OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAI'I

In the Matter of: HI-BUILT, LLC, Petitioner, vs. DANILO F. AGSALOG, DIRECTOR OF FINANCE, DEPARTMENT OF FINANCE, COUNTY OF MAUI, Respondent, and MAUI PAVING, LLC, Intervenor.	PDH-2015-011 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

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

I. INTRODUCTION

On or about December 11, 2015, HI-Built, LLC ("Petitioner"), filed a request for administrative review to contest Respondent Department of Public Works, County of Maui's denial[1] of Petitioner's protests in connection with a project designated as Solicitation for Old Haleakala Highway Reconstruction, Federal Aid Project No. STP-0900(085), District of Makawao, Island of Maui ("Project"). The matter was thereafter

[1] On January 4, 2016, the Hearings Officer ordered that Danilo F. Agsalod, Director of the Department of Finance, Department of Finance, County of Maui, be substituted as a respondent in place of the Department of Public Works.

set for hearing on December 22, 2015 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

By the request and agreement of the parties, the hearing was subsequently rescheduled to January 5, 2016. Petitioner and Respondent also agreed to allow Maui Paving, LLC ("Intervenor") to intervene in this proceeding.

The matter came on for hearing before the undersigned Hearings Officer on January 5, 2016 in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by Anna H. Oshiro, Esq. and Loren A. Seehase, Esq.; Respondent was represented by Thomas W. Kolbe, Esq. and Intervenor was represented by Jeffrey M. Osterkamp, Esq. and Keith Y. Yamada, Esq.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments. Accordingly, on January 11, 2016, the parties submitted their closing briefs.

Having reviewed and considered the evidence and arguments presented by the parties, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On or about July 20, 2015, Respondent, through its Department of Finance, issued a Notice to Bidders seeking bids for the Project ("Original IFB") pursuant to HRS §103D-302. The Project generally involved "pavement reconstruction of Old Haleakala Highway from Aeloa Road to Kula Highway with asphalt concrete, asphalt treated base and aggregate base course pavement section. Other work include[d] cold planing and resurfacing of existing pavement, installation of pavement striping and markers, installation of signs, reconstruction of concrete sidewalks and other incidental work".

2. The Project was a part of the Federal Aid Project No. STP-0900(085). The State of Hawaii, Department of Transportation ("DOT") acted as the decision maker for the use of the federal funds for the Project. Approximately 80% of the Project was funded by federal dollars.

3. Bids in connection with the Original IFB were to be submitted on the basis of both lump sum and unit prices. The Original IFB included estimated quantities of materials to be removed and installed as part of the scope of work to which bidders were to assign unit prices. The bidders' unit prices, when multiplied by the quantities provided in the Original IFB and added together with the lump sum items, would represent the total amount of the bid price.

4. The plans and specifications for the Project were prepared by Respondent's consultant, R.T. Tanaka Engineers, Inc. ("Consultant").

5. Section 102.04 of the Special Provisions of the Original IFB provided:

> **Estimated Quantities**. The quantities shown in the contract are approximate and are for the comparison of bids only. The actual quantity of work may not correspond with the quantities shown in the contract. The Department will make payment to the Contractor for unit price items in accordance with the contract for only the following:
>
> **(1)** Actual quantities of work done and accepted, not the estimated quantities; or
>
> **(2)** Actual quantities of materials furnished, not the estimated quantities.
>
> The Department may increase, decrease, or omit each scheduled quantities of work to be done and materials to be furnished. When the Department increases or decreases the estimated quantity of a contract item by more than 15% the Department will make payment for such items in accordance with Subsection 104.06 – Methods of Price Adjustment.

6. Pursuant to the terms of the Original IFB, bids were required to be submitted by and opened on August 11, 2015.

7. Two bids for the Project were submitted and opened on August 11, 2015. Intervenor was the lowest apparent bidder at $6,391,097.00 and Petitioner was the next lowest bidder at $6,576,106.00.

8. On or about August 13, 2015, Respondent learned from its Consultant that the quantities in the Original IFB erroneously included quantities for a road (Makani Road) that had been eliminated from the Project's scope of work.

9. The erroneous quantities were contained on pages P-8, P-9 and P-10 of the Original IFB. The drawings included in the Original IFB correctly described the scope of the Project.

10. As a result of the error, Respondent's Consultant was asked by Respondent to prepare a revised Detailed Engineer's Estimate for Respondent which did not include Makani Road.

11. On August 13, 2015, Shayne Agawa, Respondent's project manager for the Project, telephoned a representative from Intervenor, and sent the following email to Intervenor:

> Per our phone conversation this morning regarding the quantities for the bid items, we are still waiting for our design consultant to provide us with the corrected quantities adjusted for the removal of Makani Road. I will be providing you the revised quantities after I receive them from our consultant and after I get a chance to review them.

12. On August 13, 2015, Kevin Yamabayashi of Intervenor, responded with the following email to Agawa:

> Do you know when you should get the revised quantities? Once I get the revised quantities, I can double check and verify my estimate.

13. On August 13, 2015, Agawa emailed Yamabayashi:

> Hi Kevin,
>
> Attached is a .pdf file of the revised Proposal Schedule pages P-8, P-9, and P-10 showing the revised quantities. If possible, could you please notify us ASAP regarding the unit prices for the affected items? We need to know if your office will agree to hold the unit prices listed in your submitted bid or if the unit prices will need to be adjusted for the affected items. We need this information to determine how we proceed with the project.

14. At approximately 1:36 p.m. on August 13, 2015, Yamabayashi informed Agawa, by email, that "[Intervenor] will hold the unit prices for this project with the revised quantities." Intervenor provided Respondent with its revised bid on or about August 14, 2015.

