74. Id. at *4. TSG's contract was scheduled to begin on April 15, 2018. Following a thirty-day overlap with Ho`opono for transition purposes, TSG was scheduled to begin sole operation of the MCBH food service facilities as of May 16, 2018. Id. However, the TRO Order requires the Marine Corps to maintain Ho`opono as the MCBH food services vendor, and it prohibits the

Marine Corps from putting its contract with TSG into effect, until this Court rules on the issue of whether Ho`opono is entitled to a preliminary injunction. Id. at *9.

On June 28, 2018, TSG filed a motion to intervene. [Dkt. no. 38.] The motion was orally granted on August 10, 2018, and in an order filed on August 22, 2018. [Dkt. nos. 50 (minutes of hearing on the motion to intervene), 53 (order).]

I. Stipulated Facts

A. Food Service Operations

After this Court issued the TRO Order, the Marine Corps suspended TSG's performance of the new contract by issuing a Stop Work Order. Any contractor who receives a Stop Work Order can request an equitable adjustment, or it can make a claim under the Contract Disputes Act ("CDA"). The contractor can pursue administrative or judicial remedies if it is dissatisfied with the Marine Corps' final decision on the CDA claim. [Amended Stipulation Re: Pltf.'s Suppl. Motion for Declaratory and Injunctive Relief ("Stipulated Facts"), filed 6/27/19 (dkt. no. 95), at ¶ 3.[4]]

[4] Although the Stipulated Facts are not signed by this Court, [Stipulated Facts at pg. 6,] the original stipulation was, [Stipulation Re: Pltf.'s Suppl. Motion for Declaratory and Injunctive Relief, filed 5/23/19 (dkt. no. 84)]. At the hearing on the Amended Motion, Hoopono's counsel noted that some language had been inadvertently omitted from the original stipulation. The omitted language was read into the record and

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In August 2018, the Marine Corps and Ho`opono entered into a sole-source, one-year, bridge contract worth $3,991,901.20. Under the bridge contract, the Ho`opono blind vendor receives a share of the net profits, but is also responsible for a share of any net losses. [Id. at ¶ 5.] The net profits "average up to $9,000 a month." [Id.]

Since June 2018, *i.e.*, since the TRO Order has been in effect, the Marine Corps has issued ten Contractor Discrepancy Reports ("CDRs") and completed two Contractor Performance Assessment Reports ("CPARs") to address concerns regarding the Ho`opono Contractor's "level of staffing, staff turnover, food safety, cleanliness, property accountability, and completion of contractor employee background checks." [Id. at ¶ 2.] The Ho`opono Contractor responded to each CDR in a timely manner. [Id.] Some of the concerns were "rebutted or refuted . . . to the satisfaction of the contracting officer," but, in other instances, the compensation to the Ho`opono Contractor was decreased as a result of the CDR. [Id.] There have been no written notices of performance concerns since April 1, 2019. [Id.]

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confirmed by opposing counsel. This Court instructed Ho`opono to file an amended stipulation. [Trans. of 6/14/19 hrg. on Amended Motion ("6/14/19 Trans."), filed 6/17/19 (dkt. no. 92), at 6-7.]

B. Arbitration Proceedings

On June 29, 2018, the Marine Corps submitted a letter to the United States Department of Education ("US DOE"), designating the Marine Corps' arbitration panel member, but the US DOE has not directed Ho`opono to identify its panel member. Ho`opono is waiting for further direction from the US DOE. [Id. at ¶ 6.] Ho`opono "has not failed to timely respond to any request from the [US DOE] related to this dispute." [Id. at ¶ 11.]

TSG submitted requests to intervene in the arbitration on July 5, 2018 and September 13, 2018, but no action has been taken on those requests. [Id. at ¶ 7.]

On April 29, 2019, the Marine Corps made a formal request to the US DOE that the arbitration panel be convened, and Ho`opono joined in that request on May 20, 2019. However, as of the date of the hearing on the Amended Motion, the Secretary of the US DOE had not convened the arbitration panel. [Id. at ¶¶ 8-10.]

