



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of:)	PDH-2017-004
)	
NAN, INC.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
vs.)	AND DECISION
)	
STATE OF HAWAII, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent,)	
)	
and)	
)	
KIEWIT INFRASTRUCTURE WEST)	
CO.,)	
)	
Intervenor.)	

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

I. INTRODUCTION

On August 4, 2017, Nan, Inc., ("Petitioner"), filed a Petition for Administrative Review and Hearing Relief ("Petition") to contest the Department of Transportation, State of Hawaii's ("Respondent") denial of Petitioner's protest regarding a project designated as The New Kapalama Container Terminal Yard Design (Part I) at Honolulu Harbor, Hawaii, Job H.C. 1052 and the Demolition of Structures at the Kapalama Military Reservation (Part II) at Honolulu Harbor, Hawaii, Job H.C. 10370

(collectively, "Project"). The matter was set for hearing on August 23, 2017 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On August 8, 2017, Kiewit Infrastructure West Co. ("Intervenor") filed its Motion to Intervene.

On August 15, 2017, at the Pre-Hearing conference, the parties entered into a stipulation allowing Intervenor to intervene in this proceeding.

On August 21, 2017, Petitioner, Respondent and Intervenor filed their motions for summary judgment. On the same date, Petitioner filed its memorandum in opposition to Respondent's and Intervenor's motions for summary judgment. Intervenor also filed its memorandum in opposition to Petitioner's motion for summary judgment to which Respondent filed a joinder.

On August 22, 2017, the motions came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Trevor N. Tamashiro, Esq. appeared on behalf of Petitioner with Wyeth Matsubara, Esq. present; Laura Y. Kim-Nugent, Esq. appeared on behalf of Respondent with Tammy Lee present; and Craig K. Shikuma, Esq., Joseph A. Stewart, Esq. and Aaron Mun, Esq. appeared on behalf of Intervenor with Kyle Ostergard, Jamie D. Wisenbaker, Kyle Preedy, Kyle Nakamura and Bryce Peterson present. The parties stipulated to admit all of each other's exhibits into evidence. For purposes of these motions, the Hearings Officer considered Petitioner's Exhibits 1 thru 9 and Intervenor's Exhibits I-8, I-9, I-18, I-19, I-20, I-21, I-22, and I-23.

At the conclusion of the hearing, the Hearings Officer gave the parties the option of submitting additional briefs by August 30, 2017, however, no additional briefs were filed.

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

II. FINDINGS OF FACT

1. On December 13, 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" or "IFB" used interchangeably). The Solicitation also incorporated the Hawaii Department of Transportation, Air Water Transportation Facilities Division, General Provisions for Construction Projects, Dated 2016 ("General Provisions").

2. The Solicitation states, among other things, that if a bidder's proposal is accepted, it shall execute a contract with Respondent and be bound by the terms of its bid:

The undersigned bidder further agrees to the following:

If this proposal is accepted, it shall execute a contract with the Department to provide all necessary labor, machinery, tools, equipment, apparatus and any other means of construction, to do all the work and to furnish all the materials specified in the contract

in the manner and within the time therein prescribed in the contract, and it shall accept in full payment therefore the sum of the unit and/or lump sum prices as set forth in the attached proposal schedule for the actual quantities of work performed and materials furnished...

See, Intervenor's Exhibit I-8 at page 1763.

3. The General Provisions provide, among other things, that all numerals shall be in ink or typed and that the bid must be signed with ink:

The bidder shall submit the bid upon the forms furnished by the Department or a facsimile thereof. The bidder shall specify prices in numerals for each pay item as required on the proposal schedule. The bidder shall also show in numerals the products of any unit prices and their estimated quantities in the column provided for that purpose. The bidder shall enter the total amount of bid obtained by adding the amounts of all pay items. **All numerals shall be in ink or typed.**

* * * *

The **bid must be signed with ink** by the person or persons legally authorized to submit a bid on behalf of the bidder.

When a bid is signed by an agent, proof of the authority to sign the bid for the bidder must be on file with the State prior to the opening of bids or shall be submitted with the bid; otherwise, the bid will be rejected as irregular and unauthorized.

See, Petitioner's Exhibit 8 at 219, General Provision 2.8. (emphasis added.)

4. The General Provisions also define an "irregular bid" as follows:

Bids will be considered irregular and may be rejected for any of the following reasons:

- (1) If the bid is in a form other than that furnished by the Department or if the form is altered or any part thereof is missing.
- (2) If there are additions or irregularities of any kind which make the bid incomplete, indefinite, or ambiguous as to its meaning,
- (3) If the bid does not contain a bid price for each pay item listed.
- (4) Unbalanced proposals in which the prices for some items are out of proportion to the prices for other items.