15. On or about August 17, 2015, Agawa contacted a representative from the DOT for approval to reduce the bid amount for the Project. Respondent apparently sought to reduce the quantities for the Project to exclude the Makani Road quantities and award the contract to Intervenor. Respondent, however, was subsequently informed by the DOT that under federal law Respondent could not issue a change order adjusting the quantities in the Original IFB prior to the award of the contract.

16. After hearing from the DOT, Respondent decided to cancel the Original IFB and proceed to issue another solicitation with the corrected quantities. On August 25, 2015, Cary Yamashita, a Division Chief at the Department of Public Works Engineering Division, County of Maui, sent the following email to Greg King of the Department of Finance, the DOT, and others:

> Hi Greg:
>
> We would like to request cancellation of the bids for the subject project which were opened on August 11, 2015 due to major change in contract scope. The original scope in the bid proposal schedule included quantities for Makani Road which is not a part of the project, significantly inflating several bid items.
>
> Therefore any quantity associated with Makani Road will be omitted from this project and the revised proposal schedule will only reflect quantities that apply to Old Haleakala Highway.
>
> Accordingly, we would like to re-bid this project and will be requesting new advertisement and bid opening dates.

17. By letter dated August 27, 2015, Respondent notified the bidders that it was cancelling the Original IFB:

> [Respondent] is canceling this solicitation in accordance with HAR §3-122-96(a)(2)(B) of the Hawaii Administrative Rules. The original scope in the bid proposal schedule included quantities for Makani Road which is not part of this project, significantly inflating several bid items. The Engineering Division will revise the scope of this project and put out a new solicitation shortly, with a revised bid opening date anticipated for mid to late September.

18. On or about August 31, 2015, Respondent issued a Notice to Bidders seeking new bids for the Project ("Rebid") after determining that there was still time to rebid the Project. Bids were required to be submitted by and opened on September 22, 2015. On the same date, Agawa emailed Yamabayashi and informed him that "I was directed to rebid the project."

19. The Rebid set forth the revised the quantities, excluding the quantities for Makani Road:

Description	Bid Qty.	UM	Revised Qty.
Hot Mix Asphalt Base Course	14,714	TON	12,754
Aggregate Base	6,461	CY	5,493
Permeable Separator	38,766	SY	32,960
Triaxial Geogrid	38,766	SY	32,960
HMA Pymnt, Mix No. IV	6,379	TON	5,562
Cold Planing	38,766	SY	32,960
Adjust Wtr. MH F&C	6	EACH	5
Adjust Wtr Valve F&C	36	EACH	20
Relocation & Replacement of existing signs, reflectors & mirror	76	EACH	66

20. Keoni Gomes, Petitioner's estimator for the Project, testified that the lower, revised quantities provided in the Rebid would have lowered Petitioner's excavation costs resulting in lower unit prices.

21. By letter dated and hand-delivered to Respondent on September 8, 2015, Intervenor protested the cancellation of the Original IFB and requested that the cancellation be rescinded and the contract be awarded to Intervenor. Intervenor stated, among other things:

* * * *

> As you may be aware, both [Intervenor] and [Petitioner] submitted bids on the above-referenced project. Both parties bid on the same paving quantities identified in the bid documents. However, [Intervenor's] unit pricing was lower than [Petitioner's], and therefore ended up as the low bidder. The bids were, per custom, opened publicly.
>
> *A few days later, we were informed by [Respondent] that the paving quantities for this project were overstated. [Respondent] asked us if we would hold our pricing despite the lower quantity. (Normally, of course, a lower quantity would result, if anything, in higher unit pricing.) We agreed to hold our unit pricing, and also agreed to some minor adjustments that were affected by the lower quantity (emphasis added).*
>
> We were greatly surprised to be subsequently notified that the prior bidding would be cancelled, and the bidding would be reopened. To our knowledge, the only basis for the cancellation is because of the lower quantity. However, because both parties otherwise bid on the same specifications, the unit prices would automatically be applied to the lower quantity, and the bid result would be the same. [Respondent] is fully protected, and there is no basis for needing to reopen the bids. Moreover, a rebid would be inherently unfair to us, as [Petitioner] now has knowledge of the unit pricing we have used for this project.

* * * *

22. On or about September 15, 2015, Karen Yamauchi from the DOT sent a message to Yamashita attaching a copy of the federal regulation and directive addressing pre-award negotiations with contractors after bids were opened but before the award of the contract. The directive from the United States Department of Transportation, Federal Highway Administration dated April 30, 1985 stated:

Recently, several member State agencies of the American Association of State Highway and Transportation Officials have asked us to consider changing our requirements on competitive bidding to allow negotiation of construction contracts with apparent low bidders. The States indicate that this change would be in the public interest because it would lead to lower prices and reduce the potential for bid rigging. In view of this interest, we have reviewed Federal law covering competitive bidding as well as the Federal Highway Administration's policy in this area.

As a result of this review, we have concluded that the legal requirements of Section 112 of Title 23, United States Code, do not permit negotiation of prices with apparent low bidders. Under Section 112 and the regulations we issued to implement it, one of the most basic requirements is that the State highway agency must maintain nondiscriminatory procedures for inviting bids. These procedures should be free of requirements restricting competitive bidding on construction contracts. Bids must be opened publicly and the results announced. After tabulation and examination of the bids for errors, irregularities, responsibility and responsiveness, the State highway agency must either accept or reject the bid.

The State highway agencies do not have the authority under any circumstances to negotiate with a bidder or bidders before an award to reduce the price of a construction contract. Such negotiations with the apparent low bidder are essentially bid rigging in reverse. They subvert the fair and open competitive bidding process, under which qualified firms are entitled to an equal opportunity to compete for contracts, and invite favoritism and collusion as well as legal difficulties with unsuccessful bidders. In short, we do not believe negotiations with the apparent low bidder promote the public interest. We remain a strong advocate of open and competitive bidding, which traditionally has produced quality construction at a fair and reasonable cost.