II. Evidence Submitted for the Amended Motion

Virgil Stinnett replaced Mr. Young as Hoopono's licensed blind vendor at MCBH, as of November 1, 2018. [Amended Motion, Decl. of Virgil Stinnett ("Stinnett Decl.") at ¶ 3.] As Hoopono's licensed blind vendor at MCBH, Mr. Stinnett receives approximately $9,000 per month. [Id. at ¶ 14.] If the Ho`opono

Contractor is displaced at MCBH during the pending arbitration, Mr. Stinnett "may never be able to recover from this financial set back," even if Ho`opono ultimately prevails in the arbitration and is reinstated at MCBH. [Id. at ¶ 19.]

TSG "is a service-disabled veteran-owned small business, and a participant in the U.S. Small Business Administration's [("SBA")] 8(a) Program."[5] [TSG Opp., Decl. of

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[5] The United States Supreme Court has stated that the SBA 8(a) Program:

> is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, e.g., 13 CFR §§ 124.303–124.311, 124.403 (1994); 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions . . . , 15 U.S.C. § 637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged . . . pursuant to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR § 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," [13 C.F.R.] § 124.103. The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," [13 C.F.R.] § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in § 124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove
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> (. . . continued)

Robert Severson ("Severson Decl.") at ¶ 3.[6]] Mr. Severson states that, during the transition period with Ho`opono, TSG "incurred project-specific costs of approximately $20,000" for items such as "equipment, uniforms, travel costs, hiring costs, shipping, supplies, administrative, and management payroll costs" ("Start-up Costs").[7] [Id. at ¶¶ 6-7.] The Start-up Costs do not include TSG's "overall overhead costs." [Id. at ¶ 7.] TSG expected to receive $3.5 million in annual revenue under the MCBH contract. [Id. at ¶ 9.] Mr. Severson emphasizes that, because TSG's MCBH contract had a base-year and four option years, TSG "has already lost the opportunity to perform the base year," and it is "at risk of the entire period of performance running out before the [arbitration] is resolved." [Id. at ¶ 10.]

> "economic disadvantage" according to the criteria set forth in [13 C.F.R.] § 124.106(a).

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 207 (1995) (some alterations in Adarand).

[6] Robert Severson is the TSG President and Chief Executive Officer. [Severson Decl. at ¶ 2.] Mr. Severson previously served as a Marine for twenty-seven years. [Id. at ¶ 16.]

[7] Mr. Severson later submitted testimony that the precise amount of the Start-up Costs was $22,221.83. [Decl. of Robert Severson, filed 5/17/19 (dkt. no. 83) ("Suppl. Severson Decl."), at ¶ 10.]

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Mr. Severson acknowledges that, if TSG's MCBH contract is ultimately terminated, TSG "may be able to submit a termination settlement proposal or request for equitable adjustment." [Id. at ¶ 11.a.] However, he argues TSG is being irreparably harmed by the TRO Order because TSG has no means to obtain **immediate** recovery of the Start-up Costs and the costs that it incurred because of the Stop Work Order.[8] [Id.] Further, he asserts "it is unlikely" that TSG will recover all of its Start-up Costs and other costs, such as the costs to prepare the TSG Proposal, even if it submits a termination settlement proposal or a request for equitable adjustment. [Id. at ¶ 11.b.] TSG has also incurred legal fees and other costs in this action, as well as in other proceedings in which TSG has attempted to protect its interest in the MCBH contract. [Suppl. Severson Decl. at ¶ 17.]

In addition, Mr. Severson asserts the TRO Order is causing TSG non-monetary harm, including: depriving TSG of "the opportunity to build upon its strong past performance record by adding a contract with substantial size and scope"; [Severson Decl. at ¶ 13;] and "increase[ing] the risk that TSG will lose

[8] Mr. Severson states the Marine Corps "has advised TSG that it will not consider a request for equitable adjustment under the stop work order until the stop work order is resolved." [Suppl. Severson Decl. at ¶ 16.c.]