See, Petitioner's Exhibit 8 at 220, General Provision 2.9.

5. The Solicitation also required bidders, among other things, to submit sealed bids to Respondent by 2:00 p.m. on March 16, 2017.

6. Between January 1, 2017, through and including June 13, 2017, Respondent issued six (6) Addenda. The Addenda also postponed the bid opening from March 16, 2017 to June 16, 2017 at 2:00 p.m.

7. On June 16, 2017, the bids were opened. There were six (6) bidders: Petitioner, Intervenor, Hawaiian Dredging, Road & Highway Builders, Watts Construction and Goodfellow Brothers, Inc.

8. Intervenor was the lowest bidder having submitted a bid of \$163,521,093.00. Petitioner was the second lowest bidder having submitted a bid of \$169,948,740.50.

9. By letter dated, June 23, 2017, Petitioner submitted its Notice of Protest ("Protest Letter") to Respondent alleging, among other things, that Intervenor's bid "failed to comply with various material requirements of the IFB, rendering its bid nonresponsive on its face and, thus ineligible for award." Specifically, Petitioner alleged that Intervenor:

Submitted falsified information by allowing unauthorized Kiewit representatives to improperly alter its bid document after Kiewit's authorized representative, Jamie D. Wisenbaker, signed and certified Kiewit's bid as "correct and final"; and

Failed to provide mandatory and required evidence establishing a proper designated signatory for the bid proposal which renders the bid unauthorized and nonbinding to the State.

See, Petitioner's Exhibit 8 at 172 (emphasis added.)

10. By letter dated June 23, 2017, Respondent sent a copy of Petitioner's Protest Letter to Intervenor and requested Intervenor's response to the Protest Letter.

11. By letter dated July 7, 2017, Counsel for Intervenor sent Respondent its response to the Protest Letter.

12. By letter dated July 28, 2017, Respondent denied Petitioner's protest stating, in part, as follows:

The Hawaii Department of Transportation ("DOT") has reviewed your letter dated June 23, 2017 to the DOT regarding the above referenced Project. Your letter argues in general that apparent low bidder, Kiewit Infrastructure West Co., ("Kiewit") "failed to submit a responsive bid." After careful review and consideration of your letter and the arguments therein, your protest is denied.

* * *

Bid Proposal

The requirements regarding the issue of proper authority and proper signature, combined with the bid security are for the purpose of binding the bidder into entering a contract with the DOT should it be determined the lowest responsive responsible bidder.

* * *

Kiewit's bid satisfied all of the proper authority, proper signature, and bid security requirements for the purpose of being bound to enter into a contract with the DOT.

The project bid proposal was signed in ink by Kiewit's acting Senior Vice President, Jamie D. Wisenbaker. Submitted with Kiewit's bid proposal was Officer's Certificate of Kiewit Infrastructure West Co., dated April 17, 2017, certifying Jamie D. Wisenbaker...is authorized to execute and deliver the bid proposal on behalf of the Corporation, and upon award [sic] of the Project, to execute and deliver the Project contract and any related documents for the Project.

Your protest argues that regardless of whether Kiewit's bid was properly signed by an authorized Officer of Kiewit's, the handwritten items and handwritten edits on Kiewit's Subcontractor Listing, Hawaii Products Preference Form and on the Bid Proposal Schedule were all made after properly authorized Senior Vice President of Kiewit's Jamie D. Wisenbaker had signed Page P-5 of

Kiewit's proposal. And you claim that because these handwritten items and handwritten edits were made after Jamie D. Wisenbaker signed the bid, and that because Kiewit did not provide the DOT with any documentation that any individual besides Jamie D. Wisenbaker as authorized to sign the bid, and that therefore, Kiewit's bid is nonresponsive to the Projects Invitation for Bids ("IFB").

The DOT disagrees and responds:

HRS § 103D-104 defines a responsive bidder. A responsive bidder is, "a person who has submitted a bid which conforms in all material respects to the invitation for bids."

* * *

Another DCCA/OAH decision, *Browning-Ferris Industries of Hawaii, Inc. v. State of Hawaii, Dept. of Transportation, PCH 2000-4 (June 8, 2000)* is instructive, "[m]atters of responsiveness must be discerned solely by reference to materials submitted with the bid and **facts available to the government at the time of the bid opening**...The rules is designed to prevent bidders from taking exception to material provisions of the contract in order to gain an unfair advantage over competitors and **to assure that the government evaluates bids on an equal basis.**" *Id.* ...