We recognize that the interest in negotiation may be a result of the desire to hold down prices. Although we

> cannot permit negotiation, we certainly share the States' desire to keep prices as low as possible. We believe the States have other ways of influencing price, such as trying to increase competition among bidders, remaining on the lookout for collusion or other anticompetitive practices, improvement in design and specifications, alternative bidding, etc. I encourage you to continue working in these and other ways to achieve the lower prices we all desire.

23. On or about September 17, 2015, Respondent issued Addendum No. 1 to the Rebid which answered bidders' questions and provided "clarification of [the] scope of work".

24. On September 18, 2015, Yamashita emailed the DOT and said:

> The Chief Procurement Officer of the County of Maui is highly concerned about the issue of price exposure in this procurement, and he believes that the price exposure issue will damage the integrity of the procurement process at the county of Maui. In this case, the difference in the original scope of work (including the Makani St. portion), and the remaining project scope is only 20% different, so exposed prices are an issue since the scope of work hasn't changed that much. The Chief procurement officer believes that this price exposure issue will have a "bid shopping" effect on this procurement, which the state procurement law, and presumably the Federal procurement law, tries to fundamentally protect against.
>
> The Chief Procurement officer also believes that the Federal prohibitions against "negotiation" do not [sic] apply in this situation. If a contract is awarded to the original low bidder, there will be no negotiation. Unit prices will remain the same as in the original procurement, and adjusted downwards in direct proportion to the change in scope. Lump sum prices (e.g. traffic control) will be adjusted downwards in direct proportion to the change in the scope of work. And other prices such as mobilization are already based on percentages of the total $ value.
>
> Based on the above, please advise whether we are still required to re-bid this project.

25. On September 18, 2015, Yamauchi responded to Yamashita's email:

> Cary? I'm confused after reading your email. Is [Respondent's] Chief Procurement Officer's [sic] opinion to award the contract knowingly containing errors and at the higher bid amount than it would have been without the errors and to adjust downwards after contracted? It strikes me as improper-to-near illegal to knowingly procure a contract that contains errors especially at a higher cost. In addition, State DOT Highways Division concurred in its letter dated Aug 31, 2015, to [Respondent's] letter dated Aug 25, 2015, in which [Respondent] requested concurrence to cancel the award, reject all bids and re-advertise the project (see attached for reference)

26. Yamashita sent a follow-up email to the DOT on September 18, 2015:

> To clarify, the intent is to award the contract at the reduced amount, not at the original bid price. Interpreting the term "negotiation" is at issue here so could we just say that award can only be made on the unadjusted bid price? Please advise and thank you.

27. On September 18, 2015, Yamashita received an email from Michelle S. Kwan of the DOT pointing out that under Section 102.04 of the Special Provisions of the Rebid "seems it is allowed to adjust the quantities within 15% as quoted below and in the attachments from this project's special provisions."

28. On September 21, 2015, Respondent issued Amendment No. 2 to the Rebid extending the deadline for the submission of bids from September 22, 2015 to October 8, 2015 when the bids were to be opened.

29. In response to Kwan's email, on September 22, 2015, Yamashita emailed the DOT and said:

> Doesn't Michelle's response only apply after the contract is awarded? Please clarify this.
>
> Also, our Finance Director is requesting formal response regarding adjustment of bids prior to award of contract. Please confirm that a contract can only be awarded on the original bid amount and that quantities cannot be negotiated

> nor reduced as directed under Federal reg 23 CFR 635.113 (attached).
>
> That said, the Federal share for construction would be approximately $5.369 million, exceeding original authorization obligation of approximately $3.647 million. See attached approved Federal form 1240. Therefore, we substantially exceed the approved obligation by $1.722 million but understand that there is insufficient Federal funding to cover the shortfall.
>
> However, even this scenario seems to be questioned, refer to Karen Yamauchi's comments in verbatim: "opinion to award the contract knowingly containing errors and at the higher bid amount than it would have been without the errors and to adjust downwards after contracted? It strikes me as improper-to-near illegal to knowingly procure a contact that contains errors especially at a higher cost."
>
> Finally, please confirm that obligated Federal funds will not expire, provided that award is made within the approved budgeted authorization. Provide assurance that a re-bid option is viable as long as we meet the 180 day NTP criteria set for January 4, 2016, obtain approval to extend the deadline if necessary.

30. On September 22, 2015, an email from Li Nah Okita from the DOT was sent to Yamashita:

> cary,
> The sec 102 applies during construction. The key word is "negotiation." I want to find out did you actually negotiate with the bidders and what is it that u negotiate with the bidders before awarding. If you do negotiate then u violate the federal cfr as quoted in your email and will have to re advertise. tammy, can you provide your insight to this matter.

31. On September 22, 2015, Tammy Lee, Esq., a contracts office supervisor sent the following email to Okita:

> Hi Li Nah. I confirmed with Karen that all bids exceeded the budgeted funds for this project. Therefore, while state statute would allow it . . . it is my understanding (for a FHWA fed aid project) that 23 CFR 635.113(a) "negotiation with contractors, during the period following the opening of bids and before the award of the contract shall not be permitted." would not allow a pre award negotiation of a lesser amount proportionate to a decrease in scope.

32. On or about September 28, 2015, the DOT forwarded an email from Edwin H. Sniffen to Yamashita which stated in part:

> 1. Based on available information, the [sic] State would not object to the county deciding to either a) reject bids or b) award the original bid amount to the low responsible bidder-no pre award negotiations are allowed under CFR.
>
> 2. The State will be rescinding the letter that was sent from Ray to David Goode which confirmed that DOT agreed with recommendations to reject bid. Information has changed since the letter was sent, and it is no longer applicable.
>
> 3. The state will not be providing written confirmation of the direction that the county should take on this project. The county is free to decide the approach based on their perceived risk and the defensibility of the action.
>
> 4. If the county requires additional funds, they will need to wait until October to receive the additional fed funds as it will come from next FFY.

33. On October 5, 2015, Respondent issued Addendum No. 3 to the Rebid. The addendum stated in relevant part: "This addendum is issued to cancel the bid opening date and the solicitation for this project. A contract will be awarded on the original bid."

34. By letter dated October 8, 2015, Petitioner submitted a protest of the following actions:

* * * *

> (1) any attempt to rescind the cancellation of the County of Maui's ("COM's") July 20, 2015 solicitation ("original bid") for the above-entitled project ("Project"); (2) the cancellation of the properly issued solicitation for rebid on August 31, 2015 ("rebid") originally set for closing on September 22, 2015, which was then extended till October 8, 2015; and (3) the proposed award of contract based on the cancelled original bid.
>
> * * * *

35. As a result of Petitioner's protest, Respondent stayed the Rebid and has not awarded any contract under the Original IFB or the Rebid.

36. On or about October 8, 2015, the DOT concurred with Respondent's decision to award the contract to Intervenor.

37. By letter dated October 19, 2015 to David C. Goode, Director of the Department of Public Works, County of Maui, Raymond J. McCormick, the Highways Administrator for the DOT stated in relevant part:

> Based on additional information received by the State of Highway, Department of Transportation, we hereby rescind our letter number HWY-DD 2.9114 dated August 31, 2015, concurring with the County of Maui, Department of Public Works' (COM DPW) recommendation to reject all bids for the subject project. The COM DPW initially intended on awarding the construction contract to the low bidder based on adjusted item quantities, thus the risk of bid protest from the high bidder. However, pre-award negotiation is not allowed under the Code of Federal Regulations (CFR) Title 23 CFR Part 635.113(a) and the COM DPW was given the option to award the project based on the original bid amount to the low responsible bidder.

38. By letter dated October 20, 2015 to Petitioner and Intervenor, Respondent confirmed its decision to cancel the Rebid, rescind its cancellation of the Original IFB and award the contract to Intervenor based on the Original IFB. The letter also provided a detailed explanation for those actions:

1. After the original bid opening on August 11, 2015, the County of Maui realized that the paving quantities in the original bid were inaccurate and overstated. The quantities that were bid on also included another part of a larger project that included a section of Makani Road. Prior to the original solicitation, the scope of work of Makani Road section was deleted, but the paving quantities for the Makani Road section errantly remained in the bid solicitation.

2. The County of Maui sought to reduce the Makani Road Paving quantities and award a contract for a reduced amount to Maui Paving, LLC. The State of Hawaii Department of Transportation, as the decision maker for the use of federal highway funds (of which this project is 80% funded), stated that the County of Maui, per federal law, couldn't issue a "change order" prior to the award of the contract.

3. Prior to subsequent further investigation, the County of Maui believed that their only option was to cancel the original solicitation and re-bid the project. This was the basis for the original solicitation cancellation letters sent dated August 27, 2015.

4. Following a protest from Attorney's Cades Schutte dated September 8, 2015, and upon further investigation, the County of Maui determined that it was not limited only to the option of canceling the solicitation. The County had been concerned about the rebid and the effect of exposed pricing from the original solicitation. Our concern began when the Purchasing Division became aware that the difference in quantities was only approximately 20%. After asking the Engineering Division if there were any other options to a re-bid, the Engineering Division consulted with the State DOT. The State DOT and the County found a way to fund the entire contract amount with the understanding that it would be acceptable by federal law for the entire County of Maui to eliminate the Makani Road quantities through a contract change order after the contract had been executed.

> 6. The County of Maui tries to avoid, if at all possible, any re-bid on a project where the scope of work hasn't been sufficiently altered to where price exposure from the original bid is an issue. Thus, we believe that it's in the best interest of the County of Maui to award this bid on the original solicitation, now that we've found a way to do so.
>
> The County of Maui recognizes that there are two outstanding protests out there, and that this letter and our reasoning could affect or change one or [sic] both of the aggrieved parties to alter or re-submit or issue additional protests before we respond to the existing protests. We will wait for 5 working days after the receipt of this letter for either or both of the aggrieved parties to alter or re-submit or issue additional protests before we respond to the existing protests.

* * * *

39. Respondent's October 20, 2015 letter was sent to Intervenor and Petitioner via certified mail, return receipt requested.

40. According to Dyvette Fong of Petitioner, the Postal Service normally does not deliver certified mail directly to Petitioner's office because its mailbox is located at the bottom of a private driveway. Instead, a slip notifying Petitioner that the Post Office has received certified mail is left in Petitioner's mailbox.

41. Fong testified that generally, mail is delivered between 4 p.m. and 4:30 p.m., and that Petitioner could receive 15 to 20 notification slips a month including slips in connection with other projects it had with Respondent. Petitioner's practice is to pick up certified mail the next day.

42. According to the evidence, a slip notifying Petitioner of certified mail was left in Petitioner's mailbox sometime on October 22, 2015.

43. There was no evidence that the slip left in Petitioner's mailbox on October 22, 2015 in any way identified the contents of the mailing or who the mailing was from.

44. On October 28, 2015, Petitioner picked up the October 20, 2015 letter from the Post Office.

45. By letter dated October 30, 2015 to Respondent from Petitioner's attorneys, Petitioner confirmed that it had received Respondent's October 20, 2015 letter on October 28, 2015 and that it was protesting Respondent's intent to proceed with the cancellation of the Rebid and to "resurrect the already cancelled bid solicitation so that it can award the Project to [Intervenor]."

46. Petitioner's October 30, 2015 protest, stated in pertinent part:

* * * *

> First, we know that [Respondent] already attempted to unlawfully negotiate for a change order in advance of entering into a contract, and that [Intervenor] indicated it intended to increase its unit pricing charges due to the change in quantities. This plainly demonstrates that unit pricing is affected by quantities, so [Respondent] cannot simply eliminate quantities without unlawfully favoring one bidder over another. The bid documents contain a known error. That error affects unit pricing. Unit pricing affects bid prices. [Respondent's] one-on-one negotiations with [Intervenor] alone are not allowed under the procurement code.
>
> * * * *
>
> Third, while we understand [Respondent] is wary of rebidding this job because of price exposure, [Respondent] cannot allow such concern to override fair competition under the procurement code. No bidder's pricing based upon correct quantities has yet been revealed. Thus, the only way to allow all bidders to compete as required by law is to rebid this project with corrected specifications. [Respondent] should not completely throw out a fair bidding process simply because of this concern. As noted in our protest letter, the uniform response to a mistaken solicitation, which renders quantities or scopes ambiguous and thereby prevents fair and informed competition, is to rebid the job, even if the bids have been opened. In contrast, there is no support of [Respondent's] actions of negotiating a "revised" bid scope with a single bidder in order to avoid the strictures of federal law and competitive bidding on a clean set of specifications.

47. By letter dated November 4, 2015 to Respondent's counsel, the attorney for Intervenor provided Intervenor's responses to Petitioner's October 30, 2015 protest. Intervenor's responses did not allege that Petitioner's protest was untimely.

48. By letter dated December 4, 2015, Respondent denied Petitioner's October 8 and October 30 protests. The denial, however, indicated that Respondent considered "both protest letters to be timely."

49. On December 11, 2015, Petitioner filed the instant request for administrative review.

50. On December 22, 2015 and December 29, 2015, Intervenor filed a motion to dismiss Petitioner's petition for administrative review and a motion for summary determination, respectively. On December 30, 2015, Petitioner filed a motion for summary judgment. The motions were heard and denied on January 4, 2016.

51. The record established that the Department of Finance, County of Maui, was fully aware of and directly involved in addressing Petitioner's protests and subsequent request for administrative review, and was not subjected to any prejudice by its omission from the caption of Petitioner's request for review. On this record, the Hearings Officer ordered that Danilo F. Agsalod, Director of Finance, Department of Finance, County of Maui, be substituted as a respondent in place of the Department of Public Works.

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.

In this appeal, Petitioner seeks to have the Rebid proceed and the contract for the Project awarded under the Rebid rather than to Intervenor under the Original IFB. Toward that end, Petitioner contends that Respondent's cancellation of the Rebid was improper and contrary to the best interests of Respondent and the public.

The cancellation of solicitations is governed by HRS §103D-308 which provides:

> An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the governmental body* which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefore shall be made part of the contract file.

(Emphasis added).

In *Phillip G. Kuchler, Inc. v. DOT, PCH-2003-21 (2004),* the Hearings Officer noted that HRS §103D-308 "reflects a policy of giving precedence to the government's ability to cancel a solicitation over a bidder's interest in having the solicitation go forward where the government's 'best interests' would be served." Moreover, Hawaii Administrative Rule ("HAR") §3-122-96(a) provides in relevant part:

> Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:
>
> (1) Cancellation prior to opening:
>
> (A) The agency no longer requires the goods, services, or construction;
>
> (B) The agency no longer can reasonably expect to fund the procurement;

(C) Proposed amendments to the solicitation would be of a magnitude that a new solicitation is desirable; or

(D) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.

(2) Cancellation after opening but prior to award:

(A) The goods, services, or construction being procured are no longer required;

(B) Ambiguous or otherwise inadequate specifications were part of the solicitation;

(C) The solicitation did not provide for consideration of all factors of significance to the agency;

(D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

(E) All otherwise acceptable offers received are at clearly unreasonable prices;

(F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or

(G) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.

In promulgating HAR §3-122-96(a)(2), the Procurement Policy Board, presumably was cognizant of the potentially serious adverse impact a cancellation might have on the integrity of the competitive sealed bidding system once bids are revealed. Among other things, the cancellation of a solicitation after bid opening tends to discourage competition because it results in making all bidders' prices and competitive positions public without an award. With that in mind, the Board identified certain specific

> circumstances in HAR §3-122-96 (a)(2) where the cancellation of a solicitation *may* be in the best interests of the agency and therefore justified, even after bid opening. *Such a determination, however, must be consistent with the underlying purposes of the Procurement Code, including, but not limited to, the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public's confidence in the integrity of the system* (footnote omitted).

Phillip G. Kuchler, Inc., supra, (emphasis added).

Thus, although the procuring agency generally has broad discretion to cancel a solicitation, its determination that cancellation is in the best interests of the government must have a reasonable basis because of the potential adverse impact of cancellation on the competitive bidding system after the bids have been opened and the prices have been exposed. *Prometheus Construction v. University of Hawaii, PCH-2008-5 (May 28, 2008).*

Here, Petitioner argues that the cancellation of the Rebid and the awarding of the contract under the Original IFB do not meet the best interest standard because, among other reasons, Respondent and Intervenor engaged in unlawful negotiations in connection with the Original IFB and Respondent, in any event, cannot proceed with the Original IFB knowing that it contains erroneous quantities that, by Respondent's own admission, *significantly* inflated several bid items. In response, Intervenor argues that Petitioner's October 30, 2015 protest submitted in response to Respondent's October 20, 2015 letter, raising the unlawful negotiations claim for the first time, was untimely and, as such, precludes Petitioner from maintaining that claim in this action. Additionally, both Respondent and Intervenor deny that their post bid-opening communications amounted to "negotiations" and contend that because the bids have already been opened, it would be unfair to Intervenor, the apparent low bidder, to have to rebid the project.

HRS §103D-701(a) requires that protests be submitted "within five working days after the aggrieved person knows or should have known of the facts giving rise" to the protest. According to Intervenor, Petitioner should have known of the basis

for its protest when the Postal Service apparently left a slip in Petitioner's mailbox on October 22, 2015, notifying Petitioner of the attempted delivery of certified mail. As such, it is Intervenor's position that Petitioner's October 30, 2015 protest was untimely because it was not filed within 5 working days or by October 29, 2015 and thus, the Hearings Officer cannot consider Petitioner's protest, including its unlawful negotiations argument.

Even if a notification slip was left in Petitioner's mailbox on October 22, 2015, however, there was no evidence that the slip identified the sender of the certified mail, let alone its contents, or otherwise provided reasonable notice of the existence and availability of Respondent's letter[2]. There was also unrefuted testimony that Petitioner generally received a number of notification slips in a given month and that some of those slips may have been related to other ongoing projects Petitioner had with Respondent. On this record, the Hearings Officer cannot conclude that Petitioner knew or should have known of the basis for its protest on October 22, 2015 by virtue of the notification slip alone[3]. The evidence, instead, established that Petitioner received Respondent's October 20, 2015 letter on October 28, 2015[4]. Therefore, the Hearings Officer must conclude that Petitioner's October 30, 2015 protest was timely filed[5].

Having arrived at this conclusion, the Hearings Officer must next determine whether email communications between Respondent and Intervenor following the opening of the bids constituted prohibited negotiations and, in any event, whether it would be in Respondent's and the public's best interest to cancel the Rebid.

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[2] Thus, the notification slip alone would have been insufficient to provide Petitioner with "access to the information upon which its protest [was] eventually based." *See, Maui County Community Television v. Dept. of Accounting & General Services, PCX-2010-3 (July 9, 2010). See also, Delta Construction v. Dept. of Hawaiian Home Lands, et al., PCH-2008-22/PCH-2009-7 (April 9, 2009)*(5-day period within which a protest must be submitted is not triggered by mere speculation or hindsight).

[3] The evidence established that in its December 4, 2015 response to Petitioner's October 30, 2015 protest, Respondent readily acknowledged the timeliness of the protest: "The County of Maui is in receipt of your protest letters dated October 8, 2015 and October 30, 2015. We consider both protest letters to be timely." Petitioner also presented evidence that it received Respondent's October 20, 2015 letter by October 28, 2015 and submitted its protest within 5 working days. As such, the burden shifts to Intervenor, as the party contesting the timeliness of the protest, to substantiate its claim.

[4] Additionally, there was no evidence of any deliberate attempt by Petitioner to avoid or otherwise manipulate its receipt of the letter.

[5] According to the evidence, mail was generally delivered to Petitioner between 4:00 p.m. and 4:30 p.m. Thus, if the notification slip for the October 20, 2015 letter had been left in Petitioner's mailbox in the late afternoon on October 22, 2015, it would not have been unreasonable for Petitioner to retrieve its mail the next day on October 23, 2015. In that event, Petitioner's October 30, 2015 protest would still have been timely.

Competitive sealed bidding is based on the recognition that genuine competition can only result where parties are bidding against each other for precisely the same thing and on precisely the same footing. The object of bidding statutes is to prevent favoritism, corruption, extravagance and improvidence in the awarding of public contracts. To permit a substantial change in a proposal *after* bids have been opened and made public, would be contrary to public policy, and would tend to open the door to fraudulent and corrupt practices. *Wheelabrator Clean Water Systems, Inc. vs. City & County of Honolulu, PCH 94-1 (November 4, 1994).* Furthermore, public bidding statutes must be construed with sole reference to the public good and must be rigidly adhered to in order to guard against favoritism, improvidence, extravagance, and corruption. *Clinical Laboratories of Hawaii v. City & County of Honolulu, PCH 2000-8 (October 17, 2000).*

Toward these ends, HRS §103D-302 unequivocally prohibits negotiations once bids have been opened and prior to the award of the contract, and requires that bids are evaluated strictly on the criteria set forth in the solicitation and unconditionally accepted without alteration or correction. HRS §103D-302 provides in relevant part:

> (a) Contracts shall be awarded by competitive sealed bidding except as otherwise provided in section 103D-301. Awards of contracts by competitive sealed bidding may be made after single or multistep bidding. *Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is based on the criteria set forth in the invitation for bids.*
>
> * * * *
>
> (e) *Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter or by rules adopted by the policy board.*
>
> (f) *Bids shall be evaluated based on the requirements set forth in the invitation for bids.* These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will

> affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids shall set forth the evaluation criteria to be used. *No criteria may be used in bid evaluation that are not set forth in the invitation for bids.*
>
> * * * *
>
> (g) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes, shall be permitted in accordance with rules adopted by the policy board. *After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be permitted.*
>
> * * * *

Even "discussions" which are generally permitted for competitive sealed proposals are expressly prohibited where the contract is awarded by competitive sealed bidding:

> §3-122-1 Definitions.
>
> * * * *
>
> "Discussion" means an exchange of information to promote understanding of a state agency's requirements and offeror's proposal and to facilitate arriving at a contract that will be the best value to the state. *Discussions are not permissible in competitive sealed bidding*, except to the extent permissible in the first phase of multi-step sealed bidding to determine the acceptability of technical offers.

(Emphasis added).

Thus, where revisions to the solicitation become necessary, the procuring agency must proceed under HAR §§3-122-16.06 and 3-122-21(b) prior to the submission of bids, or HRS §103D-308, as appropriate. These provisions are designed to ensure fairness and equal opportunity to all bidders and prospective bidders and, accordingly, must be strictly adhered to.

Here, Petitioner contends that following the opening of the bids and prior to the awarding of the contract, Respondent and Intervenor engaged in private negotiation which resulted in Intervenor's agreement to "hold the unit prices for this project with the revised quantities." Respondent and Intervenor respond by arguing that Intervenor merely confirmed its unit prices in the existing bid and that, therefore, their communications did not amount to negotiations prohibited by HRS §103D-302.

The evidence established that the two bids submitted in response to the Original IFB were opened on August 11, 2015. On August 13, 2015, Respondent realized that the quantities that had been included in the Original IFB were inaccurate and included a section of Makani Road that should have been omitted. In considering its options, Respondent's project manager emailed Intervenor's representative on August 13, 2015 and, among other things, asked whether Intervenor would "agree to hold the unit prices listed in your submitted bid or if the unit prices will need to be adjusted for the affected items." Agawa, Respondent's project manager, explained in his email that Respondent "need[s] this information to determine how we proceed with the project." On the same date, Intervenor's representative emailed Respondent's project manager and said, "[Intervenor] will hold the unit prices for this project with the revised quantities." Intervenor provided Respondent with a revised bid on or about August 14, 2015. According to Intervenor's September 8, 2015 protest, Respondent had informed Intervenor that the paving quantities had been overstated and asked if Intervenor would hold its pricing despite the lower quantities. Intervenor also acknowledged in its protest that it had agreed to do so, even though a lower quantity would normally result, if anything, in higher unit pricing.

Nevertheless, both Intervenor and Respondent deny that any negotiations occurred and that Intervenor was merely confirming that it "would abide by the terms of an existing bid." Respondent's and Intervenor's communications, however, were not so limited. If they were, there would have been no need for Respondent to seek Intervenor's "confirmation" of its bid prices[6]. Instead, Respondent asked and Intervenor

[6] Respondent argues that Agawa was merely confirming that Intervenor would hold its unit prices submitted in its bid. According to Respondent, "[t]his was necessary to ensure there would be no change in unit price. This is not negotiation". Respondent, however, provides no plausible explanation as to why it was necessary to obtain Intervenor's confirmation of its unit prices even though Intervenor had already committed to those prices in its bid.

agreed to hold its pricing *notwithstanding the revised quantities* and even though, by Intervenor's own admission, lower quantities would normally result in higher unit pricing. Thus, Intervenor was given a competitive advantage when it was provided with the opportunity to confirm its pricing for the *revised quantities* and by doing so, presumably avoid a resolicitation. Furthermore, by asking Intervenor whether it would agree to hold its pricing despite the revisions, Respondent placed Intervenor in the position of having to agree or risk the loss of the contract. These communications undoubtedly constituted the exact type of negotiation that destroys the bidders' equal competitive footing and is prohibited by HRS §103D-302. In *Brewer Environmental Industries, Inc. v. A.A.T. Chemical, Inc., 832 P.2d 276 (Haw. 1992),* the Hawaii Supreme Court held that supplemental information modifying contract specifications that was obtained privately by the eventual low bidder invalidated the bidding process. There, the court held:

> The dispositive, uncontroverted material facts are that: (1) the contract specifications in the bid documents did not accurately reflect the true quantities required during the contract term, (2) the quantities directly affected the bid itself, and (3) additional information modifying the quantities specified in the bid documents and thereby affecting the bid prices was available and provided to AAT. Such material additional information enabled AAT to bid the contract on the basis of quantities not stated in the contract specifications, thus destroying "genuine competition" among the bidders and invalidating the bidding process. (citation omitted). This alone renders the resulting contract void and illegal without the need to address Appellant's other claims.

The evidence also established that Respondent, after consulting with the DOT, concluded that a rebid was necessary because the Original IFB "included quantities for Makani Road which is not a part of the project, significantly inflating several bid items". As a result, the Original IFB was cancelled and Respondent proceeded to rebid the Project. However, upon further consultation with the DOT, and *with the knowledge*

that Intervenor had agreed not to raise its prices despite the reduced quantities, Respondent decided to award the contract to Intervenor under the Original IFB. Had Intervenor indicated otherwise, it is unlikely that Respondent would have sought to award the contract to Intervenor under the Original IFB. Thus, regardless of whether the Original IFB permitted Respondent to award the contract to Intervenor and thereafter issue change orders to correct the overstated quantities as Intervenor argues[7], the Original IFB and Respondent's decision to resurrect the Original IFB were irretrievably tainted by their improper negotiation.

In *Danzl v. City of Bismarck, 451 N.W.2d 127 (N.D. 1990)*, Danzl argued that the City erred in revising the plans and specifications and negotiating with the four low bidders after the bids were opened instead of rejecting the bids and advertising anew "with request for bids so as to give all contractors an opportunity of bidding on the revised plans." In determining that the city violated the competitive bidding statutes, the court said:

> Bismarck's architect opined that "rejecting the bids and re-advertising was not in the best interest of the city." The architect further stated: "The bids received, I feel, are the best prices the city could get at that particular time." As a practical matter, the architect's opinion may have been correct. But, it is irrelevant because the legislature has ordained the procedure that must be followed when bids are rejected, including low bids, and that is to advertise anew. Notwithstanding the architect's opinion, "[i]t cannot be said that other and additional bids might not have been submitted on the revised plans if there had been a readvertisement for bids." (citations omitted). Who can say what reduction might have been made by the other bidders on the same changes in specifications?" (citation omitted).
>
> We conclude that Bismarck violated the competitive bidding statutes contained in Ch. 48-02, N.D.C.C., when it revised specifications to reduce construction costs and negotiated with the four low bidders without affording other bidders an opportunity to bid on the revised project (footnote omitted).

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[7] Intervenor argues, among other things, that the contract can still be awarded under the Original IFB because the quantities were estimates only and the revised quantities were not significant.

The opinion in *Hanson Excavating Company, Inc. v. Cowlitz County, 622 P.2d 1285 (Wash App. 1981)* is equally instructive. There, an excavating company sued Cowlitz County for breach of contract when the county rejected a contract earlier awarded to the excavating company. The excavating company had been the low bidder on a sewer construction project but was not initially awarded the contract because its bid exceeded available funds. Following the opening of the bids, the county's consultant redesigned the project in order to reduce the total price including increasing or decreasing the quantities of certain items, met with the excavating company, and secured its agreement to build the redesigned project for the revised price. The contract was then awarded to the excavating company. The county, however, subsequently rejected all bids after being advised by legal counsel that the contract was void because of the negotiations between its consultant and the excavating company. In granting the county's motion for summary judgment, the court said in relevant part:

* * * *

> The word "negotiate" is defined in Black's Law Dictionary 1188 (Rev. 4th ed. 1968) as
>
> > That which passes between parties or their agents in the course of or incident to the making of a contract and is also conversation in arranging terms of contract.
>
> * * * *
>
> The redesigned project was estimated to cost about $200,000 less than the original design for which bids had been submitted. The purpose of these discussions between [the excavating company] and [the county's consultant] was to ensure that [the excavating company] would be willing to undertake the redesigned project for the new proposed bid amount. In other words, the project was "tailored" to what [the excavating company] was willing to provide for the same unit prices.
>
> The court in *Platt Electric* held that a negotiated contract for a project which must be competitively bid is invalid.

> This is because of the strong public policy favoring competitive bidding in this state. Negotiation of a contract for a project requiring competitive bidding circumvents this policy and opens "the doors to possible fraud, collusion, and favoritism." *Platt Electric Supply, Inc. v. Seattle, supra at 274, 555 P.2d 421.* By negotiating with only one bidder, the county unfairly gave advantage to [the excavating company] that was not afforded to all the others. The county could and should have rejected all the bids as being too high. This would have constituted "good cause" under RCW 36.32.250. *See Platt Electric Supply, Inc. v. Seattle, supra at 274, 555 P.2d 421.* Having done so, the county could then have readvertised the redesigned project for bids. This was not done, however, and the contract between the county and [the excavating company] is void.

As in this case, the excavating company also contended that the changes in bid quantities were permissible by virtue of several clauses in the solicitation pertaining to the reservations of rights, within certain limits, to change quantities of work, and increase or decrease quantities during the construction. Additionally, the excavating company argued that the changes in quantities with no reduction in unit prices did not constitute a prohibited negotiation of the contract. In rejecting those arguments, the court held:

* * * *

> *Clearly, these provisions are directed to limited changes which can be made after a contract has been awarded. The provisions specify that the quantities in the bid are approximate only. They are intended to give the county a means of comparing the bids and determining the lowest bidder.*
>
> [The excavating company] also argues that the changes in quantities, with no reduction in the "line item" or unit prices, do not constitute a prohibited negotiation of the contract. To accept [the excavating company's] argument is to defeat the purpose of competitive bidding. *Competing contractors may change their bids or others may bid if bid proposal quantities are altered; all bidders should have the*

> *opportunity to bid on the same proposed quantities (footnote omitted). The county and [the excavating company] were not free to alter the bid quantities until after the contract was awarded and the project underway. This is the sole support and intent of the clauses relied upon by [the excavating company].*

(Emphasis added).

The Hearings Officer is mindful of the concerns raised by a resolicitation after bids have been opened and revealed. On the other hand, the Hearings Officer cannot overlook the improper negotiation that occurred and its effect upon the integrity of the entire process which included asking and receiving Intervenor's agreement to lower prices[8]at the risk of losing the contract[9] and providing Intervenor alone with the opportunity to submit a revised proposal. Moreover, the Original IFB contained known quantity errors that, according to Respondent, "significantly" inflated several items, and Respondent was *not* in a position to alter those quantities until after the contract had been properly awarded. On balance, the Hearings Officer concludes that the resolicitation of the Project with the revised quantities would be preferable to the awarding of the contract to Intervenor under the Original IFB. Any concern over the previous exposure of prices will be minimized because the resolicitation will be based on the lower, more accurate, revised quantities rather than the inflated quantities in the Original IFB. Under these circumstances, it seems obvious that a resolicitation would do more to foster public confidence in the integrity of the procurement system than would the awarding of the contract under the Original IFB with its known defects.

Based on all of these considerations, the Hearings Officer concludes that Petitioner has proven by a preponderance of the evidence that the cancellation of the Rebid and the awarding of the contract to Intervenor under the Original IFB would not be in Respondent's or the public's best interest.

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[8] Although Intervenor agreed to "hold" its prices, it also acknowledged that normally prices would increase with the reduced quantities. Thus, Intervenor, in effect, agreed to lower its prices despite the reduced quantities.

[9] There was no evidence that Respondent informed Intervenor that it could lose the contract if Intervenor declined to hold its prices. However, this was the clear implication from Respondent's inquiry.

IV. DECISION

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

1. Respondent's December 4, 2015 denial of Petitioner's protests is reversed and Respondent's cancellation of the Rebid is vacated;

2. This matter is remanded to Respondent with instructions to proceed with the Rebid consistent with this decision. Respondent shall thereafter award the contract for the Project pursuant to HRS §103D-302;

3. Each party shall bear its own attorney's fees, costs, and expenses; and

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

Dated at Honolulu, Hawaii: JAN 22 2016

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