(. . . continued)

valuable personnel,"[9] [id. at ¶ 14]. He speculates that, if TSG were performing the MCBH contract, TSG "would be able to leverage it to win more contracts in the future." [Id.]

DISCUSSION

I. Jurisdiction

At the outset, the Marine Corps argues this Court lacks jurisdiction to issue an injunction in this case because Ho`opono has not, and cannot, present an independent claim for judicial relief at this time. RSA arbitration decisions are subject to judicial appeal and review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, as final agency actions. See Sauer v. U.S. Dep't of Educ., 668 F.3d 644, 647 (9th Cir. 2012) (citing 20 U.S.C. § 107d-2(a)). The Marine Corps argues this matter will not be ripe for judicial review until the US DOE arbitration panel issues a final decision.

A district court in the Eastern District of Virginia has addressed the same issue, and its analysis is persuasive. The district court stated:

> the suit for injunctive relief is based on Plaintiffs' independent legal right to arbitrate the Government's alleged failure to comply with the Randolph Sheppard Act. . . . [T]he RSA, provides that:

[9] Mr. Severson later stated that the loss of revenue caused by the TRO Order "left [TSG] with no option but to lay off personnel." [Suppl. Severson Decl. at ¶ 14.]

> Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary **who shall convene a panel to arbitrate the dispute** pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

20 U.S.C. § 107d-1 (emphasis added). Once the Secretary receives any such complaint, the Secretary "shall convene an ad hoc arbitration panel . . . give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of [the APA]" 20 U.S.C. § 107d-2. If the panel finds that an act or practice of an agency or department violates the RSA, then the head of that department is instructed to terminate the act or practice and take "such other action as may be necessary to carry out the decision of the panel." Id.

Plaintiffs have filed a complaint for arbitration with the Department of Education alleging that the Government's decision to exclude Plaintiffs from the competitive range violated the RSA. Plaintiffs are presently performing the contract at Fort Benning. If Plaintiffs had been included in the competitive range, under the RSA Plaintiffs would have received priority to perform the contract at Fort Benning, subject only to limited exceptions. The RSA gives this Court authority to review the arbitration panel's decision as a final agency action under the Administrative Procedure Act. 20 U.S.C. § 107d-2. Therefore, the Court FINDS

> that it has jurisdiction to grant injunctive relief to maintain the status quo of Plaintiffs and Defendant's contractual relationship while their arbitration is pending pursuant to Federal Rule of Civil Procedure 65.

Ga. Vocational Rehab. Agency Bus. Enter. Program v. United States, Civil Action No. 4:18cv148, 2019 WL 279992, at *4 (E.D. Va. Jan. 22, 2019) (emphasis and some alterations in Ga. Vocational). For the same reasons as those set forth in Georgia Vocational, this Court concludes that it has jurisdiction over Hoopono's request in the Amended Motion.

II. Preliminary Injunction

The standards applicable to Hoopono's request for a preliminary injunction are the same as those applied to Hoopono's request for a TRO. See Washington v. Trump, 847 F.3d 1151, 1159 n.3 (9th Cir. 2017) (noting "the legal standards applicable to TROs and preliminary injunctions are substantially identical" (citation and internal quotation marks omitted)). Thus, the applicable standards are set forth in the TRO Order, 2018 WL 2187977, at *5, and will not be repeated here. Further, because the same standards apply, the evidence presented in connection with the TRO Motion will be considered in ruling on the Amended Motion. See also Stipulated Facts at ¶ 4 ("The parties further stipulate that all of the documents and evidence presented at the hearing granting the TRO in this case, are all

also stipulated into evidence and to be considered for the hearing on the [preliminary injunction].").