The facts available to the DOT at the time of the Project bid opening is that Kiewit's bid was signed in ink by a properly authorized Officer of Kiewit, and as discussed above, Kiewit's bid satisfied all of the proper authority, proper signature, and bid security requirements for the purpose of being bound to enter into a contract with the DOT. Therefore, on this point, Kiewit's bid is responsive to the project specifications.

There is no requirement for the DOT to make an after bid opening inquiry into at which particular time the bid information and prices are handwritten, or have handwritten edits, prior to the authorized signer, or after the authorized signer has signed, all the DOT requires is that the bid proposal be submitted in the **exact manner** requested by the DOT with respect to price, quantity, quality, and delivery. Here, the DOT determines that Kiewit's bid proposal was submitted by a proper signatory in ink, the bid was accompanied with proper bid security, the bid proposal amounts were listed prior to the bid opening, and that the prices were carefully checked and were submitted as correct and final on the bid opening date of June 16, 2017.

Moreover, as *Browning-Ferris* stated, the purpose of determining bid responsiveness based on the facts available to the DOT at the time the bid is opened is to assure the DOT evaluates all bids on an equal footing. Whatever the bid amounts Kiewit listed in its bid, the DOT must not allow any after bid opening revisions, in other words, Kiewit is bound to perform the Project scope at the prices listed in its bid proposal.

Proposal Bid Prices Declaration

* * *

Kiewit's declaration dated on the bid opening date of June 16, 2017 does not show that there was an intent to mislead the DOT. The Specifications require a declaration be made and that a false declaration is subject to the penalty of perjury. Since Kiewit's bid proposal was submitted by a proper signatory in ink, and a valid bid bond, the presumption to the DOT is that the bid proposal amounts were listed prior to the bid opening, and that by signing, the prices were carefully checked and were submitted as correct and final on the bid opening date of June 16, 2017.

Approved Apprenticeship Program Certification

* * *

Certification Form 1 was signed by Marc Simmons, Kiewit Estimating Manager, your protest argues that Kiewit should not qualify for the five percent Apprenticeship Preference because only Jamie D. Wisenbaker is authorized to sign the bid and as such he is the only one authorized to sign the Certification Form 1. The DOT disagrees.

The requirement to qualify for the five percent (5%) Apprenticeship Preference is for the bidder to **show proof** that it is a party to an apprenticeship agreement registered with the department of labor and industrial relations for each applicable trade the bidder will employ to construct the public works. Nothing in the HRS § 103-55.6, CM 2011-25, or Certification Form 1 requires the authorized bid signer to be the same individual to sign the Certification Form 1. Nor is there a requirement that the signing of Certification Form 1 follow the same authorization as that required of the bid signature. The purpose of requiring the authority to sign the bid (with submittal of the bid bond) is to bind the bidder to enter into a contract with the DOT. The purpose of signing and submittal of the Certification Form 1 is to **show written proof of being a party to a registered apprenticeship agreement** in order to qualify for the Apprenticeship Preference. Both the signature on the bid and the

signature on the Certification Form 1 have distinct purposes, and both are to be evaluated based on the requirements of each.

Although we appreciate your concerns, based on the foregoing, your bid protest is hereby denied. This decision is final and conclusive.

See, Intervenor's Exhibit I-22 (emphasis in original.)

13. On August 4, 2017, Petitioner filed the instant Petition.

14. Intervenor is a corporation.

15. Intervenor's bid was signed before bid submission by Jamie D.

Wisembaker, Sr. Vice President of Intervenor on page P-5 ("Certification" and/or "Declaration" used interchangeably). The Declaration was dated June 16, 2017, the same day as bid submission and opening.

16. The Declaration was signed with ink and stamped with Intervenor's corporate seal.

17. There was no Power of Attorney for Mr. Wisembaker submitted with Intervenor's bid nor is/was there a Power of Attorney for Mr. Wisembaker on file with Respondent.

18. There was an Officer's Certificate of Kiewit Infrastructure West Co. ("Officer's Certificate") submitted with Intervenor's bid. The Officer's Certificate was signed by R. John Lochner, Assistant Secretary of Intervenor and dated April 13, 2017 (within six (6) months of June 16, 2017). The Officer's Certificate certified, among other things, that Jamie D. Wisembaker, Sr. Vice President of Intervenor, was authorized to execute and deliver the bid proposal for the Project on behalf of the corporation, and upon award [sic] of the Project, to execute and deliver the Project contract and any related documents.

