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

In the Matter of NAN, INC., Petitioner, vs. HONOLULU AUTHORITY FOR RAPID TRANSPORTATION Respondent, and HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC., Intervenor.	PDH-2015-004 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION Senior Hearings Officer: David H. Karlen

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

I. INTRODUCTION

Petitioner Nan, Inc. ("Nan"), filed a Request for Administrative Hearing ("RFAH") in this matter on April 20, 2015. At the same time, Nan filed a procurement protest bond in the amount of $10,000.00.

By Notice of Hearing and Pre-Hearing Conference filed April 21, 2015, a pre-hearing conference was set for April 28, 2015, and a hearing was set for May 12, 2015.

On April 24, 2015, Hawaiian Dredging Construction Company, Inc. ("Hawaiian Dredging"), filed a Motion to Intervene in this matter.

A Scheduling Order was filed on April 28, 2015. By agreement of the parties, the pre-hearing conference was continued to May 6, 2015, and the hearing was continued to May 20, 2015. Hawaiian Dredging's Motion to Intervene was scheduled to be heard at the beginning of the pre-hearing conference.

Respondent Honolulu Authority for Rapid Transportation ("HART") filed its Response to the RFAH on May 5, 2015.

The pre-hearing conference was held on May 6, 2015. Nan was represented by Wyeth M. Matsubara, Esq., and Elizabeth Kor, Esq., and HART was represented by Ryan H. Ota, Esq., and Reid M. Miyashiro, Esq. Potential Intervenor Hawaiian Dredging was represented by Keith Y. Yamada, Esq., and David F.E. Banks, Esq.

At the beginning of the pre-hearing conference, Nan and HART stipulated that Hawaiian Dredging could intervene in this matter, and, accordingly, the Motion to Intervene was granted on condition that Hawaiian Dredging adhere to the schedule already established.

The following motions were filed on May 12, 2015:

a. Nan's Motion for Summary Judgment;

b. HART's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment;

c. Hawaiian Dredging's Motion to Dismiss and/or for Summary Judgment.

The following memoranda were filed on May 19, 2015:

a. Nan's Memorandum in Opposition to HART's Motion;

b. Nan's Memorandum in Opposition to Hawaiian Dredging's Motion;

c. HART'S Memorandum in Opposition to Nan's Motion; and

d. Hawaiian Dredging's Memorandum in Opposition to Nan's Motion.

A hearing before the undersigned Hearings Officer on all motions was held on May 20, 2015. Nan was represented by Wyeth M. Matsubara, Esq., and Elizabeth Kor, Esq.

HART was represented by Ryan H. Ota, Esq., Amy R. Kondo, Esq., and Reid M. Yamashiro, Esq. Hawaiian Dredging was represented by Keith Y. Yamada, Esq., and David F.E. Banks, Esq.

At the conclusion of argument on the Motions, the Hearings Officer orally ruled that Nan's RFAH should be dismissed. As a result, the scheduled evidentiary hearing was cancelled.

This Decision, based on the record as of the conclusion of oral argument on May 20, 2015, is the formal order with respect to the aforesaid Motions.

II. FINDINGS OF FACT

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

1. On or about December 23, 2014, HART issued its Solicitation No. RFB-HRT-798316 ("Solicitation") for the construction of the Farrington Highway Station Group ("Project") portion of the Honolulu Rail Transit Project.

2. The Solicitation is a request for bids for construction of three stations and associated items. They are the West Loch, Waipahu Transit, and Leeward Community College Stations.

3. The Solicitation does not involve any stations for the Kamehameha Guideway section of the project.

4. Subsequently, HART issued the following addenda to the Solicitation:

a. Addendum No. 1 (January 16, 2015);

b. Addendum No. 2 (February 4, 2015);

c. Addendum No. 3 (February 12, 2015);

d. Addendum No. 4 (February 18, 2015);

e. Addendum No. 5 (February 20, 2015); and

f. Addendum No. 6 (February 24, 2015).

5. On March 5, 2015, HART publicly opened five (5) bids submitted in response to the Solicitation.

6. Hawaiian Dredging submitted the lowest bid--$78,999,000.

7. Nan submitted the second lowest bid - $85,074,478.

8. On March 19, 2015, Nan filed a protest with HART raising seven (7) claims:

a. Hawaiian Dredging did not list properly licensed joint contractors/subcontractors for tensioned fabric structures;

b. Hawaiian Dredging listed multiple subcontractors for tensioned fabric structures;

c. Hawaiian Dredging's Bid Item No. 7-Compensable Delay Cost is materially unbalanced;

d. Hawaiian Dredging did not list a joint contractor/subcontractor for C-02 Mechanical Insulation nor C-04 Boiler, Hot-Water Heating, and Steam Fitting as required by the RFB;

e. Hawaiian Dredging incorrectly listed a specialty license for Pacific Commercial Services, LLC;

f. Hawaiian Dredging incorrectly listed a specialty license for Tile Craft, Inc.; and

g. Hawaiian Dredging used an incorrect Form 1 for the Operating Engineers Local Union No. 3.

9. By letter dated April 14, 2015, HART responded to each of the seven claims and denied Nan's protest in all respects.

10. On April 20, 2015, Nan filed its RFAH of the April 14, 2015 denial of its protest. Nan's RFAH did not set forth all of the claims alleged in Nan's original March 19, 2015 protest letter. Instead, Nan's RFAH asserted only the following claims:

a. Hawaiian Dredging's bid failed to comply with statutory joint contractor/subcontractor listing requirements. This claim combines the two claims listed in Finding of Fact Nos. 8a and 8b above, and is a claim NAN valued at $4,125,187; and

b. Hawaiian Dredging submitted an unbalanced bid for compensable delay costs, the claim listed in Finding of Fact No. 8c above, and a claim Nan valued at $3,800,000.

11. In its RFAH, Nan valued the sum of the claims listed in Findings of Fact 8d through 8g above, as $273.000. However, NAN did not raise these four claims in its RFAH.

12. Line Item No. 7 on the bid form required bidders to provide an "allowance" for compensable delays. A compensable delay was defined as a delay for which HART was solely responsible.

13. Bidders were required to calculate their proposed allowance by first filling in a blank on the bid form for their "daily rate." As stated on the bid form: "The daily rate will be the total amount of Contractor entitlement for each day of compensable delay."

14. The bid form then instructed the contractor to multiply its daily rate by 30 days in order to calculate the amount of the "allowance." This 30 day figure is known as the "multiplier."

15. The bid form specifically stated that the multiplier was solely for evaluation purposes and was not intended to be an estimate of the actual number of anticipated compensable delay days.

16. The bid form also made clear that the multiplier would not govern payment for compensable delays. Payment would be made only for the actual number of compensable delay days, which number could be more or less than the multiplier.

17. This method of calculating payment for compensable delays was reiterated in Response #5 to Question #5 contained in Addendum No. 4. A question from a potential bidder proposed that HART stipulate to a lump sum allowance of $200,000 for all delays since the potential bidder submitting the question thought there were too many unknown factors to allow a determination of a compensable delay cost. HART's response rejected this alternative approach, stating: "The daily rate will be the total amount of Contractor entitlement for each day of compensable delay. It is the daily rate which is being established, not the amount of the allowance."

18. The Solicitation contained no instructions or guidelines as to how any bidder should determine the amount it would use for compensable daily delay costs in responding to Line Item No. 7 on the bid form. Further, the Solicitation did not establish any limit on the amount a bidder could utilize in responding to Line Item No. 7.

19. In response to Line Item No. 7, Hawaiian Dredging's bid listed a daily rate of $30,000. Nan's bid listed a daily rate of $12,633 in its response to Line Item No. 7. There were three other bidders who submitted bids for the work that were higher than Nan's bid. Their daily rates in response to Line Item No. 7 were $85,000, $19,122.30, and $40,000.

20. With respect to its claim regarding compensable delays, Nan asserted that 210 days of delay should be used to evaluate what it claims is an overstated daily delay cost listed in Hawaiian Dredging's bid.

21. Nan has not established a reasonable basis for determining that 210 days was the appropriate number of days to use in analyzing Hawaiian Dredging's bid.

22. Substituting its proposed 210 days for HART's 30 day multiplier means that Hawaiian Dredging's "allowance" would be $3,800,000. This is how Nan determined the value of its compensable delay claim when supporting its overall claim that its entire protest exceeded 10% of Hawaiian Dredging's bid.

23. Prior to submission of its bid, Nan did not assert to HART that the use of a 30 day multiplier in determining the allowance for compensable delays (Line Item No. 7 on the bid form) was "arbitrary," "unreasonable," "imprudent," "unrealistic," or inappropriate in any way. Further, prior to submission of its bid, Nan did not assert to HART that 210 days, or, for that matter, any number of days other than 30, should be utilized as a multiplier.

24. As part of their bid, bidders were required to list their joint contractors or subcontractors. They were required to fill out a form by listing the names of the joint

contractor or subcontractor, the nature of work that each listed entity would perform, and the specialty license, if any, possessed by each of those entities.

25. There were two areas of work on the Project related to tensioned fabric structures.

26. Hawaiian Dredging listed Structureflex LLC ("Structureflex") in its bid as a subcontractor to perform the work of "Structural Steel Tensioned Fabric," and stated in its bid that Structureflex had a C-48 specialty license.

27. In fact, Structureflex did not have a C-48 specialty license or any Hawaii contractor's license whatsoever at the time Hawaiian Dredging submitted its bid.

28. Nan's protest to HART asserted that Structureflex was improperly listed as a subcontractor for the "Structural Steel Tensioned Fabric" because it did not have the required Hawaii "B" general building license to do this work.

29. Hawaiian Dredging listed Swanson Steel Erectors, Inc. ("Swanson") in its bid as a subcontractor to perform the work of "Structural Steel," and stated that Swanson had a C-68 specialty license.

30. In fact, Swanson did not have a C-68 specialty license. Instead, it had a C-48 specialty license. A C-48 license is required to do the structural steel work, but Hawaiian Dredging failed to properly list the correct license in its bid.

31. Nan's protest to HART recognized that Swanson had a C-48 license but took the position that, for purposes of analyzing the responsiveness of Hawaiian Dredging's bid, a C-68 license and the fact that Swanson did not have a "B" contractor's license meant that Hawaiian Dredging had improperly listed a subcontractor that could not do the structural steel work.

32. Nan's protest asserted that, post-bid, Hawaiian Dredging could not correct or adjust the subcontractor listing it had already submitted, and that Hawaiian Dredging could

not correct any problems with the Structureflex listing for Tensioned Fabric Structure by doing the work itself .

33. Nan's protest than discussed what it called Attachment 2, a one-page document from Structureflex dated March 3, 2015. This document stated that it was the "intent" of Structureflex to contract for the installation of the structural steel support systems associated with the tensile membrane fabric structures with Swanson, and that issuance of a Hawaii contractor's license (of some unspecified type) was "pending." No prices of any kind were listed on this document.

34. This Structureflex document was not part of Hawaiian Dredging's bid. Nan obtained it prior to filing its protest with HART presumably because Structureflex had directed it to "all bidding contractors."

35. Based on this Structureflex document, Nan's protest argued that the Hawaiian Dredging subcontractor listing was ambiguous. It could not be determined which subcontractor, one of which was not licensed, would do the structural steel work.

36. Related to this claim was a separate claim in Nan's protest that Hawaiian Dredging bid listed multiple subcontractors to perform the same nature and scope of work. It asserted that both Structureflex and Hawaiian Dredging were listed to do work under the structural steel portion of the specifications.

37. Following the submission of Nan's protest to HART, HART forwarded a copy of the protest to Hawaiian Dredging for comment. Hawaiian Dredging responded with a letter to HART dated March 16, 2015. There is no evidence that this letter was provided to Nan at that time. Hawaiian Dredging's Motion filed May 12, 2015, Exhibit F.

38. In its March 16, 2015 letter, Hawaiian Dredging argued that the "Tensioned Fabric Structures" section of the work, Section 13 21 23, contained multiple components. Swanson, with a C-48 specialty license was qualified to install the structural steel support

systems. While Hawaiian Dredging's bid mistakenly listed Swanson as having a C-68 license, it actually had the correct C-48 license and was fully qualified to do the work as Hawaiian Dredging had listed on its bid—"Tensioned Fabric Structures."

39. On the other hand, Hawaiian Dredging argued that installation of the tensile fabric membrane did not require a "B" license. Structureflex was listed for a separate portion of the work, described as "Structural Steel Tensioned Fabric." Further, if a "B" license was actually needed for that portion of the scope of the work, Hawaiian Dredging would be able to self-perform that work under its own "B" license.

40. Hawaiian Dredging further asserted in this March 16, 2015 letter that Structureflex's fabric installation work amount to only $288,764, an amount far less than 1% of Hawaiian Dredging's total bid price. According to Hawaiian Dredging, Addendum No. 2, Response 4, stated that listing subcontractors with values equal to or less than 1% of the total bid amount was not explicitly required by the Solicitation. To verify this amount, Hawaiian Dredging's letter submitted Attachment 1, a Structureflex document listing prices for all three stations totaling $4,125,187 plus markup for a bond and a "breakdown" of those prices where the total for "fabric install" was $288,764.

41. Hawaiian Dredging also responded to Nan's claim that its subcontractor listing was ambiguous by pointing out that Structureflex was listed to do the fabric work and Swanson was listed to do the structural work. Since the particular scopes of work were delineated, there was, according to Hawaiian Dredging, no ambiguity or inadequacy of information.

42. HART's April 14, 2015 response to Nan's protest stated that Swanson, with its C-48 license, was qualified to perform the structural work associated with the Tensioned Fabric Structures. According to HART, no specialty license was required for installation of the fabric membrane to the steel support structures. HART ignored the typographical error

of listing Swanson as having a C-68 specialty license and noted that Swanson was correctly listed as having a C-48 license for two other portions of the work to be subcontracted. Further, there was no statutory requirement to list specialty license classification numbers.

43. Insofar as installation of the fabric membrane was concerned, HART stated that no specialty license was required. Therefore, Hawaiian Dredging did not need to identify a specialty contractor to do the installation of the fabric membrane to the steel support structures.

44. HART then asserted that Nan was too late if it was complaining that this installation work required a "B" license. No such license was required by the specifications, so Nan should have brought this issue up prior to the submission of bids. HART also noted that Hawaiian Dredging could self-perform the work under its own "B" license.

45. HART did acknowledge that the listing of Structureflex with a C-48 specialty license was an error and could not be accepted. According to HART, however, the disqualification of Structureflex as a listed subcontractor did not make Hawaiian Dredging's bid nonresponsive because the bid did list a subcontractor with a valid C-48 license for the Tensioned Fabric Structures work. HART was going to waive the erroneous Structureflex listing as a minor informality under HAR §3-122-3(c)(1)(B).

46. Insofar as Nan was claiming that Hawaiian Dredging listed multiple subcontractors for the Tensioned Fabric Structures, HART stated that the disqualification of Structureflex as a C-48 subcontractor meant there was only one listed C-48 subcontractor and that there would not be any bid shopping.

47. In its RFAH, Nan responded to HART's protest denial letter by alleging that Structureflex did in fact need a "B" license and that Nan did not have to submit a pre-bid protest in that regard. According to Nan, HART's argument would improperly allow a completely unlicensed entity to perform the work.

48. Nan's RFAH then challenged HART's assumption that Hawaiian Dredging could always do the work under its own "B" license because once Structureflex was listed as a subcontractor, Nan alleged that Hawaiian Dredging was bound to use Structureflex.

49. Nan concluded this section of its RFAH by asserted that failing to identify a properly licensed subcontractor to perform the Tensioned Fabric Structures work made Hawaiian Dredging's bid nonresponsive, Because the value of this work was $4,125,187, and thus far above 1% of Hawaiian Dredging's bid, HART could not waive this defect in the bid.

50. Nan then argued in its RFAH that HART did not adequately deal with the claim that Hawaiian Dredging listed two separate subcontractors to perform the same scope of work. It claimed that Swanson was listed as performing both structural and fabric work and Structureflex was listed as performing fabric work.

51. Nan's Motion for Summary Judgment, filed May 12, 2015, dealt only with the subcontractor listing issues and did not discuss the compensable delay claim issue. It alleged that Hawaiian Dredging's "identification of a subcontractor who lacked the required legal qualifications, and improper listing of multiple subcontractors for the same scope of work" rendered Hawaiian Dredging's bid nonresponsive. Nan Motion, page 3. For the most part, Nan's Motion goes over the arguments previously outlined above with respect to the subcontractor listing issues.

52. However, on page 16 of its Motion, Nan raised something very new. It asserted that Swanson was actually a subcontractor to Structureflex and not to Hawaiian Dredging with respect to the structural steel work. According to Nan, Hawaiian Dredging did not have any "commitment, agreement, understanding, proposal or anything from Swanson for the structural steel work under Section 05 12 13." In essence, alleged Nan, Hawaiian Dredging had no subcontractor for the above-referenced structural steel work at the

time of bid opening because Structureflex was not properly licensed and Swanson was going to be a subcontractor to Structureflex, not to Hawaiian Dredging.

53. Nan's Motion did not make any references to specific documents to support this new allegation.

54. Hawaiian Dredging's Opposition to Nan's Motion, filed May 19, 2015, briefly commented on Nan's new allegation. At pages 2 and 3 of its memorandum, Hawaiian Dredging stated:

> Nan adds to its misstatements by claiming that Swanson was to be a second-tier subcontractor under Structureflex; and that Hawaiian Dredging did not have a commitment from or agreement with Swanson to perform the work for which Hawaiian Dredging listed in its bid. Motion at p. 16. Nan does not cite to anything to support these assertions, nor can it.

55. HART's Memorandum in Opposition to Nan's Motion, filed May 19, 2015, briefly commented on Nan's new allegations at page 4:

> Petitioner attempts to claim that HDCC's proposal was nonresponsive because HDCC did not have "any commitment, agreement, understanding, proposal or anything" from Swanson. From the plain language of HDCC's bid, there is no evidence to support Petitioner's claim. Subcontractor bids were not a part of the required submittals for HART's Request for Bids, RFBB-HRT-798316 ("RFB"), and to the extent that subcontractor bids were not required as part of the RFB submittals and the issue was responsiveness, Petitioner's subcontractor bids were not relevant and were not considered as part of the Protest.

56. Nan's Memorandum in Opposition to Hawaiian Dredging's Motion, filed May 19, 2015, had a much more detailed discussion of this new allegation at pages 2 through 7 as well as pages 26 through 28, supported by Exhibits A through F thereto.

57. This same expanded discussion was essentially repeated in Nan's Memorandum in Opposition to HART's Motion.

58. During oral argument on May 20, 2015, Hawaiian Dredging admitted that the factual basis of Nan's claim and analysis regarding Swanson as a sub-subcontractor rather than a subcontractor was correct.

59. According to Nan's statements during oral argument, Nan first became aware of indications of this new issue regarding Swanson being a sub-subcontractor rather than a contractor when Nan received HART's April 14, 2015 letter denying Nan's protest.

59. As of the date of oral argument, May 20, 2015, Nan had not filed a protest with HART that raised the new issue regarding Swanson as a sub-subcontractor rather than as a subcontractor to Hawaiian Dredging.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed to be Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

A. General Considerations

1. Standards for Summary Judgment Motion

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

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

2. Scope of Review

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

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

3. Determination of Jurisdiction

The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the Hearings Officer, as jurisdiction is a statutory matter and cannot be conferred by the stipulation or agreement of the parties. Kiewit Infrastructure West Co. v. Dep't of Transportation and Goodfellow Bros., Inc. v. Dep't of Transportation and Hawaiian Dredging Construction, Co., PCX-2011-2/PCX-2011-3 (June 6, 2011).

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

1. Introduction

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

> (c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(g) may initiate a proceeding under this section....
>
> (d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:
>
> > (1) For contracts with an estimated value of less than $1,000,000, the protest concerns a matter that is greater than $10,000; or
> >
> > (2) For contracts with an estimated value of $1,000,000 or more, the protest concerns a matter that is equal to no less than ten percent of the estimated value of the contract...

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

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

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

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

(j) As used in this section, "estimated value of the contract" or "estimated value", with respect to a contract means the lowest responsible and responsive bid under section 103D-102, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable.

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

Separate and apart, however, from the requirement of submitting an appropriate protest bond, the protestor must also demonstrate that the "protest concerns a matter" no less than ten percent of the estimated value of the contract. In this case, the ten percent figure equates to $7,899,900. This figure is ten percent of Hawaiian Dredging's bid.

Nan concedes that no one item of concern raised in its RFAH equals or exceeds $7,899,900. However, it asserts in footnote 1 on page 2 of its RFAH that the total of its protests issues exceeds the ten percent minimum threshold as follows:

> In particular, the issues in Nan's Protest consist of challenges to HDCC's listing two (2) separate subcontractors to perform the same scope of work ($4,125,187), HDCC's unbalanced bid for compensable delay costs ($3,800,000), HDCC's failure to list all subcontractors under 1% of the total bid ($273,000), and these protests issues total $8,198,187, which is greater than 10% of HDCC's bid of $78,999,000.

2. Nan May Not Use Claims Made to HART but Not Raised in its RFAH to Meet the Minimum Jurisdictional Amount

Nan may not use the $273,000 figure allocated to the failure to list all subcontractors issues to meet the jurisdictional amount because those issues were raised only in the

administrative protest to HART. The issues are not raised in Nan's RFAH. Not being raised in the RFAH, the Hearings Officer has no jurisdiction to consider and decide those issues. It follows that claims for which there is no jurisdiction in this proceeding cannot be utilized to satisfy the jurisdictional minimum amount in controversy requirement. A protestor cannot bootstrap itself into compliance with the minimum amount in controversy requirement by relying on claims over which there is no jurisdiction. Sumitomo Corporation of America v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, PCX-2011-5 (August 13, 2011).

It should also be noted that, mathematically, this issue is not the deciding issue insofar as meeting the jurisdictional minimum amount in this case is concerned. The values alleged by Nan to the issues it does raise in its RFAH are $4,125,187 and $3,800,000, for a total of $7,925,187. This total exceeds the jurisdictional minimum amount of $7,899,900. Moreover, if the $3,800,000 value Nan assigns to the compensable delay claim should instead be, at most, $900,000 as advocated by HART and Hawaiian Dredging, then the total value of the claims would be well under $7,899,900 even if the additional claim amounts totaling $273,000 were considered.

3. Nan May Cumulate Smaller Claims to Meet the Minimum Jurisdictional Amount

Since no single claim of Nan exceeds the jurisdictional minimum amount, the question arises as to whether Nan may cumulate or aggregate multiple smaller claims so as to demonstrate jurisdiction because the alleged total of the claims exceeds the jurisdictional amount. HRS §103D-709(d) requires that the protest "concerns a matter equal to or no less than ten percent" of Hawaiian Dredging's bid. This is an issue of first impression insofar as procurement protests are concerned.

The Procurement Code provides no specific guidance in this matter. The Hearings Officer believes that guidance can be found in the interpretation of the federal diversity

statute, 28 U.S.C. §1332, because that statute also concerns a minimum monetary amount that is necessary in order to obtain jurisdiction. As HART professionally sets forth in its Motion, the decision in Sheehan v. Grove Farm Co., 114 Haw. 376, 389-390, 163 P.3d 179, 192-193 (Haw. App. 2005) did look to the federal diversity statute when deciding how to determine whether a claim met the minimum jurisdictional amount required for cases filed in Circuit Court.

While the minimum dollar amount in the federal statute has been increased over the years, the basic text of the federal statute has remained constant: "The district court shall have original jurisdiction where the matter in controversy exceeds the sum of ..." (Emphasis supplied). It is well established that a plaintiff is entitled to aggregate claims, even if factually unrelated, in order to meet the minimum jurisdictional amount required by this statute. See, e.g., Wolde-Meskel v. Vocational Instruction Project Community Services, Inc. 166 F.3d 59, 61-62 (2d Cir. 1999).

While Rule 18 of the Federal Rules of Civil Procedure that provides for joinder of claims has no direct parallel in the rules governing procurement protests, it is nevertheless significant that an aggregation of claims under the federal system is considered a "matter in controversy" where the word "matter" is used in the singular. That, in turn, supports an interpretation that the word "matter" when used in the singular in HRS §103D-709(d) can refer to a multitude of claims by one party that makes up one "matter."

In Sheehan v. Grove Farm Co., supra, the appellate court looked to the federal diversity statute when interpreting a Hawaii statute involving a jurisdictional minimum amount even when that Hawaii statute did not contain language similar to that of the federal statute. In the present matter, the case for looking to interpretations of the diversity statute is even stronger because of the similarity in language of the two statutes in question.

HART notes that cases interpreting the federal diversity statute do not take into account the legislative intent behind the 2012 amendments to the Procurement Code that was summarized in GreenPath Technologies, Inc. v. Department of Finance, County of Maui, PDH-2014-002 (March 20, 2014), at page 23. As stated in that decision, the Legislature wanted to eliminate protests over matters of a very small amount so as to preserve consideration of bids with relatively small flaws and not delay and detrimentally affect the procurement process because of uncertainties and controversies over minor errors. However, the language of the amendment to the Procurement Code is the primary evidence of the Legislature's intent, and that language supports accumulation or aggregation of claims as long as the total exceeds the minimum jurisdictional amount.

Moreover, allowing an aggregation of claims to qualify for the jurisdictional minimum amount under HRS §103D-709(d) is also consistent with the intent and spirit of the 2012 legislation limiting bid protests to "major" problems. When the Legislature decided that procurement protests should not cover claims of a small amount, it did not give a green light to overlook procurements with multiple problems that raise a "red flag" that there is a major overall problem with the procurement. In this case, for example, the concern is over two allegedly multi-million dollar problems that add up to the minimum jurisdictional amount. The Hearings Officer believes that the Legislature intended to provide a forum for resolution of multiple claims that, together, amount to a "big" case.

4. Nan's Claim Concerning Compensable Delays Was Timely and Was Not Required to be Raised Prior to Submission of Nan's Bid

Hawaiian Dredging's Motion asserts at page 6 that Nan's claim regarding compensable delays was not timely because it should have been raised prior to submission of Nan's bid. Hawaiian Dredging relies on HRS §103D-701(a), which states, in relevant part:

> [N]o protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

A review of Nan's RFAH, however, does not support Hawaiian Dredging's assertion here. The relevant section of the RFAH begins at page 9 with a general discussion of materially unbalanced bids. The last paragraph on page 9 begins a discussion of Nan's allegation that Hawaiian Dredging "proposed an unreasonably high and unrealistic price" for the daily compensable cost it utilized in Bid Item No. 7. That paragraph continues on this topic for some length to discuss the allegation that Hawaiian Dredging's daily cost is too high as well as the alleged ramifications of that daily cost. The next paragraph claims HART must verify Hawaiian Dredging's compensable delay cost against certain documentation submitted in escrow. All of the discussion at this point challenges Hawaiian Dredging's daily compensable delay cost. This could not have been known prior to submission of the bids, and it does not concern the validity or appropriateness of the terms of the Solicitation.

The remainder of the RFAH section on compensable delay costs goes into what Nan alleges to be the lack of a proper risk assessment and a discussion of what would result if a risk assessment were done in the manner Nan alleges would be proper. This is, again, based on Hawaiian Dredging's bid price for compensable daily delay costs and is not a challenge to the terms of the solicitation. As stated on page 10 of the RFAH, according to Nan, "[u]ltimately, HDCC placed an unreasonable, unrealistic, and falsely high cost per day to recover the cost of 'under-stated' items." That is, "ultimately" Nan's protest is based on an allegedly "unreasonable, unrealistic, and falsely high" item on Line Item No. 7 of Hawaiian Dredging's bid.

In support of its Motion on this point, Hawaiian Dredging points to a statement on page 10 of Nan's RFAH that "because Bid Item No. 7 was arbitrarily set at 30 days, it is negligible when compared to the actual delays that have been experienced by the previous related projects, which will also have a direct influence on the delays anticipated for this project."

If the 30 day multiplier set forth in Bid Item No. 7 was actually established for purposes of analysis of delay costs or the assessment of monetary risks for delays, Hawaiian Dredging would arguably be making a good point in its Motion. However, the 30 day multiplier in Bid Item No. 7 was not set for that purpose. As noted in the Findings of Fact, the bid form specifically stated that the multiplier was solely for evaluation purposes, i.e., part of a purely arithmetical means of comparing bids, and was not intended to be an estimate of the actual number of anticipated compensable delay days.

Nan's criticism of the 30 day multiplier in its RFAH could arguably have been better phrased, but, in context, it was consistent with the rest of this section of the RFAH-- lengthier delays should have been expected and a risk assessment done based on that realistic expectation. Any challenge by Nan to the specific use of 30 days is irrelevant because HART never intended the 30 day period to define its expected delay period or constitute a risk analysis of expected delays. One arguably poorly phrased sentence in Nan's lengthy protest cannot be extrapolated to make Nan's compensable delay claim untimely.

5. Nan's Compensable Delay Claim Cannot be Valued at $3,800,000

HART and Hawaiian Dredging assert that Nan's valuation of that portion of its claim concerning an allegedly unbalanced bid stemming from the compensable delay bid item is $900,000 rather than $3,800,000. Nan's RFAH does not meet the jurisdictional minimum amount if this portion of its claim is valued at $900,000 instead of $3,800,000.

A major portion of the argument here is based on the case of Air Rescue Systems Corp v. Finance Department, County of Hawaii, PDH-2012-006 (December 10, 2012). In that case, the amount of the matter of concern was determined by multiplying the proposed hourly rate by the numbers of hours specified in the bid for a specific line item. However, that calculation was not done in the context of resolving a dispute over the amount to be assigned to a bid line item. Rather, the calculation was utilized in pinpointing the amount of

particular item in dispute, i.e., the specific matter of concern, and rejecting the protestor's claim that the entire amount of the contract should be considered as the "matter of concern."

Here, on the other hand, there is no claim that the entire amount of the contract is relevant to calculation of the minimum jurisdictional amount.

More significantly, we do not have a quantification of the actual number of days to be used as a multiplier for the daily rate in this case. All we have is a "multiplier" used for arithmetical comparisons of the bids, a "multiplier" that is specifically stated to be completely irrelevant to the determination of actual compensation for delay costs once the contract is awarded. The Hearings Officer concludes that the analysis here cannot rest on a simple multiplication of $30,000 per day times 30 days because the 30 day figure is meaningless.

Bid Item No. 7 is not a work item to be performed by the contractor. It is an advance partial determination of the costs of not working should a compensable delay occur. Unlike the lump sum bid item for total delay costs involved in Nan, Inc. v. Department of Public Works, County of Hawaii, PDH-2014-017 (December 29, 2014), the total delay cost here cannot be determined until the project is completed and the number of compensable delay days, if any, have been determined.

The question then becomes: Can Nan justify the use of 210 days of delay in order to meet the minimum jurisdictional amount when there is nothing in the Solicitation that can be used to determine the actual number of days of delay that will be compensable.

Nan asserted that its analysis showed the average delay on three other HART projects was 476 days. According to Nan, this all but confirms delays will be unescapable. Based on this 476 day figure, Nan asserts that the 210 day figure it is using is "conservative."

Even if Nan's 476 day figure is accurate, Nan's analysis does not take into account the nature of the delays that have occurred on the other projects, and it makes no attempt to

establish any parallels between those delays and the situation with the Project here. Further, Nan admits that the 476 day figure consists of all types of delay days, i.e., contractor caused delay days not compensable for this Project are included in the 476 day figure.

The Hearings Officer concludes that Nan's 476 day figure does not provide any reasonable basis for estimating the number of compensable delays for the Project in question and Nan's analysis provides no basis for using the 210 day figure in Nan's RFAH even if, mathematically, it is less than 476 days.

Nan has argued that a well pled allegation that the jurisdictional amount has been met is sufficient to establish jurisdiction so that the Hearings Officer can proceed to the merits of Nan's RFAH. That argument is in line with the jurisprudence of the federal diversity statute where, in general, a case while not be dismissed at its inception unless it appears to a legal certainty that the jurisdictional amount cannot be met despite the plaintiff's allegations or that bad faith is involved. Wolde-Meskel v. Vocational Instruction Project Community Services, Inc., supra.

On this point, however, the Hearings Officer declines to follow the federal cases. Unlike them, the Hearings Officer concludes that the benefit of the doubt should not be given to a protestor when the amount at issue is uncertain but could possibly, under some very speculative scenario, exceed the jurisdictional minimum. That result does not necessarily flow from the critical language of "matter of concern." Further, that result is definitely at odds with the legislative intent behind the 2012 amendments to the Procurement Code. At least in the context of the present case, where the 210 days is highly speculative and no credible analysis was proposed to support that figure, the Hearings Officer concludes that the legislative intent is not served by allowing a bid protest to hold up the procurement process

upon such sheer speculation that the jurisdictional amount might by some possibility eventually be involved.[1]

Another look at the actual language of the Bid/Pricing Proposal in question is helpful here. Item 7 on page 4 of the Bid/Pricing Proposal states:

> Allowance for Compensable Project Delay. The daily rate will be the total amount of Contractor entitlement for each day of compensable delay. The quantity of days of compensable delay shown is a "multiplier" for evaluation purposes only and is not intended as an estimate of the number of days of compensable delay anticipated by HART. HART will pay the daily rate of compensation only for the actual number of days of compensable delay, as defined in the General Conditions; the actual number of days of compensable delay may be greater or less than the "multiplier" shows.

The Bid/Pricing Proposal then mandates that the "multiplier" be 30 days, and all bidders were required to use the same "multiplier." Accordingly, the only discretionary item here for bidders was the daily compensable rate.

Nan's protest letter claims that Hawaiian Dredging's claimed compensable delay cost is greatly overstated and "falsely claimed" at a $30,000 per day bid unit price. The rest of Nan's protest concerns evaluating the risk posed by using this per day unit price in the face of what Nan claims are inevitable lengthy delays. By definition, however, the compensable days of delay are only for days when HART alone is responsible for the delay. Thus, by definition, Hawaiian Dredging cannot influence the number of compensable days of delay. Once again, the focus of Nan's protest insofar as what Hawaiian Dredging allegedly did not do correctly is Hawaiian Dredging's $30,000 daily rate.

In the face of the complete uncertainty over the eventual delay cost, if any, under Item 7 of the Bid/Pricing proposal, the most logical focus of this inquiry is Item 7 itself as written and without any speculative extension of time.

---

[1] At oral argument, the Hearings Officer also noted that the 210 day figure was coincidently close to the bare minimum needed to justify jurisdiction but that the mathematics had to be reviewed to see how close it was. Upon further review, it appears that the 210 day figure is the absolute minimum necessary to meet the jurisdictional threshold. However, on the present record, the Hearings Officer does not find that Nan is proceeding in bad faith because Nan valued its original protest to HART at $8,198,197, and, thus, initially, the 210 day figure was not so critical for the purposes of demonstrating jurisdiction.

Taking all of the above into account regarding this unique contractual clause, the Hearings Officer concludes that, for purposes of meeting the minimum jurisdictional amount, Nan cannot establish that its compensable delay claim can be valued at $3,800,000.

D. Nan's Protest Should be Dismissed for Lack of Jurisdiction Because it Does Not Concern the Minimum Jurisdictional Amount

Whether the compensable delay claim is valued at $30,000 as set forth above or at $900,000 as accepted by HART and Hawaiian Dredging is irrelevant. At either valuation, NAN's RFAH fails to involve a matter of concern that exceeds the minimum jurisdictional amount. It therefore must be dismissed for lack of jurisdiction.

E. Nan's Compensable Delay Claim is Without Merit

In the usual situation where an RFAH is dismissed for lack of jurisdiction, the Hearings Officer's decision concludes at that point and does not go on to discuss the merits of the protest. However, that has not always been the case in the past, and some previous OAH decisions contain alternate holdings. If, for some unknown reason, the Circuit Court decides on an appeal of this case that jurisdiction does in fact exist, expression of an alternate holding on the merits also allows the Circuit Court to reach the merits of the case. There is no need for any time-consuming remand to the Hearings Officer for another proceeding on the merits which would occur if jurisdictional issues were the only ones before the Circuit Court.

The Hearings Officer concludes in his discretion that an alternate holding should be issued in this case. All parties as well as the Hearings Officer are aware that this particular Project is part of a massive construction project of particular public interest that has already been the subject of delays due to litigation. Expression of an alternate holding could preclude further litigation delay for the three stations that make up this particular Project and thus avoid further delay, on top of previous delays, for the entire rail project.

A leading case on unbalanced bids in federal procurements is McKnight Construction Co., Inc. v. Department of Defense, 85 F.3d 565 (11th Cir. 1996). In the federal procurement system, a "bid is nonresponsive when it is mathematically and materially unbalanced." A bid is "mathematically unbalanced when each line item in the bid does not reflect the actual costs to the bidder." Id. at 567. Further, when a "mathematically unbalanced bid is so grossly unbalanced that it will result in an advance payment, the bid is materially unbalanced and must be rejected." Id. at 568.

The "material unbalance" of concern in the McKnight case was the fact that the first two line items in the low bidder's bid were significantly higher than the same line items of the other bidders as well as the government's estimated costs for those two line items. The two line items in question constituted about 50% of the entire bid. Such large early payments are disfavored because they allow the low bidder to have an unfair advantage over other bidders "through the potential use of interest-free money. In addition, because later work is undervalued, there is a reduced incentive to complete the work." Id. at 568. The table of line items in that decision demonstrates that items 4 and 5 were significantly undervalued, as other bidders listed amounts 7 or 8 times that of the low bidder.

Another idea of what constitutes a "mathematical imbalance" was set forth in SMS Data Products Group, Inc. v. United States, 900 F.2d 1553, 1555 (Fed. Cir. 1990):

Mathematical imbalance occurs "if each bid item fails to carry its share of the cost of the work (or supplies) plus the bidder's profit/overhead or if the bid is based upon nominal prices for some items and enhanced prices for others." (Citations omitted)

Hawaiian Dredging's bid passes muster under either of these versions of the term "mathematical imbalance." There is no challenge to any of the line items in Hawaiian Dredging's bid that pertain to actual work, there are no line items of actual work in Hawaiian Dredging's bid that are either too high or too low, and there is no "front-loading" that would

amount to an interest free loan from HART due to inflated prices for work early in the project.

Furthermore, a comparison with the delay cost figure for the other four bidders shows that Hawaiian Dredging's cost figure was below the average daily delay cost for all bids. That was the method of analysis utilized in the McKnight case.[2]

Faced with this problem, Nan asserts reliance on its own in-house estimate of what Hawaiian Dredging's delay costs should be. The problem with this subjective approach is that a daily delay cost cannot be defined in this situation. The Solicitation provides absolutely no guidance as to what costs are or are not acceptable. There is no requirement that different contractors should have the same delay cost formula. There is no requirement that delay costs be based solely on the instant project (as Nan is asserting). Further, the daily figure required in response to Line Item 7 is supposed to apply at the same rate no matter when delays occur. The same rate must be charged whether the delay is early in the project, in the middle of the project, or at the tail end of the project while, in reality, such an idea of identical delay charges no matter when in the project's history the delay occurs is not intuitively obvious. In fact, one would expect the opposite—delay costs would vary depending upon when they occur during the life of the project.

Given the highly unusual nature of Line Item 7, which is not even an item of work to be performed, Nan's ideas of what the delay costs for other contractors should be are only speculative and are not persuasive. Comparing the rates of all five contractors is the only objective evidence that the Hearings Officer can work with in this case.

Another problem with Nan's claim is that Nan is reduced to asserting that the compensable delay cost is inflated in order to balance the unnaturally low price of Hawaiian Dredging's total bid. If an unbalanced bid claim must find something too high versus

something too low in the low bidder's bid, and since Nan does not demonstrate any particular item in Hawaiian Dredging's bid is too low, it is left to asserting the entire bid is too low and that Hawaiian Dredging intends to make up this bidding deficit at the back end with an artificially high delay cost. However, there was no demonstration that Hawaiian Dredging's overall bid was too low, and, again, Hawaiian Dredging has no control over the number of days of compensable delay or when those days will occur in the course of the project. Nan's claim reaches much too far in an unsuccessful attempt to fit this unusual contractual clause concerning delay costs into the analysis necessary for unbalanced bid claims.

If a bid is not mathematically unbalanced, the inquiry on this issue should be finished.

> ...*mathematical imbalance*, alone, does not make a bid unacceptable. A bid must be *materially* imbalanced before it must be rejected.

SMS Data Products Group, Inc. v. United States, supra, 900 F. 2d at 1557 (Emphasis in original).

That was also the situation in Road Builders v. City and County of Honolulu, Department of Budget and Fiscal Services, PCY 2012-013 (April 27, 2012). Because there was no showing of mathematical imbalance in that case, the decision did not go into whether there was a material imbalance.

F. Since Nan's Compensable Delay Claim is Without Merit, There is No Jurisdiction to Consider Nan's Subcontractor Listing Claim

When there are multiple claims that, in the aggregate, exceed the jurisdictional amount, and one or more of those claims are without merit such that the remaining undecided claims are below the jurisdictional amount, the Hearings Officer concludes that there is no longer jurisdiction to consider the remaining undecided claims.

---

[2] In the McKnight case, the low bidder's line item costs were also compared to the government estimate. Here, there is no government estimate that can be utilized for comparison purposes.

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

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

The Hearings Officer is aware that such a result is contrary to the majority interpretation of the federal diversity statute. Federal diversity cases, however, involve private disputes of a certain monetary value where a money judgment can be entered against the defendant if the plaintiff prevails. Procurement protests, on the other hand, involve the public interest in the procurement process where a judgment in favor of the protestor can, but does not necessarily, lead to the award of a contract to the protestor. As set forth above, the

public interest in the procurement process that is not present with respect to the federal diversity jurisdiction statute strongly compels dismissal of Nan's RFAH.

Nan argued strenuously at the hearing that the Hearings Officer had already decided this issue in Nan's favor in an earlier decision, Sumitomo Corporation of America v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, PCX-2011-5 (August 13, 2011) at page 58. However, Nan's quotation of that decision at, e.g., page 17 of its Memorandum in Opposition to Hawaiian Dredging's Motion, is incomplete. The full text of that decision shows first that the Hearings Officer was considering a hypothetical that the ten percent threshold requirement pertains only to the allegation stage and not to proof of the merits. The decision then added the phrase "which the Hearings Officer concludes is the appropriate interpretation of the law."

As the Hearings Officer stated at oral argument on May 20, 2015, that additional language relied upon by Nan and found in paragraph 106 on page 58 of the Sumitomo decision was ambiguous. Upon further review, however, it is clear that the phrase "appropriate interpretation of the law" was not referring to Nan's position but to the opposite position. In Paragraph 105 of the decision, immediately above the paragraph with the quotation in question, the decision referred to the dismissal of a life cycle cost analysis over which there was no jurisdiction due to the protestor's failure to exhaust its administrative remedies. Since that life cycle claim was the basis for the claimed jurisdictional amount, dismissal of the life cycle claim meant the other claims together did not amount to the jurisdictional minimum amount.

The Sumitomo decision therefore reaches the same result as the result expressed herein. To the extent that there is ambiguous language in the Sumitomo decision that casts some possible doubt on that result, the Hearings Officer hereby clarifies that the proper

interpretation of the statute is that Nan's failure to prevail on the merits of its compensable delay claim means that the remainder of its claims must be dismissed for lack of jurisdiction.

E. Most of the Subcontractor Listing Issue is Moot

Nan's primary claim on the subcontractor listing issue was that Hawaiian Dredging in some way listed two subcontractors for the structural steel work and that only one of those subcontractors was licensed. As described in detail above, however, that was not actually the case. As it turned out, no subcontractors were listed for the structural steel work. Instead, Hawaiian Dredging listed Swanson Steel as a subcontractor when it had no actual relationship of any kind with that firm; instead, Swanson Steel would have been a sub-subcontractor to Hawaiian Dredging through Structureflex, an unlicensed contractor.

The true facts make Nan's primary claim here moot. At the time of its protest, neither Nan nor HART knew the true facts. Both parties were arguing over an issue that did not in fact exist. There is no point in having the Hearings Officer render an opinion about what is now a non-issue.

Nan's claim regarding the listing of Structureflex as a subcontractor for the steel tension fabric still remains. However, Hawaiian Dredging demonstrated, without any opposing evidence, that the value of this issue was $288,674, and thus less than 1% of the amount of Hawaiian Dredging's bid. This is not enough to help Nan reach the minimum jurisdictional amount even if Nan's other claim on compensable delay claims is, for purposes of argument only, valued at $3,800,000.

Accordingly, even though Hawaiian Dredging was incorrect in listing Structureflex as a subcontractor, the Hearings Officer does not need to reach the issue of whether HART can waive this defect and/or whether Hawaiian Dredging can do the work with its own forces without running afoul of the subcontractor listing rules.

F. The New Allegation Concerning Swanson Steel as a Sub-Subcontractor is Untimely

The claim that Swanson was falsely listed as Hawaiian Dredging's subcontractor for the structural steel work when in fact it was a sub-subcontractor to Structureflex, an unlicensed subcontractor, was not raised in Nan's initial protest to HART dated March 9, 2015. Nan represented at oral argument on the subject motions that it was not potentially aware of the Swanson sub-subcontractor situation until HART rejected its protest by letter dated April 14, 2015.

Since the details have not been revealed as to how Nan determined that Swanson was not a subcontractor based upon information Nan received on or about April 14, 2015, it is impossible to tell how soon Nan could put the pieces of the puzzle together and thus determine the date Nan knew or should have known of this situation.

It is undisputed, however, that Nan first made its allegation regarding Swanson's status in its own Motion for Summary Judgment filed May 12, 2015. Thus, giving Nan the benefit of the doubt insofar as the time it took to formulate the claim, it is clear that Nan knew of the claim no later than May 12, 2015.

When revelations of facts potentially giving rise to a new claim surface during the course of a bid protest, the protestor cannot attempt to immediately litigate the new claim before the OAH. Unlike "regular" civil litigation, the rules concerning procurement protests do not allow for a mere amendment to the RFAH to bring an amended claim. The protestor must first file this new claim with the procuring agency, and this procedure needs to be followed even when the first protest is still open and there proceedings regarding that first protest are still ongoing. Failure to do so precludes the protestor from bringing the new claim before the OAH because the protestor has failed to exhaust its administrative remedies. See, e.g., Safety Systems and Signs Hawaii, Inc. v. Department of Transportation, State of Hawaii, PDH-2014-005 (April 30, 2014).

IV. DECISION

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

a. To the extent set forth above, HART's Motion and Hawaiian Dredging's Motion are granted.

b. Nan's Motion for Summary Judgment is denied as moot.

c. Nan's new claim regarding Swanson Steel being a sub-subcontractor, and not a subcontractor, to Hawaiian Dredging is dismissed for lack of jurisdiction.

d. Nan, Inc.'s Request for Administrative Hearing in this matter is dismissed with prejudice for lack of jurisdiction.

e. The parties shall bear their own attorney's fees and costs incurred in this matter.

f. The cash or protest bond of Nan, Inc., shall be deposited into the general fund.

DATED: Honolulu, Hawaii, May 28, 2015.

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