A. Likelihood of Success

Ultimately, the issue of whether the Marine Corps violated the RSA in awarding the MCBH contract to TSG is for the US DOE arbitration panel to decide. See 20 U.S.C. §§ 107d-1(b), 107d-2(a), 107d-2(b)(2). However, in reviewing the Amended Motion, this Court must determine whether Ho`opono is likely to succeed on the merits in the arbitration. See, e.g., Kansas v. United States, 171 F. Supp. 3d 1145, 1158 (D. Kan. 2016), *aff'd in part sub nom.*, Kansas ex rel. Kan. Dep't for Children & Families v. SourceAmerica, 874 F.3d 1226 (10th Cir. 2017).[10]

As noted in the TRO Order, the Ho`opono Proposal was not included in the competitive range because it received unacceptable ratings for its food services operations plan and staffing and transition plan. 2018 WL 2187977, at *3. Hoopono's position is that the Ho`opono Proposal should have been included in the competitive range because the proposal included the staffing levels that the Ho`opono Contractor had

[10] Because the SLA had prevailed in the RSA arbitration by the time the appeal was decided, the Tenth Circuit declined to address the issue of whether the district court erred in granting the SLA a preliminary injunction during the pendency of the arbitration. Kansas, 874 F.3d at 1236 n.3.

been providing under the original contract, including its option periods, plus the increases required by Amendment 1. See id.

The RSA's implementing regulations provide:

> (a) Each department, agency, or instrumentality of the United States in control of the maintenance, operation, and protection of Federal property shall take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on all Federal property **Provided** that the location or operation of such facility or facilities would not adversely affect the interests of the United States. Blind persons licensed by State licensing agencies shall be given priority in the operation of vending facilities on any Federal property.
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> (b) Any limitation on the location or operation of a vending facility for blind vendors by a department, agency or instrumentality of the United States based on a finding that such location or operation or type of location or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary who shall determine whether such limitation is warranted. A determination made by the Secretary concerning such limitation shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination in the Federal Register along with supporting documents directly relating to the determination.

34 C.F.R. § 395.30(a)-(b) (emphasis in original). At the hearing on the TRO Motion, Eileen Keating Carnaggio[11] testified

[11] Ms. Carnaggio, a civilian employee of the Marine Corps, was the contracting officer who handled Solicitation and the (. . . continued)

that she was not aware of any written findings that the terms in the Solicitation's Performance Work Statement ("PWS") were necessary to avoid an adverse effect on the United States' interests. [Trans. of 5/9/18 hrg. on TRO Motion ("5/9/18 Trans."), 5/17/18 (dkt. no. 35), at 31-32.] In fact, it appeared that Ms. Carnaggio was not aware of the requirements of § 395.30(a) and (b). During her cross-examination by Hoopono's counsel, Ms. Carnaggio testified:

> Q Did you make a written finding that the PWS and its limits were necessary so that the interests of the United States would not be adversely affected?
>
> A I'm not aware of a document like that. It's like a DNF?[12]
>
> . . . .
>
> Q And you did not send anything to the Secretary of Education indicating that the limits in the PWS were necessary in order to not adversely affect the interests of the United States, correct?
>
> A I – I – I'm really kind of confused by the question. I don't really understand it.
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> . . . .

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evaluation and award of the contract referenced therein. [Marine Corps' Exhibit List, filed 4/25/18 (dkt. no. 17), Exh. O (Decl. of Eileen Keating Carnaggio ("Carnaggio Decl.")) at ¶¶ 1, 3.]

[12] This appears to refer to a Determination and Findings, also referred to as a "D&F." See Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 1.701.

> THE WITNESS: We wrote that PWS in the manner to improve the services on the Marine Corps Base, to improve the mess hall services. We weren't trying to make it difficult for anybody to propose or we weren't trying to make any kind of limitations of anybody. We were just trying to write it in a way that we could provide good services to the Marines. So **I just don't really understand this limitation thing that you're referring to.** I don't – I don't understand it. Sorry.

[5/9/18 Trans. at 31-33 (emphasis added).] Based on Ms. Carnaggio's testimony, it is clear that, if § 395.30(a) and (b) applied to the PWS in the Solicitation, as amended, the Marine Corps failed to comply with the requirements in those sections. The Marine Corps' position is that the PWS in the Solicitation, as amended, only contained the terms that were necessary to achieve the desired quality of dining services at MCBH. In the Marine Corps' view, those terms were not limitations, and therefore it was not required to consult the US DOE Secretary to determine whether a limitation was warranted to avoid an adverse effect on the United States' interests.

