



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2014 DEC 29 A 8:53

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

In the Matter of)	PDH-2014-017
)	
NAN, INC.,)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW, AND DECISION
Petitioner,)	
)	Senior Hearings Officer:
vs.)	David H. Karlen
)	
DEPARTMENT OF PUBLIC WORKS,)	
COUNTY OF HAWAII,)	
)	
Respondent.)	
)	
and)	
)	
ISEMOTO CONTRACTING CO., LTD.,)	
)	
Intervenor)	
_____)	

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

I. INTRODUCTION

Petitioner Nan, Inc. ("Nan"), filed a Request for Administrative Hearing ("RFAH") in this matter on December 3, 2014. At the same time, Nan filed a procurement protest bond in the amount of \$10,000.00.

By Notice of Hearing and Pre-Hearing Conference filed December 4, 2014, a pre-hearing conference was set for December 12, 2014, and a hearing was set for December 23, 2014.

Respondent Department of Public Works, County of Hawaii ("County") filed its Response on December 11, 2014.

The pre-hearing conference was held on December 12, 2014. Nan was represented by Elizabeth Kor, Esq., and the County was represented by Renee N.C. Schoen, Esq. A Pre-Hearing Order was filed on December 15, 2014.

Thereafter, in a telephone conference with counsel on December 16, 2014, the parties stipulated that Isemoto Contracting Co., Ltd. ("Isemoto") could intervene in this case. A formal written stipulation and order to that effect was filed on December 23, 2014.

The following motions were filed on December 17, 2014:

- a. Isemoto's Motion to Dismiss, or in the Alternative, for Summary Judgment;
- b. The County's Motion to Dismiss;
- c. The County's Motion for Summary Judgment;
- d. Nan's Motion for Summary Judgment;
- e. Nan's Motion to Supplement Respondent's Exhibit List; Exhibit "A"; and
- f. Isemoto's Substantive Joinder to the County's two Motions.

On December 18, 2014, Nan filed its Notice of Intent to Introduce Evidence;

Exhibit "B."

The following memoranda were filed on December 22, 2014:

- a. Nan's Memorandum in Opposition to Isemoto's Motion for Summary Judgment;
- b. Nan's Memorandum in Opposition to the County's Motion to Dismiss;
- c. Nan's Memorandum in Opposition to the County's Motion for Summary Judgment;
- d. The County's Memorandum in Opposition to Nan's Motion for Summary Judgment; and
- e. Isemoto's Memorandum in Opposition to Nan's Motion for Summary Judgment.

On December 22, 2014, the County filed its Substantive Joinder to Isemoto's Motion.

A hearing before the undersigned Hearings Officer on all motions was held on December 23, 2014. Nan was represented by Elizabeth Kor, Esq. The County was represented by Renee N.C. Schoen, Esq. Isemoto was represented by Nathan H. Yoshimoto, Esq.

At the beginning of the hearing, and without objection from the County or Isemoto, the Hearings Officer granted Nan's requests to have its Exhibits "A" and "B" considered.

At the conclusion of argument on the Motions, the Hearings Officer orally ruled that Isemoto's Motion for Summary Judgment was granted in part and denied in part, and that, as a result, Nan's RFAH would be dismissed. The Hearings Officer also expressed an opinion that the County's Motions should be granted if it had been necessary to reach their merits. The Hearings Officer also stated that the oral ruling was provisional and that only the forthcoming written decision would be "official."

This Decision, based on the record as of the conclusion of oral argument on December 23, 2014, is the formal order with respect to the aforesaid Motions.

II. FINDINGS OF FACT

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

1. On or about August 20, 2014, the County issued its Proposal and Specifications for Kapiolani Street Extension, Lanikaula Street to Mohouli Street, Job No. E-4039. The project involved road construction as well as related improvements.

2. On the very first page of the Notice to Bidders contained in the Proposal, the County informed prospective bidders that several utility companies would be doing work in connection with this project, that any utility agreements with these companies, if required, would be part of the contract for the instant project, and that the contractor would be

responsible for coordination and scheduling to accommodate the work of the utility companies. As stated in the Notice to Bidders:

Hawaii Electric Light Company, Inc., Hawaiian Telecom Inc., Oceanic Time Warner Cable, Department of Water Supply, Department of Environmental Management, and Gas Company will be doing work in connection with this project. The utility agreements with these companies, if required, shall be made a part of this contract. The contractor shall be responsible for coordinating, cooperating, scheduling, and rescheduling his work to accommodate the utility companies work involved in this project.