19. The Officer's Certificate was stamped with Intervenor's corporate seal.

20. Also submitted with Intervenor's bid was a surety bid bond in the proper amount (5%).

21. Intervenor's bid contained numerous handwritten entries, changes, additions, edits and/or alterations, some with the initials "JDW" next to them, some without.

22. Intervenor's bid also contained numerous typewritten entries.

23. All of the handwritten and typewritten entries were placed on Intervenor's bid before bid submission and opening.

24. There were no irregularities on the face of Intervenor's bid, that is, there were no missing sub-contractors or prices on line items. Intervenor's bid was not mathematically or materially unbalanced on its face.

25. Employee(s) of Intervenor made handwritten additions and/or changes to the bid at the site of the bid opening after the bid was signed by Mr. Wisenbaker, but before it was submitted. There was no Power of Attorney for Intervenor's employee(s) submitted with Intervenor's bid nor was there any Power of Attorney for Intervenor's employee(s) on file with Respondent.

26. It is common practice for employees of bidders to make "last minute" additions and/or changes to a bid at the bid site prior to bid submission.

27. Intervenor's bid also included four (4) Certification of Bidder's Participation in Approved Apprenticeship Program Under Act 17 ("Form 1") forms.

28. All four (4) of the Form 1s, dated June 16, 2017, were signed by Marc Simmons, Estimating Manager/employee of Intervenor and various apprenticeship program sponsors. No Power of Attorney for Mark Simmons was submitted with the bid, nor is/was there one on file with Respondent.

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. JURISDICTION

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.

B. STANDARD 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, all reasonable inferences from the evidence,

must be viewed in the light most favorable to the non-moving party. See, *Nan, Inc. vs. DOT, SOH and Hawaiian Dredging Construction Company, Inc.*, PDH 2015-006 (Sept. 4, 2015), citing *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, 25, 873 P.2d 98, 104 (1994).

C. PETITIONER’S CLAIM

In its Petition for Administrative Review and Hearing Relief, Petitioner raises the following Claims and Issues:

It is clear that the undisputed facts support Nan’s claim that this Office should find Kiewit’s bid as nonresponsive, and find that Nan is the lowest responsive and responsible bidder whose bid is in the best interests of the State. The State’s failure to conduct an inquiry into Kiewit’s bid responsiveness was arbitrary and capricious, and its decision to reject Nan’s protest should be reversed. Next, the State failed to reject Kiewit’s bid proposal as non-responsive in spite of the 34 false certifications contained within its bid. Finally, the State’s (sic) improperly failed to disqualify Kiewit’s falsely certified Form 1s – the effect of which should have been that Petitioner was the lowest responsive and responsible bidder whose bid is in the best interest of the State.

See, Petition at 15, Claims and Issues.

Petitioner seeks a determination that Intervenor’s bid was nonresponsive to the Solicitation because Intervenor’s bid form contained numerous handwritten additions and/or changes, some of which were initialed “JDW”. According to Petitioner, the handwritten entries and/or initials were not made by Jamie D. Wisenbaker, but by Kiewit employee(s), and made after the Declaration was signed by Jamie D. Wisenbaker. As such, Petitioner asserts that the Declaration was a “false certification”

that the bid was “carefully checked” and “submitted as correct and final.” Petitioner also asserts that employees cannot make additions and/or changes to a bid without a power of attorney (or proof of authority) authorizing them to sign on behalf of the bidder, and that the State’s failure to conduct an inquiry into Kiewit’s bid responsiveness was arbitrary and capricious, and its decision to reject Nan’s protest should be reversed. Finally, Petitioner alleges that Intervenor’s bid is nonresponsive because it contained falsely certified Form 1s.

D. CONCLUSIONS OF LAW

RESPONDENT DOES NOT HAVE A DUTY TO INQUIRE BEYOND THE FACE OF A BID AND DID NOT ACT ARBITRARY AND CAPRICIOUS IN ITS INQUIRY INTO THIS MATTER

In its motion for summary judgment, Petitioner argues that “[t]he State has a **duty** to inquire beyond the face of an **irregular** bid to determine its responsiveness and the **failure to conduct an inquiry** into Kiewit’s **irregular** bid is an **arbitrary and capricious** act which cannot stand.” See, Petitioner’s motion for summary Judgment at 16 (emphasis added.) Petitioner points out that it “has firsthand experience as the subject of DOT’s vigorous post-bid opening inquiry into whether Nan’s authorized representative had or had not “carefully checked” whether its bid proposal prices as “correct and final” during a previous procurement protest proceeding.” See Petitioner’s motion for summary judgment at 13 referencing *Nan, Inc. v. DOE SOH*, PDH -2015-006 (September 4, 2015).

The material facts (or lack thereof) on this issue are not in dispute. First, Petitioner assumes facts not in evidence. There were no “irregularities” on the face of Intervenor’s bid at the time of bid opening. Petitioner does not allege, nor does the

Hearings Officer find, that the numerals were not “in ink” or typed, or that the bid was not signed “with ink.”¹ Petitioner does not allege, nor does the Hearings Officer find, that the bid was “in a form other than that provided by the Department or if the form is altered or any part thereof is missing.”² There were no missing sub-contractors or prices on any of the line items.³ Intervenor’s bid was not mathematically or materially unbalanced on its face.⁴ As discussed in more detail below, the fact that Intervenor’s bid contained numerous handwritten entries, some of which were “additions,” the “additions” did not make the bid “incomplete, indefinite, or ambiguous as to its meaning”⁵ and did not make the bid irregular or nonresponsive on its face. Simply put, there was no reason for Respondent to conduct an inquiry into the responsiveness of Intervenor’s bid.

Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*. In the instant case, Respondent correctly determined that Intervenor’s bid proposal “...was submitted by a proper signatory in ink, the bid was accompanied with proper bid security, the bid proposal amounts were listed prior to the bid opening, and that the prices were carefully checked and were submitted as correct and final on the bid opening date of June 16, 2017.”⁶

¹ See, General Provision 2.8.

² See, General Provision 2.9(1).

³ See, General Provision 2.9(3).

⁴ See, General Provision 2.9(4).

⁵ See, General Provision 2.9(2). If anything, the Hearings Officer finds just the opposite, to wit: that the handwritten “additions” made the bid complete, definite and unambiguous as to its meaning.

⁶ See, Intervenor’s Exhibit I-22 at 2022.

Second, notwithstanding there were no irregularities on the face of Intervenor's bid, and contrary to Petitioner's assertion, Respondent did indeed conduct an inquiry into Kiewit's bid responsiveness. Respondent sent a copy of Petitioner's Protest Letter to Intervenor and asked for a response. Having received and reviewed Intervenor's response, Respondent affirmed that Intervenor's bid was responsive and denied Petitioner's protest.

Furthermore, as discussed in more detail below, Intervenor's bid did not contain "false certifications" and the Form 1s were properly executed.

Based on the uncontroverted evidence presented, the Hearings Officer concludes that Respondent did not have a "duty" to make an after-bid-opening inquiry into when the Declaration was signed or when the information on the bid was handwritten and/or edited. The Hearings Officer also concludes that Respondent did not act arbitrary and/or capricious in conducting an inquiry in this matter and/or rejecting Petitioner's protest.

AN EMPLOYEE OF A BIDDER CAN MAKE HANDWRITTEN ADDITIONS AND/OR CHANGES TO A BID AFTER THE DECLARATION WAS SIGNED, BUT BEFORE THE BID IS SUBMITTED WITHOUT RENDERING THE BID NONRESPONSIVE

Petitioner argues that "[t]he State improperly failed to reject the bid proposal of Kiewit as non-responsive for the 34 false certifications in its submitted bid." Petitioner goes on to explain that it is a "factual impossibility" that Mr. Wisenbaker was able to both pre-sign Kiewit's certification page while also carefully checking the bid prices as "correct and final." See, Petitioner's motion for summary judgment at 20.

The Hearing Officer disagrees with Petitioner's argument.

Given the advances in technology, the Hearings Officer concludes that it was not a "factual impossibility" that Mr. Wisenbaker was able to pre-sign the Declaration page and later on carefully check the handwritten bid prices as "correct and final." As noted in Mr. Wisenbaker's Declaration attached to Intervenor's motion for summary judgment:

On June 16, 2017 which is the date Kiewit submitted its bid to the DOT, **I communicated directly with the Hawaii area office by phone, email, and text numerous times**, including specifically to Kyle Preedy, a Kiewit Area Manager that oversees Hawaii work under my supervision. The discussions concerned the finalization of Kiewit's bid, including any changes resulting from the bids received from subcontractors and decisions on work Kiewit would self-perform. After the prices for all categories were finalized and included in the bid, the total amount of the bid was recalculated as being \$163,521,093.00. **I directed and approved changes to the bids and the final total bid amount. Only after I approved the total bid amount did I authorize the bid to be submitted on Kiewit's behalf to the DOT.** (emphasis added.)

Intervenor is a corporation. Intervenor's bid was signed with ink in compliance with HAR § 3-122-2. The Declaration, dated June 16, 2017, was signed with ink by Intervenor's Sr. Vice President Jamie D. Wisenbaker before the bid was submitted (See, Intervenor's Exhibit I-8 at page 1768). Attached to Intervenor's bid, among other things, was an Officer's Certificate (current within 6 months of the bid submission) (See, Intervenor's Exhibit I-8 at page 1769) and surety bid bond in the proper amount (5% of bid) (See, Intervenor's Exhibit I-8 at page 1789). Both the Declaration and Officer's Certificate bore the corporate seal of Intervenor. See Petitioner's Exhibit 8 at pages 187 and 188.

The Hearings Officer concludes that Intervenor's bid was signed by a proper authority of the corporation in compliance with General Provision § 2.8. The

Hearings Officer further concludes that Intervenor's bid met all the legal requirements for submission including but not limited to, proper signature, proper authority, and proper bid security.

On June 16, 2017, at the bid-opening site, employee(s) of Intervenor made numerous (according to Petitioner 34) handwritten additions and/or changes to the bid after it was signed but prior to submission.⁷ A reasonable inference could be made that said employee(s) had the authority to make the handwritten additions and/or changes. However, whether Intervenor's employee(s) had the authority to do so or not is irrelevant since either way, Intervenor is/was bound to the terms of its bid.

The Declaration signed by Sr. Vice President Jamie D. Wisenbaker certifies that the bid prices have been "carefully checked" and "submitted as correct and final" at the time of bid opening. As to the purpose of the Declaration, this Office has previously stated:

The Declaration was 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 bidder and that bidder was committed to those prices. Notwithstanding the Declaration, however, HRS §103D-302(g), already severely limits the bidder's ability to correct or withdraw 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 makes it 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 Declaration, **regardless of**

⁷ Notwithstanding that Petitioner failed to establish this fact in its moving papers, the parties stipulated to this fact at the pre-hearing conference.

when it was dated merely added another layer of assurance of the bidder's commitment.

Hensel Phelps Construction Co. vs. DOT and Nan, Inc., PDH-2016-004 at page 12, (October 14, 2016) (emphasis added.)

The Hearings Officer finds and concludes that Jamie D. Wisenbaker, Sr. Vice President of Intervenor, was duly authorized to sign the bid as an officer of Intervenor, and not as an agent, and signed it in ink, thereby certifying a bonafide bid. A Power of Attorney is not required. The General Provisions, Article II, Section 2.8 pertaining to "proof of the authority to sign the proposal for the bidder" cited by Petitioner only applies when a bid is signed by an agent of the bidder, not its officer and/or employee.

The bid itself contained numerous line items with handwritten additions and/or changes, some of which were initialed "JDW", made by Kiewit's employee(s), albeit after the Declaration was signed, but before bid submission. The parties agreed that it is common practice for employees of bidders to make "last minute" additions and/or changes to a bid at the bid site prior to bid submission. It is, apparently, not unusual for subcontractors, especially electricians, to submit their line item bids, or modify them, at the "last minute." That explains why, as pointed out by Intervenor, five (5) of the six (6) bids submitted in response to this Solicitation, including Petitioner's, have handwritten entries. That explains why four (4) of those five (5) bids, including Petitioner's, have handwritten entries for the name of the electrical subcontractor, Item No. 65 lump sum price for electrical work and the final bid totals.⁸ This Hearing Officer sees nothing wrong with a bidder authorizing its employee(s) to make handwritten (in ink) additions and/or changes to the bid prior to bid submission since the bidder is still

bound by those additions and/or changes including any erroneous additions and/or changes. If this Office were to conclude otherwise, Petitioner's own bid would fail.

There is nothing in the Solicitation, HRS Chapter 103D or the implementing rules which require the same person to prepare, sign and initial any changes to the bid prior to it being submitted. The Hearings Officer concludes that Intervenor's employees can make handwritten additions and/or changes to the bid, regardless of whether the handwritten entries are made before or after the Declaration was signed, so long as the handwritten entries are made in ink and prior to bid submission. Petitioner has not cited to any authority, nor is the Hearings Officer aware of any, that stands for the proposition that a bidder's employee cannot make handwritten additions and/or changes to a bid after the Declaration was signed but prior to bid submission. To make such a conclusion would effectively handcuff bidders from making any additions and/or changes to a bid (e.g. in response to an Addendum) after the Declaration was signed which, if anything, could lead to the submission of a nonresponsive (e.g. missing and/or incorrect information) bid. If anything, an argument could be made that the "last minute" additions and/or changes indicate that Intervenor's employees were extra careful in checking and updating the line item bid prices and the total bid amount.

The Declaration, regardless of when it was dated, certifies that the bid prices were "carefully checked" and "submitted as correct and final" at the time of bid opening. Even if Mr. Wisenbaker did not direct and approve the changes to the bids and the final total bid amount as noted above, there is nothing to say that a bid cannot be "carefully checked" by an employee of a bidder at the bid site prior to bid submission.

⁸ See, Intervenor's Exhibits I-8, I-9, I-18, I-19, I-20 and I-21

The Hearings Officer finds and concludes that it would not be inappropriate for an employer to delegate the task of carefully checking, adding entries and/or correcting bid prices to their employee(s). If done prior to bid submission, this does not render a bid nonresponsive.

Bid responsiveness refers to the question of whether a bidder has promised in the exact manner requested by the government with respect to price, 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)*. Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government **at the time of the bid opening**. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*. (emphasis added.)

In this case, the undisputed evidence establishes that Intervenor promised in the precise manner requested by Respondent with respect to the material terms of the Solicitation and is, therefore, obligated to perform the exact thing called for in the Solicitation. For these reasons, the Hearings Officer concludes that the complaints regarding Intervenor's signing of the Declaration were not a material nonconformity and consequently did not render its bid nonresponsive. Moreover, Petitioner does not point

to any unfair advantage bestowed upon Intervenor or any unfair disadvantage suffered by the other bidders as a result of Intervenor's Declaration. Under these circumstances, Petitioner's complaints are merely technical in nature and contrary to common sense.

In *Hensel Phelps Construction Co. vs. DOT and Nan, Inc.*, PDH-2016-004, (October 14, 2016), ("*Hensel Phelps*") this Office was faced with a similar issue in which Hensel Phelps argued that Nan's bid was nonresponsive because the Declaration was signed on June 9, 2016 whereas certain bid prices were not even submitted/obtained until June 14, 2016 in response to an Addendum and the bid was not submitted until June 16, 2016. Hensel Phelps argued, similarly if not identical to what Petitioner is arguing here, that Nan submitted a "false declaration" since the proposal forms and pricing placed on them did not even exist at the time the Declaration was signed. The State's protest denial letter in *Hensel Phelps* noted:

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 [16], 2016 did not include a false declaration.**

Hensel Phelps Construction Co. vs. DOT and Nan, Inc., PDH-2016-004 at page 10, (October 14, 2016) (emphasis added.)

Ironically, Petitioner here was the beneficiary of this Office's decision in *Hensel Phelps* that the dating of the Declaration before certain bid entries were made did not affect any material term of the Solicitation and, therefore, did not render Nan's bid nonresponsive to the Solicitation. In other words, making bid entries after the Declaration was signed, but before bid submission, in and of itself, did not render the bid nonresponsive.

Furthermore, the facts of this case are clearly distinguishable from *Nan, Inc. vs. DOT, State of Hawaii and Hawaiian Dredging Construction Co., Inc., PDH-2015-006 (September 4, 2015)* cited by Petitioner, wherein this Office found and concluded that:

Nan's bid was **materially unbalanced** and created potential substantial and unacceptable risks to the DOT and the State. The DOT's eventual decision to reject Nan's bid was justified.

*Nan, Inc. vs. DOT, State of Hawaii and Hawaiian Dredging Construction Co., Inc., PDH-2015-006 at page 60 (September 4, 2015). (emphasis added.)*⁹

As stated by Petitioner in its Petition at page 15:

The Hawaii Procurement Code "lays the foundation and sets the standards for the way government purchases will be made, but allows for flexibility and the use of **common**

⁹ A materially "unbalanced" bid by definition makes a bid "irregular" on its face and subject to rejection. See, General Provision 2.9(4).

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 (citation omitted). The Code was enacted to: (1) "provide for fair and **equitable treatment** of all persons dealing with the procurement system"; (2) foster broad-based competition"; and (3) increase confidence in the **integrity of the system.**" (citation omitted). (emphasis added).

The Hearings Officer concludes that, if anything, by taking a position directly contrary to their position taken in *Hensel Phelps, supra*, (in which they prevailed) Petitioner is asking Respondent and this Office to disregard common sense and give them preferential treatment which, if anything, will only serve to undermine the integrity of the system. As noted at page 20 of Intervenor's Motion for Summary Judgment:

Here, by arguing that Kiewit's certification was improperly signed ["false certification"], Nan is taking a position directly contrary to Nan's position in *Hensel Phelps*. Nan cannot have it both ways. Further, Nan is judicially estopped from engaging in such duplicitous conduct. See *Roxas v. Marcos*, 89 Hawaii 91, 124, 969 P.2d 1209, 1242 (1989) ("Pursuant to the doctrine of judicial estoppel, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is contrary to, or inconsistent with, one previously assumed by him . . .") (citations omitted) ("The party to be estopped must be asserting a position that is factually incompatible with a position taken in a prior judicial or **administrative hearing...**") (emphasis added.)

Unlike the Declaration, which contains very specific signature and proof of authority requirements, the Addenda, including the list of subcontractors, nature and scope of work, designation of approved Hawaii products and proposal schedule do not. Employees who prepare the bid entries and/or make additions and/or changes to the bid do not need a power of attorney to do so. First, they are employees, not agents.

Second, they are not signing the bid proposal, but preparing the bid entries and/or making additions and/or changes.

Based on the uncontroverted evidence presented, the Hearings Officer concludes as a matter of law that an employee of a bidder can make handwritten additions and/or changes to a bid after the declaration was signed, but before the bid is submitted without rendering the bid nonresponsive.

AN EMPLOYEE OF A BIDDER, OTHER THAN THE PERSON WHO SIGNED THE DECLARATION, CAN SIGN THE FORM 1s WITHOUT RENDERING THE BID NONRESPONSIVE

Petitioner argues that “[t]he State improperly failed to reject the form 1’s of Kiewit bid proposal.” See, Petitioner’s motion for summary judgment at 25. Petitioner further argues that the person who signed the Form 1s was not authorized and that only Mr. Wisenbaker could certify documents on Kiewit’s behalf. Id.

The Hearings Officer is not persuaded by Petitioner’s argument.

The material facts on this issue are likewise not in dispute. The Declaration, dated June 16, 2017, was signed by Sr. Vice President Jamie D. Wisenbaker prior to bid submission. The four (4) Form 1s submitted with the bid, also dated June 16, 2017, were signed by Marc Simmons, Estimating Manager and employee of Intervenor prior to bid submission.

The Declaration and the Form 1s are separate and distinct documents. The Declaration is necessary to show the procurement authority that the signer has the authority to make the bid and be contractually bound, if awarded the contract. The Form 1 is to certify the bidder’s participation in an approved apprenticeship program in the specified trade(s) under Act 17. Petitioner has not cited to any authority, nor is the

Hearings Officer aware of any, which stands for the proposition that the same person and only the same person who signs the Declaration must also sign the Form 1 in order for a bid to be responsive. Neither Act 17 nor Form 1 require that Form 1 be signed by the same person who signed the Declaration. Form 1, unlike the Declaration, does not require that an officer of the corporation sign. Neither Act 17 nor Form 1 require that a Power of Attorney accompany the Form 1. A Power of Attorney (or other proof of authority) for Marc Simmons is not required. Marc Simmons is not signing the bid proposal for the bidder, just the Form 1s. The General Provisions, Article II, Section 2.8 pertaining to "proof of the authority to sign the proposal for the bidder" cited by Petitioner only applies when a proposal is signed by an agent of the bidder, not its employee(s) (emphasis added) and is simply not applicable here.

Based on the uncontroverted evidence presented, the Hearings Officer concludes as a matter of law that an employee of a bidder, other than the person who signed the Declaration, can sign the Form 1s without rendering the bid nonresponsive. Of course, this does not preclude the person who signed the Declaration from also signing the Form 1s.

Having found that Intervenor's Form 1s were properly executed, Intervenor is entitled to the five percent bid adjustment for participation in an approved apprenticeship program(s). Petitioner's argument from a "mathematical perspective" is, therefore, moot.

Based on the foregoing, the Hearings Officer finds and concludes that Intervenor's bid was responsive and that they are the lowest bidder.

Based on the foregoing, the Hearings Officer concludes 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. Petitioner's motion for summary judgment is denied;
2. Respondent's motion for summary judgment is granted;
3. Intervenor's motion for summary judgment is granted;
4. Petitioner's Petition for Administrative Review and Hearing Relief is dismissed with prejudice;
5. Respondent's denial of Petitioner's protest is affirmed;
6. Each party shall bear its own attorneys' fees and costs; and
7. The protest bond of Petitioner shall be deposited into the general fund.

Dated at Honolulu, Hawaii: SEP 12 2017



RODNEY K.F. CHING
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

*Hearings Officer's Findings of Fact, Conclusions of Law, and Decision;
In Re Nan Inc. v. SOH DOT and Kiewit, PDH-2017-004.*