However, the evidence presented in connection with the TRO Motion shows that the "terms" of the PWS in the Solicitation, as amended, effectively excluded Ho`opono from eligibility for the MCBH contract. See, e.g., 5/9/18 Trans. at 28-29 (Ms. Carnaggio's testimony about the staffing requirements in the PWS); Mem. in supp. of 4/3/18 Motion, Exh. 9-1 (Amendment 1) at 17, § 2.6.1 (Staffing Requirements). Thus, in

the US DOE arbitration, Ho`opono is likely to succeed on the merits of the following issues: 1) the terms of the PWS were limitations that required a written justification to the US DOE Secretary, and a determination by the secretary that the limitations were warranted; 2) the Marine Corps failed to comply with those requirements; and 3) the bidding process for the Solicitation therefore violated the RSA.[13] The first requirement for a preliminary injunction – likelihood of success on the merits – is satisfied. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (listing requirements).

B. Irreparable Harm

In the TRO Order, it was determined that,

> even if Ho`opono prevails in the arbitration, the Marine Corps' sovereign immunity would preclude Ho`opono from recovering any monetary damages from the Marine Corps. Because of the inability to recover monetary losses incurred while the arbitration is pending, the imminent economic injury Ho`opono and Mr. Young face would be irreparable. Thus, the irreparable harm factor weighs in favor of granting the TRO.

2018 WL 2187977, at *8. There have been no changes in the material circumstances of this case since the entry of the TRO

[13] Ho`opono contests other aspects of the bidding and award process for the Solicitation. However, for purposes of the Amended Motion, it is sufficient that Ho`opono is likely to succeed on the merits of the issue of § 395.30(b) compliance. It is not necessary to address whether Ho`opono is likely to succeed on the merits of all of the issues in the arbitration.

Order. Hoopono's replacement of Mr. Young with Mr. Stinnett as its licensed blind vendor for the MCBH food services operations does not change the irreparable harm analysis. It is the State of Hawai`i Department of Human Services, through Ho`opono, that enters into contracts with the Marine Corps, not the individual blind vendors. See, e.g., Carnaggio Decl. at ¶ 4 ("The incumbent contractor is the State of Hawaii's Department of Human Services, Ho`opono Services for the Blind Branch."). There has been no evidence that Ho`opono violated the current MCBH bridge contract by replacing Mr. Young with Mr. Stinnett, another licensed blind vendor. This Court therefore rejects TSG's argument that Ho`opono has failed to maintain the status quo that was preserved in the TRO Order.

The evidence presented in connection with the TRO Motion establishes that both Ho`opono and the licensed blind vendor assigned to MCBH would face irreparable harm unless the status quo is maintained. For example, Lea Dias[14] testified that the loss of the MCBH contract "would be a huge loss of opportunity for the blind vending program" because "[i]t would be a loss of income for" the blind vendor "[a]nd it would be a

[14] Ms. Dias is Hoopono's Branch Administrator, and has been in that position since 2009. [Mem. in supp. of 4/3/18 Motion, Exh. 2 (Decl. of Lea Dias ("Dias Decl.")) at ¶¶ 2, 6.] She was Hoopono's contact person for its original MCBH contract. [Id. at ¶ 27.]

lost opportunity and minimizing the intent of the Randolph-Sheppard Act." [5/9/18 Trans. at 45-46.] Ms. Dias testified that every blind vending contract is important to Ho`opono because the federal blind vending program is "the most successful program for employment for blind people in the history of the United States. It maximizes opportunities for blind individuals to become self-sufficient and to become entrepreneurs, to be tax-paying citizens, to live the American dream." [Id. at 48.]

Mr. Stinnett receives substantial income from the MCBH contract,[15] and the loss of that income would cause him irreparable harm because the Marine Corps' sovereign immunity would preclude him from recovering money damages from the Marine Corps if Ho`opono prevails in the arbitration. See Stinnett Decl. at ¶¶ 14, 19; TRO Order, 2018 WL 2187977, at *7 (discussing sovereign immunity (some citations omitted) (citing Sauer v. U.S. Dep't of Educ., 668 F.3d 644, 647 (9th Cir. 2012); 5 U.S.C. § 702; Premo v. Martin, 119 F.3d 764, 771 (9th Cir.