County's Exhibit 1, page 3 (emphasis supplied).

3. The Proposal and Specifications also included Special Provisions concerning the contractor's responsibility as to coordinating, scheduling, and rescheduling of all utility work. See Section 102.5, Examination of Contract and Site of Work, County's Exhibit 1, page 43.

4. Of particular importance was the Special Provisions amendment to Section 104.11(a) of the County's standard provisions which relieved the County of any financial responsibility for any delays or other costs incurred on account of the utility owners. In relevant part, the Special Provision states:

The Bidder/Contractor warrants and acknowledges that the Utility Work required by or for the utility owners in relation to this project and the duty to coordinate, cooperate, and schedule/reschedule such Utility Work with the requirements of the project, including working with the Utilities in developing PCD's as required, shall be the sole responsibility of the Contractor. The County shall not be held responsible for any costs and delays caused by the utility owners or Utility Work.

Costs of coordinating, cooperating and scheduling/rescheduling, including work with the Utilities in developing PCD's as required, of the Utility Work by and with the utility owners and any delay costs due to scheduling problems in relation to the Utility Work shall be considered incidental to the other work items and shall not be paid for separately. The Contractor shall be responsible to communicate with the affected utilities prior to submitting their bid so that the Utility Work schedule and costs can be incorporate into their bid.

...

The County shall not pay additional compensation to the contractor for delay, inconvenience, or damage sustained by the contractor due to interference or

performance by any utility owner or the Public Utilities Commission. Any time extension to accommodate utility work shall be non-compensable.

County's Exhibit 1, pages 55-56 (emphasis supplied).

5. To similar effect are the Special Provisions' amendments to Section 108.05(B) of the County's standard provisions (County's Exhibit 1 at page 71), and Note D, Coordination with utility contractors, on Plan Sheet 19 (County's Exhibit 3 at page 483).

6. The award of the contract was to be based on the lowest Base Bid or the lowest Base Bid plus Additive Alternate No. 1, at the discretion of the Director of the County's Department of Public Works. County's Exhibit 1 at page 10.

7. Bidders were to submit their proposals on forms furnished by the County.

Bidders were to specify in words or figures the following:

- a. A unit price for each pay item with a quantity given;
- b. The products of the respective unit prices and quantities;
- c. The lump sum amount; and
- d. The total amount of the proposal obtained by adding the amounts of the

several items.

County's Exhibit 1 at page 44.

8. The contract for the project was to be for a lump sum amount. The unit prices to be filled in by the bidder were to be used for purposes of making monthly estimates to gauge progress payments and to adjust the contract's lump sum amount due to post-contract changes in the quantities listed in the County's proposal form. County's Exhibit 1 at page 10.

9. The County's Proposal Form listed 159 line items. Some of these were lump sum items for which a single amount had to be filled in, some were estimated quantities for which a unit price and an extended amount (unit price multiplied by the number of units) had

to be filled in, and some were items for which the County had predetermined the price. See County's Exhibit 1 at pages 11-21.

10. On the last page of the County's Proposal Form, the bidder was to list the arithmetical sum of all dollar amounts of the 159 line items. The last page of the County's Proposal Form also contained the following:

NOTE: Bidders must complete all unit prices and amounts. Failure to do so may be grounds for rejection of bid.

County's Exhibit 1 at page 22.

11. The County reserved the right to reject proposals, waive technicalities or advertise for new proposals, if the rejection, waiver, or new advertisement favored the County. County's Exhibit 1 at pages 43, 48.

12. On or about October 3, 2014, the County issued Addendum No. 1 to the Plans and Specifications for the project in question. A significant portion of Addendum No. 1 listed requests for clarifications (also known as RFIs) received from potential bidders and the County's responses to these requests. County's Exhibit 2.

13. In particular, question and answer 12 resulted in a change to the provisions set forth above regarding the requirement that the contractor assume the entire monetary risk of delays associated with the utility work.

12. Reference: Relocating Existing Utility by Utility Companies

Q: This project requires relocating of Overhead Utilities by pertinent utility companies. There is a great possibility that the completion day may be pushed back behind the given 280 calendars days due to delay beyond the contractor's control. Please advise if the contractor will be entitled for time extensions and reimbursement for extended overhead, equipment standby and any other costs associated to this delay if it is beyond the contractor's control.

Response: Bid Item 104.100 "Construction Delays due to Utilities" has been added, see revised Proposal with this Addendum. Justified time extensions in accordance with the contract documents will be allowed.

County's Exhibit 2 at page 342 (emphasis in original).

14. Addendum No. 1 added a new line item to the beginning of the County's Proposal form entitled Item No. 104.0100, "Construction Delays due to Utilities." One lump sum amount was to be filled in for this new line item. County's Exhibit 2, page 391.

15. While the source of this new line item was an inquiry about overhead utilities, the new line item itself appears to cover all utilities, including any underground utilities.

16. The new line item called for one amount to be inserted in the bid even though the actual costs of any delays due to utility work might be higher or lower than the amount in the bid.

17. The bids were opened on October 23, 2014. Five bidders submitted bids on the Project. Isemoto submitted the apparent low bid as follows:

Base Bid	\$13,608,222.78
Additive Alternate No. 1	<u>11,730.00</u>
Total	\$13,619,952.78

18. All of the line items in Isemoto's Proposal Schedule were completed except for the first one, Bid Item No. 104.0100 Construction Delays due to Utilities, which was completely blank. County's Exhibit 4 at page 489.

19. Nan submitted the second lowest bid as follows:

Base Bid	\$14,401,803.46
Additive alternate No. 1	<u>48,024.00</u>
Total	\$14,449,827.46

County's Exhibit 4 at page 489.

20. All bidders other than Isemoto filled in a lump sum amount for Bid Item No. 104.0100 Construction Delays due to Utilities. Those amounts ranged from \$1.00 to the \$81,727.00 amount submitted by Nan. County's Exhibit 4 at page 484.

21. Nan requested a copy of Isemoto's bid and received it on October 24, 2014. As of that date, Nan knew or should have known that there was a blank for one line item on Isemoto's bid.

22. On October 28, 2014, Nan sent what it termed an "awareness letter" to the County asserting that Isemoto's bid was nonresponsive because it was incomplete and ambiguous. Because Isemoto's bid failed to list an amount for line item No. 104.0100, Nan asserted that Isemoto's bid should be declared nonresponsive and the contract awarded to Nan, the second lowest bidder. County's Exhibit 6.

23. On November 12, 2014, the County sent an e-mail to Nan acknowledging receipt of Nan's "awareness letter" and informing Nan that the County "will be moving forward with the award to [I]semoto [C]onstruction." County's Exhibit 7.

24. On November 13, 2014, the County sent an "Intent to Award" letter to Isemoto. County's Exhibit 8.

25. On November 19, 2014, Nan sent an e-mail to the County with a copy of Nan's bid protest. The e-mail stated:

Attached is a copy of Nan, Inc.'s written protest letter regarding the noncompliance of Isemoto's bid proposal submitted for the Kapi'olani Extension Lanikaula St to Mohouli St Project (Job No. E-4039). We will send a signed hard copy of the letter attached via registered mail to your office today. Please confirm your receipt of this correspondence.

Nan's Exhibit B.

26. Nan's written protest letter, County's Exhibit 9, is a letter dated November 20, 2014. The date of November 20 was a mistake made by Nan, as the letter was actually prepared and signed by Nan's in-house counsel on November 19, 2014.

27. A signed copy of Nan's letter dated November 20, 2014 (County's Exhibit 9), was attached to Nan's e-mail of November 19, 2014 (Nan's Exhibit B).

28. The County did not receive by mail a signed hard copy of Nan's letter dated November 20, 2014, until November 20, 2014.

29. By letter dated November 26, 2014, the County denied Nan's protest. County Exhibit 10.

30. On November 28, 2014, the County awarded the contract to Isemoto.

31. Nan filed its RFAH herein on December 3, 2014.

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.

A. General Considerations

1. Standards for Summary Judgment Motion

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

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

2. Scope of Review

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

The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

B. Nan's Protest Was Not Timely Filed With the County

Isemoto's Motion brings into question the timeliness of Nan's bid protest to the County contained in its letter dated November 20, 2014 (County's Exhibit 9) Isemoto has two assertions in that regard: (a) the protest should have been filed within five working days after the County opened bids and Nan received a copy of Isemoto's bid on October 24, 2014; and (2) alternatively, the protest should have been filed within five working days of November 12, 2014, when Nan received the County's e-mail stating that the County did not accept the argument in Nan's awareness letter and was going forward to award the contract to Isemoto (County's Exhibit 7).

The required time frame for filing a bid protest with the procuring agency is set forth in HRS §103D-701(e), which provides in relevant part that

A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.

In this case, Nan should have been aware of the blank item in Isemoto's bid as of the day it received a copy of that bid, October 24, 2014, because the blank item is obvious to even a quick review of the bid. In any event, Nan was aware of the blank item no later than October 28, 2014, when it sent its "awareness letter" to the County.

At that time, however, Nan was not an "aggrieved person" because the County had not taken any action that, to Nan's knowledge, indicated an award to Isemoto. For all Nan knew at the time of its "awareness letter," the County might well agree with Nan's position and disqualify Isemoto's bid.

The better view is expressed in the oft-cited case of GTE Hawaiian Telephone Co. v. County of Maui, PCH 98-6 (December 9, 1998) at page 10:

[T]he basis for a protest grounded upon nonresponsiveness of another bid, in addition to the alleged nonresponsiveness itself, is the protestor's knowledge that the government has awarded or intends to award the contract to the nonresponsive bidder. Prior to that time, a protest would be premature since the government could well reject the offending bid. In other words, the adverse action being protested in the government's acceptance of the alleged nonresponsive bid, not merely the offeror's submission of such a bid. (Citation omitted)

Accordingly, that portion of Isemoto's Motion alleging that Nan should have filed its protest within five business days of October 24, 2014, is denied.

There is, however, an alternative argument in Isemoto's Motion that Nan filed its protest one day late even if November 12, 2014 is considered the "trigger date" starting the five business day deadline. On November 12, 2014, the County's e-mail to Nan notified Nan that the County was going forward to award the contract to Isemoto.

Nan does not deny that November 12, 2014, is the "trigger date." As Nan itself admitted in its protest letter dated November 20, 2014:

Timeliness of Procurement Protest

Nan's Protest is timely filed under HRS §103D-701(a) and HAR §3-126-4(a) because it is being filed before five (5) working days after the notice of the DPW's November 12, 2014 apparent intent to award to another bidder.

County's Exhibit 9 at page 534. See also Nan's Memorandum in Opposition to Isemoto's Motion at its sixth unnumbered page:

It was not until November 12, 2014, that Petitioner was notified by the County that, notwithstanding the material defects in Intervenor's bid and Petitioner's expressed concerns that the County intended to award the subject project to Intervenor....Given the fact that Petitioner had been led to believe that the County was considering the concerns expressed by Petitioner, any filing of a bid protest prior to receipt of Respondent's November 12, 2014 email informing Petitioner that the County intended to award the subject contract to Intervenor would have been speculative and would not have been appropriate.

The problem for Nan is that November 20, 2014 is six (6) business days after November 12, 2014, so submission on November 20, 2014 was a day late and not in compliance with the statutory deadline.

To counter this argument, Nan first asserts that the letter was misdated—it was actually prepared and signed on November 19, 2014. Nan then asserts that a signed copy of this misdated letter was actually sent by e-mail to the County on November 19, 2014. Nan’s Exhibit B.

Unfortunately for Nan, sending a document by e-mail is not an acceptable method of filing of a procurement protest. HAR §3-126-3(c) states:

To expedite handling of protests, the envelope should be labeled “protest” and either served personally or sent by registered or certified mail, return receipt requested, to the chief procurement office or as otherwise specified in the solicitation.¹

HAR §3-126-4(a) makes these methods of service mandatory for protests over competitive sealed bid procurements, stating in relevant part:

The provisions of section 3-126-3(c) and (d) to file a protest shall be complied with.

As held in GTE Hawaiian Telephone Co. v. County of Maui, *supra*, at page 13, the timely filing of a procurement protest is a mandatory jurisdictional requirement and cannot be waived by the County.

Accordingly, that portion of Isemoto’s Motion alleging that Nan’s procurement was untimely because it was not properly submitted within five business days of November 12, 2014, is granted. The necessary consequence of granting this portion of Isemoto’s Motion is that Nan’s RFAH must be dismissed.

¹ There was no argument in this case that another method of service was allowed “as otherwise specified in the solicitation.”

C. Nan's Protest Does Not Concern a Matter Equal to the Required Minimum Amount in Controversy

While the partial granting of Isemoto's Motion results in the dismissal of Nan's RFAH, for the guidance of the parties the Hearings Officer will also discuss the jurisdictional argument raised in the County's Motion to Dismiss.

As a result of statutory amendments made permanent by the 2012 Legislature, protests regarding competitive sealed bid procurements must concern a matter equal to a certain minimum amount. HRS §103D-709(d) provides, in relevant part:

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(g) may initiate a proceeding under this section....

(d) 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:

(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or

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

(e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

(1) \$1,000 for a contract with an estimated value of less than \$500,000;

(2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or

(3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000...

(j) As used in this section, "estimated value of the contract" or "estimated value", with respect to a contract means the lowest responsible and responsive bid under section 103D-102, 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.

There is no debate in this case that the “estimated value of the contract” exceeds \$1,000,000, and, moreover, that a \$10,000 bond was required pursuant to HRS §103D-709(e). Nan has indeed filed such a \$10,000 bond.

Separate and apart, however, from the requirement of submitting an appropriate protest bond, the protestor must also demonstrate that the “protest concerns a matter” no less than ten percent of the estimated value of the contract. In this case, the ten percent figure equates to at least \$1,360,823.²

Relying on GreenPath Technologies, Inc. v. Department of Finance, County of Maui, PDH 2014-002 (March 20, 2014), Nan asserts that the entire contract is the matter of concern so that the required jurisdictional amount is at issue. Such a reading of the GreenPath case is misplaced.

In GreenPath, the protestor alleged that the proposal selected by the County of Maui was ambiguous because it could not be determined which of two parties had made the proposal. Another challenge was that the proposer had improperly conditioned its entire contract price by unilaterally inserting different terms into its proposal. A third challenge was a claim that the proposer had listed two prices for every item in its proposal. All three of these matters necessarily concerned the entire contract amount. See the GreenPath decision at pages 25-26.

More to the point here is the earlier decision of Air Rescue Systems Corp v. Finance Department, County of Hawaii, PDH-2014-006 (December 10, 2012). The protest there involved the disqualification of a bid because it added in a line item not called for in the

² This figure is ten percent of Isemoto’s base bid. It is unnecessary in this case to determine whether ten percent of the amount of the bid for Additive Alternate No. 1 should also be considered, and the Hearings Officer expresses no opinion, one way or another, on that question.

solicitation. Although this action by the bidder jeopardized its entire bid, the “matter of concern” for purposes of meeting the jurisdictional minimum amount was the maximum expected value of the proposed line item.

Similarly, here, the “matter of concern” is the blank Bid Item No. 104.0100, Construction Delays due to Utilities.

At first glance, it might appear that valuation of the “matter of concern” would be difficult. Since bidders other than Isemoto valued this item to be, at most, \$81,727.00, the County asserts that the maximum amount of the “matter of concern” is \$81,727.00. The bid line item in question, however, does not concern a fixed or determinable amount of work where a reasonable cost estimate can be made and applied to the issue at hand. The bid item here is, on the contrary, an unusual one involving anticipation of the consequences of increased costs and a delay in construction due to an as yet undefined and unpredictable amount of difficulties with utilities. Accordingly, the Hearings Officer cannot accept what figures other bidders have used as an absolute guide to the value of the “matter of concern.” The value of this line item could be, in the abstract, unique to each contractor, and there has been no showing that the value assigned by Nan in its bid is an automatic cap on what Isemoto would assign to this bid item had it not left the item blank.

