



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of:)	PDH-2016-004
)	
HENSEL PHELPS CONSTRUCTION)	HEARINGS OFFICER'S
CO.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
vs.)	
)	
DEPARTMENT OF)	
TRANSPORTATION, STATE)	
OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
NAN, INC.,)	
)	
Intervenor.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On or about September 6, 2016, Hensel Phelps Construction Co., (“Petitioner”), filed a request for administrative review to contest Respondent Department of Transportation, State of Hawaii’s (“Respondent”) denial of Petitioner’s protest in connection with a project designated as the KOA Terminal Modernization Program Phase 1 at Kona International Airport at Keahole, Kailua-Kona, Hawaii, Project

No. AH2045-16 (“Project”). The matter was thereafter set for hearing on September 20, 2016 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On or about September 13, 2016, the parties entered into a stipulation allowing Nan, Inc. (“Intervenor”) to intervene in this proceeding.

On September 15, 2016, Petitioner and Respondent filed cross-motions for summary judgment. On the same date, Intervenor filed a motion to dismiss, or in the alternative, for summary judgment. On September 19, 2016, Petitioner filed its memorandum in opposition to the motions filed by Respondent and Intervenor, and Respondent and Intervenor filed their respective memoranda in opposition to Petitioner’s motion.

The motions came on for hearing before the undersigned Hearings Officer on September 20, 2016 in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D; Erik D. Eike, Esq. appearing for Petitioner; Laura Y. Kim, Esq. appearing for Respondent and Trevor N. Tamashiro, Esq. appearing for Intervenor.

Having heard the argument of counsel, and having considered the motions, along with the declarations and exhibits attached thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision granting Respondent’s motion for summary judgment and Intervenor’s motion to dismiss, and denying Petitioner’s motion for summary judgment.

II. FINDINGS OF FACT

1. On or about April 27, 2016, Respondent issued a Notice to Bidders seeking bids for the Project. The Notice to Bidders was issued along with General, Technical and Special Provisions, Specifications, Proposal for the Project, Proposal Schedule and Bond forms (“Solicitation”).

2. The Project generally involved “construction of a Centralized Security Screening Checkpoint building, a baggage makeup building with TSA baggage screening

equipment, two concession and restroom buildings, two covered bag drop areas with USDA agricultural screening equipment and related site work including but not limited to, the following: site improvements, demolition of the Onizuka Space Center building, Baggage Handling System (BHS), ramp offices, ramp markings and lighting, CCTV, PA/FIDS coordination, mechanical, and electrical systems, and associated work.

3. Under Special Provision II.B.1 of the Solicitation, subcontractors were required to be properly licensed at the time of bid submission if no federal funds were involved, but not until the time of the start of the subcontracted work if federal funds were involved:

If a contractor's license is required by law for the performance of the work which is called for in this bid, the bidder and all subcontractors must have the required license before the submission of the bidder's proposal in the case of a non-federal aid project, and for federal-aid projects, the bidder must have the required license prior to the award of the project and all subcontractors prior to the start of the subcontracted work.

4. Page P-5 of the Proposal in the Solicitation required bidders to certify their bid prices as checked, correct and final ("Declaration") and provided in part:

The undersigned hereby certifies that the bid prices contained in the attached proposal schedule have been carefully checked and are submitted as correct and final.

This declaration is made with the understanding that the undersigned is subject to the penalty of perjury under the laws of the United States and is in violation of the Hawaii Penal Code, Section 710-1063, unsworn falsification to authorities, of the Hawaii Revised Statutes, for knowingly rendering a false declaration.

* * * *

5. Article II, Section 2.7 of the General Provisions of the Solicitation provided in relevant part:

2.7 Preparation of Proposal – The bidder shall submit his proposal on the forms furnished by the Department or a facsimile thereof. The bidder shall specify unit prices in words or figures, or both as required, for each pay item. He shall also show the products of the respective unit prices and quantities written in figures in the column provided for that purpose and the total amount of the proposal obtained by adding the amount of the several items. All the words and figures shall be in ink or typed. In case of a discrepancy between the prices written in words and those written in figures, when both are required, the prices written in words shall govern.

* * * *

The bidder's proposal must be signed in ink by the person or persons legally authorized to submit a proposal on behalf of the bidder.

* * * *

6. On May 13, 2016, Respondent issued Addendum No. 1 to the Solicitation incorporating the minutes of the Pre-Bid Meeting held on May 11, 2016.

7. On May 27, 2016, Respondent issued Addendum No. 2 to the Solicitation which provided certain specification and drawing revisions and responded to written questions. Addendum No. 2 also postponed the bid opening from June 2, 2016 to June 9, 2016 at 2:00 p.m.

8. On May 27, 2016, Respondent issued Addendum No. 3 to the Solicitation which provided additional specification and drawing revisions, a revised Proposal Schedule, and responses to written questions. Question No. 94 on page 27 of the addendum asked: "Please confirm if this project is federally funded in any way. If so that would make a difference on licensing requirements for subcontractors based on the Article II – Proposal Requirement and Conditions in the Special Provisions." In response, Respondent advised all bidders that "[t]his project is federally funded."

9. Relying on the information in Addendum No. 3, Petitioner selected subcontractors which it determined could be licensed by the time of the start of the work if not already licensed.

10. On June 9, 2016, Respondent issued Addendum No. 4 to the Solicitation rescheduling the bid opening from June 9, 2016 to June 16, 2016 at 2:00 p.m.

11. On June 14, 2016, two days before the scheduled bid opening, Respondent issued Addendum No. 5 to the Solicitation which provided additional changes, including a revised Proposal Schedule to be completed by bidders, and responses to written questions.

12. The Proposal Schedule provided with Addendum No. 5 required bidders to list their bid prices for the various items involved in the work required by the Solicitation.

13. Question 2 in Addendum No. 5 asked, "Please advise if this is a federal-aid project." In response, Respondent instructed bidders: "This is not a federal-aid project. See Article II – Proposal Requirements and Conditions in the Special Provision for subcontractors licensing requirements in non-federal aid project." Question 3 in the addendum asked, "Please confirm if this project is federally funded in any way. If so that would make a difference on licensing requirements for subcontractors based on the Article II-Proposal Requirements and Conditions in the Special Provisions". In response, Respondent stated, "This project is not federally funded."

14. Before submitting its bid on June 16, 2016, Petitioner checked the website maintained by the Professional and Vocational Licensing Division of the Department of Commerce and Consumer Affairs, State of Hawaii, "Professional & Vocational Licensing Search" ("DCCA Website"), to determine whether its subcontractors were properly licensed.

15. The DCCA Website indicated that the contractor's license for one of the subcontractors Petitioner had intended to use on the Project, Big Island Air Conditioning Inc. ("BIAC"), had been "AUTOMATICALLY FORFEITED DUE TO

INSURANCE LOSS (60 days to restore)”. According to the website, BIAC’s license had been automatically forfeited because BIAC’s general liability insurance had been cancelled on September 26, 2015. Based on this information, Petitioner determined that it was unable to utilize BIAC for the Project as BIAC would not be properly licensed at the time of bid submission. Instead, Petitioner named another, licensed subcontractor in its bid.

16. Along with the information concerning BIAC’s license status, the DCCA Website contained the following disclaimer:

License information on this site reflects information in the Professional and Vocational Licensing Division as of June 16, 2016; however, applications and forms are subject to standard processing time, and the information here does not reflect pending changes which are being reviewed. The site is updated daily, Monday through Friday, except holidays.

The State of Hawaii makes no guarantee as to the accuracy of the information accessed, the timeliness of the delivery of transactions, delivery to the correct party, preservation of the privacy and security of users and makes no warranties, including warranty of merchantability and fitness for a particular purpose. The DCCA/PVL web site receives the DCCA/PVL licensee information directly from the DCCA/PVL licensee database. The DCCA/PVL web site is considered a primary source for DCCA/PVL licensee information – it is the same licensee information the DCCA/PVL provides through other means and is true and correct to the best of our knowledge. User is advised that if the information obtained herein is to be reasonably relied upon, user should confirm the accuracy of such information with the provider thereof.

17. On June 16, 2016, the bids were opened. Intervenor was the apparent low bidder having submitted a bid of \$69,014,200.00. Petitioner was the second lowest bidder with a bid price of \$69,406,000.00.

18. Intervenor’s bid listed BIAC as its subcontractor for the “HVAC” work.

19. As of June 16, 2016, the DCCA Website indicated that the contractor's license for BIAC had been "AUTOMATICALLY FORFEITED DUE TO INSURANCE LOSS (60 days to restore)".

20. As a part of its bid, Intervenor completed and submitted the new Proposal Schedule that had been issued with Addendum No. 5. Intervenor also included in its bid, the Declaration signed by its president and dated June 9, 2016, a Surety Bid Bond, and written acknowledgment of its receipt of the 5 addenda issued by Respondent.

21. By letter dated June 23, 2016, Petitioner protested the awarding of the contract to Intervenor:

Upon review of the submitted proposals for the KOA Terminal Modernization Program Phase 1 project (State Project No. AH2045-16), it has been discovered that the proposal submitted by [Intervenor] contained several irregularities which are sufficient grounds for disqualification. The following irregularities have been identified:

1.) [Intervenor] listed Big Island Air Conditioning Inc. (CT-31753) to perform HVAC work. At the time of bid, Big Island Air Conditioning's contractor license was forfeited due to non-compliance with rules and regulations of the contractor's license board, and it remains forfeited as of today. Additionally, Bid Island Air Conditioning does not have a principal RME with an active license which renders their license terminated. By utilizing unlicensed subcontractors, [Intervenor] has an unfair advantage over other Offerors who utilized only properly licensed subcontractors pursuant to State law.

2.) [Intervenor] included a price for bid item 01560 Environmental Controls which is unbalanced and out of proportion for other items in the proposal. Section 2.8 (5) of the General Provision strictly prohibits a bidder from submitting unbalanced proposals so as to prevent such things as front end loading a proposal.

3.) [Intervenor] did not submit a current declaration certifying that the bid prices contained in their proposal

schedule had been carefully checked and submitted as correct and final. The declaration included with the proposal was dated June 9, 2016. Since the Proposal was submitted on June 16, 2016 it would have been impossible for [Intervenor] to declare on June 9th that all bid prices were carefully checked and submitted as correct and final. We believe this renders a false declaration.

* * * *

22. On or about July 24, 2015, the DCCA received BIAC's liability and workers compensation insurance certificate policy number TLA9718587-03, effective September 26, 2015 to September 26, 2016. On May 16, 2016, the DCCA received a Notice of Policy Termination for policy number TLA9718587-03, policy period September 26, 2015 to September 26, 2016. On June 24, 2016, the DCCA received BIAC's certificate of liability insurance policy number CPX7050648-00, effective September 26, 2015 to September 26, 2016. The policy had been issued by First Insurance Company of Hawaii, Ltd. in September 2015.

23. On July 13, 2016, Tammy Lee, a representative of Respondent, was informed by Candace Ito from the Department of Commerce and Consumer Affairs ("DCCA"), Professional Licensing and Vocational Division ("PVL"), that the DCCA received BIAC's proof of continuous insurance with no gap in coverage. As a result, Ito informed Lee that BIAC's license was continuously valid with no breaks.

24. There was no indication in the record that the DCCA had assessed any fee or imposed any condition on BIAC in order to have its license restored, or issued any notification of license forfeiture to BIAC as a result of a failure by the licensee to maintain the required insurance policies.

25. By letter dated August 31, 2016 to Petitioner, Respondent denied the protest:

The Hawaii Department of Transportation (DOT) has reviewed your concerns regarding apparent low bidder [Intervenor's] bid proposal in your letter dated June 23, 2016 for the subject Project. For the reasons stated below,

the DOT denies the grounds for your letter, which DOT will treat as a bid protest. The DOT intends to award this contract to [Intervenor], the lowest responsive, responsible bidder.

Big Island Air Conditioning

The DOT has verified with the Hawaii Department of Commerce and Consumer Affairs (DCCA) Contractors License Board, Professional and Vocational Licensing Division (PVL) that at the time of the June 16, 2016 bid opening date, [Intervenor's] listed subcontractor, Big Island Air Conditioning, Inc.'s license status on the DCCA's Professional & Vocational Licensing Search website indicated it as forfeited. However, the DCCA PVL stated that Big Island Air Conditioning, Inc. submitted proof of continuous insurance and bond coverages, on or about June 24, 2016, and therefore, Big Island Air Conditioning, Inc.'s license was restored by the DCCA's PVL in accordance with Hawaii Revised Statutes, (HRS) 444-11.1(c), "[t]he board shall not restore the forfeited license until satisfactory proof of continuous insurance and bond coverages is submitted to the board as required by this section."

Bid Island Air Conditioning, Inc.'s Responsible Managing Employee (RME) is listed with License No. CT-32200, and is Current, Valid & in Good Standing with the effective date of 5/7/2012.

Therefore, the DOT determines that [Intervenor's] listed subcontractor, Bid Island Air Conditioning, Inc. is properly licensed.

Environmental Controls

[Intervenor] listed a Lump Sum Price of \$1,176,300.00 for Item No. 01560, Environmental Controls. This scope of work is spread out for the duration of the project with a percentage to be billed for each monthly payment application. The Specification Section 01560 states that the scope for the Environmental Control for this project contains the performance of air pollution, water pollution, noise control, disposal of construction waste, and HAZMAT control activities for the extent of the project.

The DOT therefore determines that [Intervenor's] proposal price for the Environmental Controls scope of work is not unbalanced nor out of proportion for other items in the proposal.

* * * *

Proposal Bid Prices Declaration

Your letter indicates that because [Intervenor's] bid proposal declaration certifying that the bid prices contained in its proposal schedule have been carefully checked and are submitted as correct and final was dated June 9, 2016 and the bid opening date was June 16, 2016, that you, "believe this renders a false declaration." The DOT denies your claim. However, and without waiving any of DOT's denial to your argument, the DOT responds as follows:

* * * *

[Intervenor's] declaration dated June 9, 2016 does not conclusively show that there was an intent to mislead the DOT. Addendum No. 5, was issued on June 14, 2016. It revised pages P-11 – P-23 of the Project Proposal Schedule. [Intervenor's] bid proposal was submitted on pages P-11 – P-23 of the Proposal Schedule that was issued by Addendum No. 5. The Specification requires a declaration be made and that a false declaration is subject to the penalty of perjury. Since [Intervenor's] bid proposal was submitted using the current and proper proposal schedule, the presumption appears to show that the bid proposal amounts were listed after June 9, 2016 and that by signing, the prices were carefully checked and were submitted as correct and final on the bid opening date of June 16, 2016. Hensel Phelps provides no substantive evidence to the contrary. Therefore, based on the forgoing the DOT determines that [Intervenor's] bid submittal dated June 9, 2016 did not include a false declaration.

* * * *

26. On September 6, 2016, Petitioner filed the instant request for administrative review.

27. Petitioner's request for administrative review raised the following claims and issues:

- A. The State improperly failed to reject or disqualify the bid proposal of [Intervenor] as non-responsive for failing to comply with the express terms of the Solicitation as amended and applicable law regarding subcontractor listing and licensing requirements. Failure to list properly licensed subcontractors as of the time of bid submission is a matter of responsiveness that must be measured as of the time of bid opening.
- B. The State improperly failed to reject or disqualify the bid proposal of [Intervenor] as non-responsive for failing to submit a valid Declaration verifying its submitted Proposal Schedule.
- C. The State improperly failed to enforce its published instructions and directives regarding subcontractor licensing thereby giving [Intervenor] an improper unfair advantage; and alternatively, the State improperly falsely induced HP to increase its bid price pursuant to the State's published instructions when the State now reveals it did not intend to enforce those directives. Without such false inducement, HP's bid price would have been at least \$3 million less than that submitted by [Intervenor].

III. CONCLUSIONS OF LAW

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

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§ 103D-310, 103D-701 or 103D-702. The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate.

Petitioner seeks a determination that Intervenor's bid was unresponsive to the Solicitation because Intervenor failed to submit a properly dated Declaration with its bid. According to Petitioner, Intervenor's Declaration, which was dated June 9, 2016, was submitted to verify prices on a form that was not created and issued until June 14, 2016. As such, Petitioner argues that the Declaration was "false on its face as the proposal forms and pricing placed on them did not even exist at the time of the Declaration." Additionally, Petitioner alleges that Intervenor's bid is unresponsive because Intervenor listed a subcontractor, BIAC, who was not properly licensed at the time the bids were due.¹

INTERVENOR'S DECLARATION

The Declaration was obviously aimed at minimizing or avoiding any delays in the procurement process by ensuring that the prices listed in the bids were the prices intended by the bidders and that bidders were committed to those prices. Notwithstanding the Declaration, however, HRS §103D-302(g), already severely limits the bidder's ability to correct or withdrawal an inadvertently erroneous bid and prohibits any changes in bid prices and other provisions after bids are opened if the changes are deemed prejudicial to the public's interest or to fair competition. Intervenor was undoubtedly bound to its bid once submitted and committed to entering into the contract contemplated by the Solicitation if it received the award. Moreover, the undisputed evidence made clear that Intervenor intended to commit itself to the prices it submitted in the revised Proposal Schedule: There is no dispute that Intervenor's signed Declaration was submitted with its bid that also included a surety bid bond which ensured that Intervenor would enter into and perform the contract if it received the award. The bid also included the completed Proposal Schedule that had been revised and issued by Addendum No. 5, and Intervenor's written acknowledgement of its receipt of Addendum No. 5 as well as the other 4 addenda. The Declaration, regardless of when it was dated, merely added another layer of assurance of the bidder's commitment.

Bid responsiveness refers to the question of whether a bidder has promised in the precise manner requested by the government with respect to price,

¹ Petitioner acknowledges that these are the claims upon which this appeal is based.

quality, quantity, and delivery. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999); Environmental Recycling vs. County of Hawaii, PCH 98-1 (July 2, 1998); Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000); Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008)*. Based on the uncontroverted evidence presented here, the Hearings Officer concludes that the dating of the Declaration for June 9, 2016 did not affect any material term of the Solicitation and, therefore, did not render Intervenor's bid unresponsive to the Solicitation².

BIAC'S LICENSE

Intervenor and Respondent argue that if the Hearings Officer rejects Petitioner's claim that the Declaration rendered Intervenor's bid nonresponsive, he no longer has jurisdiction over Petitioner's remaining claim that BIAC was not properly licensed on June 16, 2016. According to Intervenor and Respondent, the Hearings Officer loses jurisdiction because at that point, Petitioner's protest would no longer concern a matter at least 10% of the estimated value of the contract involved here. HRS §103D-709(d) provides in relevant part:

* * * *

Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

* * * *

(2) For contracts with an estimated value of \$1,000,000.00 or more, the protest concerns a matter that is equal to no less than ten percent of the estimated value of the contract.

* * * *

² As Intervenor correctly points out, the Solicitation requires that the Declaration be signed in ink. On the other hand, the Solicitation does not contain any requirement regarding the specific date of the Declaration.

In *Nan, Inc. v. Honolulu Authority for Rapid Transportation, et al.*, PDH-2015-004 (May 2015), the Hearings Officer held that when there are multiple claims that, in the aggregate, exceed the jurisdictional amount, and one or more of those claims are without merit such that the remaining undecided claims are below the jurisdictional amount, there is no longer jurisdiction to consider the remaining undecided claims. There, the Hearings Officer explained:

This result follows from the legislative intent behind the 2012 amendments to the Procurement Code. A major purpose of the amendments was to reduce the number of protests concerned with amounts that were too small, in the Legislature's opinion, to be considered. It was not that the issues involved in smaller protests were being ignored or condoned. It was the Legislature's decision, however, that issues involved in smaller protests must be resolved in some manner outside of the procurement process and should not hold up administration of the particular project in question.

The present case provides a good example of why this legislative intent should be put into effect as stated above. While the two large claims here added up to a "major" claim exceeding the jurisdictional minimum, as it turned out at least one of the claims was meritless. The remaining claim is no longer, in itself, a "major" claim that meets the jurisdictional minimum amount. The bid protest process is not designed to be an academic exercise in considering all claims-it is designed to provide a practical means of evaluating "major" claims that, if proven, lead in this instance to the disqualification of a low bidder. Since Nan is no longer bringing a "major" claim, its protest should not be allowed to lead to the disqualification of the low bidder solely on account of a claim that is below the jurisdictional amount and would be dismissed for lack of jurisdiction if it had been the only claim raised in Nan's RFAH.

* * * *

Because the estimated value of the contract in this case was \$69,014,200.00³, Petitioner must show that its protest based upon the status of BIAC's

³ Under HRS §103D-709(j), "estimated value of the contract" is defined as "the lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable."

license concerned a matter at least 10% of the estimated value of the contract or \$6,901,420.00. Here, the undisputed evidence indicated that BIAC submitted a proposal to Intervenor for the HVAC work in the amount of \$1,575,000.00. No other evidence was proffered to show a higher value for the HVAC work required on the Project.

Petitioner nevertheless argues that HRS §103D-709(d) must be construed broadly and that its claim that Intervenor's bid is nonresponsive "goes to 100% of Nan's proposal." Under Petitioner's theory, a protestor would be able to seek administrative review of a claim that the low bid was nonresponsive even if that claim was based on a very small portion of the work required under a solicitation⁴. This interpretation and application of HRS §103D-709(d) is contrary to the statute's underlying intent and would render HRS §103D-709(d) virtually meaningless. As the Hearings Officer in *Nan, Inc. v. HART, supra*, recognized, §103D-709(d) was designed to streamline the procurement resolution process by precluding administrative review of certain, "smaller protests" in order to expedite the government's procurement of goods and services⁵.

Petitioner also argues that the 10% jurisdictional minimum of HRS §103D-709(d) is inconsistent with HRS §103D-302(b) which allows the procuring agency to accept bids that fail to list all of its subcontractors, provided the work to be performed is equal to or less than 1% of the total bid amount. HRS §103D-709(d), however, goes directly to the protestor's ability to seek an administrative review of an agency's decision and the Hearings Officer jurisdiction to conduct such a review. HRS §103D-302(b), on the other hand, merely carves out a limited exception to the subcontractor listing requirement. *See for instance, Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007)(so long as the value of the work to be performed by the subcontractor is equal to or less than one percent of the total amount bid and the acceptance of the bid would be in the best interest of the State, the agency is authorized to waive violations of the subcontractor listing requirement)*. The Hearings Officer finds no inconsistency between these provisions and, having rejected Petitioner's claim that

⁴ This refers to a single, remaining claim that does not concern a matter meeting the jurisdictional amounts set forth in HRS §103D-709(d). As the Hearings Officer held in *Nan, Inc. v. HART, et al., supra*, the protestor is entitled to aggregate its claims to qualify for the jurisdictional minimum amount under HRS §103D-709(d).

⁵ HRS §103D-709(d) is applicable only to the administrative review of the agency's determination of protests. It does not affect a bidder's ability to protest to the agency.

Intervenor's Declaration rendered its bid nonresponsive, must conclude that Petitioner's remaining protest does not meet the jurisdictional amount required by HRS §103D-709(d) and is therefore not entitled to administrative review.

Assuming *arguendo* that Petitioner is entitled to a review of its claim that Intervenor's bid is nonresponsive because one of its subcontractors was not properly licensed at the time the bids were due, the Hearings Officer first notes that there is no dispute among the parties that the subcontractors listed in the bids were required to be licensed by June 16, 2016, the deadline for the submission of bids. In apparent reliance on information provided by the DCCA Website which indicated that BIAC's license had been automatically forfeited due to loss of insurance, Petitioner listed another, licensed subcontractor for the required HVAC work and protested the award of the contract to Intervenor because its bid listed BIAC as one its subcontractors. The automatic forfeiture of contractors' licenses due to loss of insurance is governed by HRS §444-11.1. That section provides:

§444-11.1 Requirements to maintain license. (a) A licensed contractor shall have and maintain in full force and effect the following:

- (1) Workers' compensation insurance; unless the licensee is authorized to act as a self-insurer under chapter 386 or is excluded from the requirements of chapter 386;
- (2) Liability insurance from an insurance company or agency for comprehensive personal injury and property damage liability; and
- (3) Bond when required by the board, under section 444-16.5.

(b) Failure, refusal, or neglect of any licensed contractor to maintain in full force and effect, the applicable workers' compensation insurance, liability insurance, or bond shall cause the automatic forfeiture of the license of the contractor effective as of the date of expiration or cancellation of the contractor's workers' compensation insurance, liability insurance, or bond.

(c) The board shall not restore the forfeited license until satisfactory proof of continuous insurance and bond coverages is submitted to the board as required by this section.

(d) Failure to restore a license within sixty days after the date of forfeiture shall result in the forfeiture of all fees and shall require the person to apply as a new applicant.

(Emphasis added).

In construing the various provisions of the Code, the foremost obligation is to ascertain and give effect to the intention of the Legislature which is to be construed primarily from the language of the statute itself. The language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose. *Hawaii Newspaper Agency, et. al v. State Dept. of Accounting & General Services, PCH 99-2; Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-3 (April 16, 1999)(Consolidated).*

Under HRS §444-11.1(b), a contractor's license is automatically forfeited when the contractor fails to "maintain in full force and effect" the applicable insurance policies. Here, there is no question that BIAC's policies were in full force and effect between September 26, 2015 and September 26, 2016, including on June 16, 2016. Notwithstanding that, Petitioner argues that the "statute and the CLB require not just insurance be in place, **but that proof of such insurance also be provided as a condition of the license.**" (emphasis in original). Thus, according to Petitioner, BIAC's license was automatically forfeited on June 16, 2016, because it did not provide proof of insurance to the DCCA until after the bids had been submitted, notwithstanding the fact that BIAC had the requisite insurance coverage. A careful review of HRS §444-11.1 however, leads the Hearings Officer to a different conclusion.

According to HRS §444.11.1(b), the automatic forfeiture of a contractor's license is triggered only when the licensee fails, refuses or neglects to maintain the required insurance. In that event, HRS §444-11.1(b) also provides that the forfeiture shall be "effective as of the date of expiration or cancellation" of the required insurance⁶. Because the uncontroverted evidence established that BIAC's insurance was in effect

⁶ It therefore stands to reason that the automatic forfeiture authorized by HRS §444-11.1(b) is inapplicable where the requisite insurance coverage never expired or was cancelled.

continuously through September 26, 2016, BIAC's license was not subject to the automatic forfeiture provision in HRS §444-11.1⁷. The fact that BIAC did not provide the DCCA with proof of its current insurance policy until after the bids were submitted does not alter the fact that BIAC maintained the required insurance between September 26, 2015 and September 26, 2016. Moreover, Petitioner does not point to, and the Hearings Officer cannot find any authority to support the argument that a contractor's license is automatically forfeited where, as here, the contractor is properly insured but nevertheless does not immediately update its insurance records with the DCCA⁸. Nor can the Hearings Officer find any authority for the proposition that the DCCA Website is dispositive of a contractor's license status regardless of the accuracy of the information displayed on the website.⁹ Based on the undisputed evidence presented here and a plain reading of HRS §444-11.1, the Hearings Officer concludes that BIAC was properly insured and, therefore, properly licensed on June 16, 2016 notwithstanding the information provided on the DCCA Website. Any other conclusion would place form over substance and fly in the face of common sense¹⁰. Petitioner also complains that Respondent, by deciding to award the contract to Intervenor despite its listing of BIAC as its HVAC subcontractor, failed to enforce its published instructions and directives and falsely induced Petitioner to increase its bid price. Nevertheless, having determined that BIAC was properly licensed, the Hearings Officer must conclude that this related claim is also without merit.

⁷ Because BIAC's license was never forfeited, there was no need for BIAC to "restore" its license. As such, the argument that BIAC was required to, but did not restore its license by submitting proof of continuous insurance to the Board within 60 days is not relevant here.

⁸ If, as a matter of policy, the Legislature desires a rule that requires the automatic forfeiture of a contractor's license where the contractor fails to immediately notify the DCCA of any change in its insurance policy even though the contractor has continuously maintained the requisite insurance coverage, it can so provide. It has not done so and the Hearings Officer has no authority to establish a policy contrary to that previously established by the Legislature.

⁹ Even the DCCA recognizes as much. In the disclaimer which accompanies the licensing information displayed on the DCCA Website, the DCCA "makes no guarantee as to the accuracy of the information accessed . . ." and users are "advised that if the information obtained herein is to be reasonably relied upon, user should confirm the accuracy of such information with the provider thereof."

¹⁰ The intent of the Code, as expressed in the Senate Committee's Report S8-93, Spec. Sess., Senate Journal at page 39 (1993), states that, "This bill lays the foundation and sets the standards for the way government purchases will be made, but allows for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State." *The Systemcenter, Inc. v. State Dept. of Transportation*, PCH 98-9 (December 10, 1998).

All of these considerations lead the Hearings Officer to find and conclude that there are no genuine issues of material fact left for hearing and that Respondent and Intervenor are entitled to a ruling in their favor as a matter of law.

IV. DECISION

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

1. Respondent's motion for summary judgment and Intervenor's motion to dismiss are granted and this matter is hereby dismissed;
2. Petitioner's motion for summary judgment is denied;
3. Each party shall bear its own attorneys' fees and costs; and
4. The protest bond of Petitioner shall be deposited into the general fund.

Dated at Honolulu, Hawaii: OCT 14 2016



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