[15] Mr. Stinnett's income from the blind vending facility that he was assigned to prior to MCBH was greater than his anticipated income from the MCBH operation. See Stinnett Decl. at ¶¶ 13-14. However, that fact is irrelevant to the irreparable harm analysis because his anticipated income from the MCBH operation is significant, and there has been no evidence suggesting that the transfer of Mr. Stinnett to Hoopono's MCBH operation was improper.

1997))). Thus, Ho`opono and Mr. Stinnett are likely to suffer irreparable harm in the absence of a preliminary injunction. The second Winter requirement also weighs in favor of granting the Amended Motion.

C. Balancing of the Equities

The third Winter requirement – that the equities weigh in the plaintiff's favor – involves weighing the possible harm that would be caused by a preliminary injunction against the possible harm that would be caused by not issuing a preliminary injunction. See TRO Order, 2018 WL 2187977, at *8 (quoting Univ. of Hawai`i Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1108 (9th Cir. 1999)).

In granting the TRO Motion, it was found that any injury the Marine Corps would suffer if a TRO was granted was outweighed by the injury that Ho`opono and its blind vendor would suffer if a TRO was not issued. Id. at *9. The Marine Corps has not presented any evidence in connection with the Amended Motion that would alter this analysis. Although there is evidence of some concerns with the Ho`opono Contractor's performance at MCBH since the issuance of the TRO Order, all of those concerns have been resolved, and there have been no concerns raised since April 1, 2019. [Stipulated Facts at ¶ 2.] Further, there has been no evidence suggesting that the concerns which were raised prior to April 1, 2019 were of such a serious

nature that they should alter this Court's balancing of the equities in this matter. Therefore any injury the Marine Corps would suffer if a preliminary injunction is granted is outweighed by the injury that Ho`opono and its blind vendor would suffer if a preliminary injunction is not issued.

In the TRO Order, the possible harm that a TRO would cause TSG was considered, and the possible harm to TSG was found to be primarily economic and outweighed by the possible harm to Ho`opono if a TRO was not entered. See 2018 WL 2187977, at *8-9. However, at that time, "[t]here [wa]s no evidence about the severity of [TSG]'s economic injury if a TRO [wa]s granted." Id. at *9. Evidence about the possible economic and non-economic harm to TSG is now before this Court.

The losses TSG has incurred because of the TRO Order and the Stop Work Order are regrettable and, without a doubt, painful to TSG. However, TSG has remedies at law, which are mandated by the FARs.

> (a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of

work stoppage. Within a period of 90 days after a stop-work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either—

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. **The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing**, accordingly, if—

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon a proposal submitted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, **the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement**.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, **the Contracting Officer shall allow, by**

> **equitable adjustment or otherwise, reasonable costs resulting from the stop-work order**.

48 C.F.R. § 52.242-15 (emphases added). Mr. Severson emphasizes that neither an equitable adjustment nor a termination settlement is immediately available, and he asserts that neither will compensate TSG for all of the costs TSG has incurred. Even accepting these representations, the monetary harm that TSG would suffer if a preliminary injunction is entered is outweighed by the monetary harm that Ho`opono and its blind vendor would suffer if a preliminary injunction is not entered. Hoopono's potential monetary harm is more severe because, even if Ho`opono prevails in the US DOE arbitration, Ho`opono has no remedy at law if it is displaced from the MCBH food services operation while the arbitration is pending.