There is an acceptable method of valuing the “matter of concern” here, however, and that is based on the structure of the bid proposal. This contract involves a lump sum price. It is not a line item priced contract. As the solicitation’s terms state, the line items are to be used to provide estimates for progress payments. For example, if, in the first month of work the contractor excavated 510 cubic yards of material for ditches and channels (Bid Item No. 207.100, County’s Exhibit 1, page 11), the contractor would be paid one-half of the amount it inserted in its bid for that item. All of the line items in the proposal, therefore, are the equivalent of a “schedule of values” commonly submitted after a contract is awarded for the

purpose of estimating progress payments. Similarly, as stated in Finding of Fact No. 8, the amounts inserted by the bidders could be used as baselines for adjusting the price of the contract if there were a significant difference between estimated and actual quantities. Possible post-contract modifications to the contract price in the form of unit prices does not change a fixed price, or lump sum, contract into a unit price contract. Cf. Carnell Construction Corporation v. Danville Redevelopment & Housing Authority, 745 F.3d 703, 723 (4th Cir. 2014).

Leaving a line item blank, therefore, cannot be interpreted as the bidder reserving the right to change the contract price by adding in an amount for that line item at a later date. Similarly, a blank line item does not indicate any possible intent to not do the work for that line item or a refusal to commit to doing that work. The only result of an omission of a figure for a line item is that progress payments to the contractor cannot be based on how much work the contractor has done on that line item. The contractor still has to do the work but cannot use that work as a basis for progress payments.

It should also be noted here that the blank item is not a standard work item, such as excavation or paving, that must be done in order to complete the project. Instead, it is an anticipated extra cost of doing all of the work covered by the other 159 line items on the Proposal Form. A blank for this line item cannot be interpreted as a lack of commitment to do any of the project work—all it indicates is a lack of intent to make an additional charge if the work is somehow detrimentally affected by problems with the utilities.

The bottom line is that the total price of the contract is the sum amount placed on the last page of the Proposal Schedule, County's Exhibit 1 at page 22. There was no allegation that the sum of the items listed in Isemoto's proposal did not equal the total sum Isemoto listed on the last page of its Proposal Schedule. Therefore, the blank item is worth zero, and the amount of the "matter of concern" is also zero.

Since the “matter of concern” as appropriately considered in light of the relevant contract provisions has no value, the jurisdictional minimum amount of ten percent of the contract’s estimate value is not involved herein. The County’s Motion to Dismiss should therefore be granted.

D. The County’s Motion for Summary Judgment is Moot

In addition to its Motion to Dismiss on jurisdictional grounds, discussed above, the County also filed a Motion for Summary Judgment. In this Motion, the County asserted: (a) Isemoto submitted a responsive bid; (b) the failure to specify a dollar amount for the bid item in question was a minor informality that can be waived; and (c) any ambiguity in Isemoto’s bid is a *de minimis* variation and can be waived because such a waiver favors the County. In view of the lack of jurisdiction to consider Nan’s protests, the County’s Motion for Summary Judgment need not be considered, and it is denied as moot.

E. Nan’s Motion for Summary Judgment is Moot

Because there is no jurisdiction to consider Nan’s protest, Nan’s Motion for Summary Judgment is denied as moot.

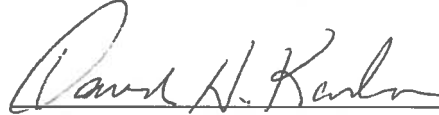
IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. Isemoto’s Motion for Summary Judgment is granted in part and denied in part as stated above.
- b. The County’s Motion to Dismiss is granted.
- c. Nan, Inc.’s Request for Administrative Hearing in this matter is dismissed with prejudice.
- d. The County’s Motion for Summary Judgment is denied as moot.
- e. Nan’s Motion for Summary Judgment is denied as moot.

- f. The parties shall bear their own attorney's fees and costs incurred in this matter.
- g. The cash or protest bond of Nan, Inc., shall be deposited into the general fund.

DATED: Honolulu, Hawaii, DEC 29 2014.



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