TSG also asserts it is suffering non-monetary impacts because of the TRO Order, and it will continue to suffer such impacts if a preliminary injunction is entered. As to TSG's position that it is being deprived of the opportunity to build its performance record, Mr. Severson himself admits TSG already has a "robust past performance record." [Severson Decl. at ¶ 13.] "TSG has performed four contracts for dining services within the last five years, with an average contract value of $1.9 million per year." [Suppl. Severson Decl. at ¶ 22.] Further, since it was initially awarded the MCBH contract, TSG

submitted six other contract proposals. [Id. at ¶ 23.] Thus, TSG's inability to build its performance record by operating the MCBH food service facilities cannot be found to be a substantial harm. Mr. Severson also testified that, if TSG were performing the MCBH contract, TSG would be able to use that experience to obtain more high-value contracts. [Id. at ¶ 22.] No evidence has been submitted to support this position, nor has evidence been submitted that its non-performance of the MCBH contract precluded it from obtaining any other contract. Finally, TSG's loss of personnel is regrettable, but that loss is comparable to the loss of personnel that the Ho`opono Contractor would experience if a preliminary injunction is not entered. Thus, the non-monetary harm that TSG would suffer if a preliminary injunction is entered does not outweigh the non-monetary harm that Ho`opono and the Ho`opono Contractor would suffer if preliminary injunction is not entered.

Having considered all of the potential harms that are likely to result if a preliminary injunction is entered and all of the potential harms that are likely to result if one is not entered, it is clear that the third Winter requirement weighs in favor of entering a preliminary injunction.

D. Public Interest

The analysis of the fourth Winter requirement – that the public interest weigh in the plaintiff's favor – set forth

in the TRO Order also applies to Hoopono's request for a preliminary injunction. See 2018 WL 2187977, at *9. However, the record now includes evidence regarding the public's interest in seeing the MCBH Contract awarded to TSG, a participant in the SBA 8(a) Program. The purposes of the SBA 8(a) Program are laudable, and the public has an interest in seeing government contracts awarded to qualifying small businesses. However, the Solicitation states:

> The Randolph Sheppard Act vendor (a State Licensing Agency) will be afforded priority for award of the contract. Therefore, if a State Licensing Agency submits a proposal that is among the most highly rated proposals with a fair and reasonable price and if it is judged to have a reasonable chance of being selected for award as determined by the contracting officer after applying the evaluation criteria contained in the solicitation and completeing [sic] any required consultation with the U.S. Department of Education, the State Licensing Agency will receive the contract award.

[Mem. in supp. of 4/3/18 Motion, Exh. 9 (Solicitation) at 101 of 103, ¶ 2 (citations omitted).] Thus, by its own terms, the Solicitation placed the RSA priority above the SBA 8(a) Program set-aside. Hoopono's position in this case is that the Marine Corps violated the RSA at multiple stages of the solicitation and award process and, had the Marine Corps complied with the RSA, the MCBH contract would have been awarded to Ho`opono, not to the SBA 8(a) Program participant. It is because Congress has expressly stated that the RSA vendor will have priority – and

not because TSG is unworthy of being awarded the MCBH contract – that is the basis for granting the preliminary injunction.

Issuing a preliminary injunction would further the RSA's purposes by preserving the status quo until the arbitration panel determines whether the Marine Corps violated the RSA. Preserving the status quo is appropriate because Ho`opono has established that it is likely to succeed on the merits of at least one of the issues in the arbitration. The fourth Winter requirement therefore weighs in favor of granting the Amended Motion.

E. Summary

Because Ho`opono has established all of the requirements in the Winter analysis, a preliminary injunction is warranted in this case. Hoopono's Amended Motion is GRANTED, and the Marine Corps is ORDERED to maintain Ho`opono as the food services vendor at MCBH by maintaining the current bridge contract and/or entering into similar contracts. The Marine Corps must maintain Ho`opono as the food services vendor at MCBH, and the Marine Corps is prohibited from putting the MCBH contract with TSG into effect, until there is a final decision in the pending arbitration before the US DOE or until the injunction is lifted.

CONCLUSION

On the basis of the foregoing, Hoopono's amended motion for a preliminary injunction, filed March 8, 2019, is HEREBY GRANTED. The Order Granting Plaintiff's Motion for Temporary Restraining Order, filed May 11, 2018, is HEREBY DISSOVLED, and this Court HEREBY ISSUES a preliminary injunction, according to the terms set forth in this Order.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAI`I, August 21, 2019.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge