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

In the Matter of NAN, INC., Petitioner, vs. DEPARTMENT OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU Respondent, and HENSEL PHELPS CONSTRUCTION CO., Intervenor.	PDH-2015-005 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 June 16, 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 June 16, 2015, a pre-hearing conference was set for June 22, 2015, and a hearing was set for July 6, 2015.

On June 14, 2015, Hensel Phelps Construction Co. ("Hensel Phelps"), filed a Motion to Intervene in this matter.

Respondent Department of Budget and Fiscal Services, City and County of Honolulu ("City and County") filed its Response to the RFAH on June 19, 2015.

A prehearing conference was held on June 22, 2015. Nan was represented by Wyeth M. Matsubara, Esq., and the City and County was represented by Geoffrey M. Kam, Esq. Potential Intervenor Hensel Phelps was represented by Erik D. Eike, Esq. Pursuant to agreement, the hearing date was continued to July 9, 2015, and, shortly after the conclusion of the prehearing conference, the parties stipulated to the intervention of Hensel Phelps. A formal Prehearing Order was filed June 23, 2015, and a Stipulation to Allow Hensel Phelps Construction Co. to Intervene as Interested Party was filed on June 24, 2015.

Nan filed its Motion for Summary Judgment on June 29, 2015. Neither the City and County nor Hensel Phelps filed any motions. Both the City and County and Hensel Phelps filed memoranda in opposition to Nan's Motion on July 7, 2015.

A hearing before the undersigned Hearings Officer on Nan's Motion for Summary Judgment was held on July 9, 2015. Nan was represented by Wyeth M. Matsubara, Esq., the City and County was represented by Geoffrey M. Kam, Esq., and Hensel Phelps was represented by Erik D. Eike, Esq.

At the conclusion of argument on Nan's Motion, the Hearings Officer orally ruled that there was no jurisdiction in this matter and that Nan's RFAH should be dismissed. As a result, the previously scheduled evidentiary hearing was cancelled.

This Decision, based on the record as of the conclusion of oral argument on July 9, 2015, is the formal order with respect to the aforesaid Motion and ruling.

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.

A. Chronology of the Protest

1. On or about December 8, 2014, the City and County issued its Solicitation RFB-No. DDC-786304, Job No. W1-13 ("Solicitation") for the construction of a wastewater treatment facility in Kailua. An additive alternative for a Kaneohe facility was included in the Solicitation.

2. On March 18, 2015, the City and County publicly opened seven (7) bids submitted in response to the Solicitation. The bid amounts were as follows:

	Bidder	Base Bid	Additive Alternate
a.	Southland Contracting	$130,886,500.00	$10,000,000.00
b.	Hensel Phelps	$149,429,000.00	$14,890.000.00
c.	Nan	$156,747,058.45	$32,658,957.00
d.	Parsons RCI, Inc. ("Parsons")	$165,291,775.00	$15,060,000.00
e.	Hawaiian Dredging Construction	$169,880,025.00	$25,788,000.00
f.	Shimmick/Goodfellow JV	$175,289,000.00	$14,150,000.00
g.	Kiewit Infrastructure West	$179,978,000.00	$10,250,000.00

3. On March 23, 2015, Nan submitted a protest to the City and County challenging the bids by Southland Contracting ("Southland"), Hensel Phelps, and Parsons.

4. Insofar as Southland was concerned, Nan made the following claims:

(1). Southland failed to list a reinforcing steel subcontractor;

(2). Southland failed to list a "mechanical process subcontractor" to perform work depicted in Drawing Sheets M-001 to M-903;

(3). Southland failed to list a structural steel subcontractor;

(4). Southland failed to list a qualified soil stabilization/jet grouting subcontractor;

(5). Southland failed to list a fire protection subcontractor;

(6). Southland failed to list numerous subcontractors that were required to be listed even if the subcontracted work amounted to less than 1% of the total bid;

(7). Southland failed to list a qualified contractor to perform the drilled shafts/caissons work; and

(8). Southland failed to list a qualified coating systems applicator.

5. By letter dated June 9, 2015, the City and County replied to Nan's protest letter of March 23, 2015. The City and County's letter first denied that Nan was an aggrieved person, and thus, according to the letter, had no standing to protest, because no official action had yet been taken with respect to the Solicitation.

6. Without waiving its position that Nan's protest was untimely, the City and County's letter of June 9, 2015, went on discuss the merits of Nan's claims.

7. Insofar as Southland was concerned, the City and County's letter of June 9, 2015, sustained Nan's protest on grounds (1), (3), (5), (6), and (8) listed in Finding of Fact No. 4 above, and denied Nan's protest on grounds (2), (4), and (7) listed in Finding of Fact No. 4 above.

8. Nan's letter of March 23, 2015, also protested that Hensel Phelps' bid was non-responsive for the following reasons:

(1). Hensel Phelps failed to list a "mechanical process subcontractor" for work related to process equipment and lines for water and wastewater treatment. According to Nan, Hensel Phelps' listing of a subcontractor to do the HVAC and plumbing portions of the mechanical work was not sufficiently responsive. Nan claimed the value of the "missing" mechanical process package was $25 million to $30 million.

(2). Hensel Phelps failed to list a structural steel subcontractor for work requiring a C-48 structural steel specialty license. This scope of work was allegedly worth $6 million.

(3). Hensel Phelps failed to list a qualified soil stabilization/jet grouting subcontractor. Nan asserted that the cost for this scope of work was nearly $11 million.

(4). Hensel Phelps failed to list numerous subcontractors whose work amounted to less than 1% of the bid amount.

(5). Hensel Phelps failed to list a qualified subcontractor to perform the drilled shafts/caisson work. Nan asserted that all bids it received for this work exceeded $4 million.

(6). Hensel Phelps failed to list a qualified coating systems applicator. Nan asserted that the value of the coating systems work was over $5 million.

9. Without waiving its position that Nan's protest was untimely, the City and County's letter of June 9, 2015, denied Nan's protest insofar as Hensel Phelps was concerned.

10. Nan's protest letter of March 23, 2015, also asserted Parsons' bid was nonresponsive. Without waiving its position that Nan's protest was untimely, the City and County's letter of June 9, 2015, denied Nan's protest insofar as Parsons was concerned.

11. On June 16, 2015, Nan filed its RFAH with the OAH.

12. Insofar as Hensel Phelps is concerned, Nan's RFAH reasserted the four claims identified above as (1), (2), (3), and (6) in Finding of Fact No. 8 above that it had asserted in its March 23, 2015 protest letter to the City and County. Nan's RFAH did not reassert the claims identified above as (4) and (5) in Finding of Fact No. 8 above.

B. Summary of claims asserted in Nan's RFAH

1. Mechanical process subcontractor

13. Nan asserted at page 5 of its protest letter of March 23, 2015, that Hensel Phelps failed to list a valid subcontractor to perform "the mechanical package related to Process Equipment and lines for Water and Wastewater Treatment shown on drawing sheets

M-001 to M-903." Nan's protest letter acknowledged that Hensel Phelps had listed Critchfield Pacific, Inc., a subcontractor with a C-37 license, to perform the HVAC and plumbing portions of the mechanical work, but asserted that Hensel Phelps did not list a "mechanical process subcontractor" to perform the scope of work shown on drawing sheets M-001 to M-903 and covered under specification sections 15050 to 15200.

14. In its June 9, 2015 letter denying Nan's protest, at page 8, the City and County asserted that the piping systems work for this project may be performed by an "A" contractor without a C-37 or C-37e subcontractor.

15. In making this assertion, the City and County relied on its interpretation of a prior OAH case, KD Construction v. City and County of Honolulu, PCH-2001-9 (December 26, 2001), and claimed that the subject project is similar in scope to the project that was the subject of that earlier case.

16. Nan devoted pages 9 to 16 of its RFAH to this claim. In addition to some generalized legal commentary, Nan asserted:

a. The KD Construction v. City & County of Honolulu decision relied upon by the City and County had been superseded by the later Hawaii Supreme Court decision of Okada Trucking Co. v. Board of Water Supply, 97 Haw. 450, 940 P.3d 73 (2002), and that this later case supported Nan's position;

b. The scope of the La'ie project under consideration in the KD Construction case and the scope of the subject project, with the cost of the latter 25 times greater than the cost of the former, are significantly different, and specialty licensing requirements are still required for the subject project even if they were not required for the La'ie project; and

c. The City and County is not entitled to rely on a Contractors License Board opinion that was informal, unofficial, not even binding upon the Board itself, and

issued before the Hawaii Supreme Court's decision in Okada Trucking Co. v. Board of Water Supply, supra.

17. In its Response to the RFAH at pages 6-7, filed herein on June19, 2015, the City and County reaffirmed its reliance on the KD Construction decision, asserted that the Okada Trucking Co. case was distinguishable, and briefly asserted that the work required in sheets M-001 to M903 "falls squarely within the "A" general engineering contractor's expertise."

2. Structural steel subcontractor

18. Nan's protest letter and RFAH assert that Hensel Phelps failed to list a subcontractor to perform the structural steel work, and that this scope of work requires a C-48 structural steel specialty license which Hensel Phelps does not have.

19. Nan's protest letter and RFAH further asserted that the cost for the structural steel work is $6 million, which is well over one percent of Hensel Phelps' bid.

20. In denying Nan's protest, the City's letter of June 9, 2015, stated that:

> [Hensel Phelps] has indicated that Triton Pacific Construction LLC will perform the structural steel work, exclusive of the materials, for less than 1% of the proposed bid amount.
>
> This protest issue is denied; [Hensel Phelps] requests a waiver of subcontractor listing because the work to be performed is less than 1% and may be waived in the best interest of the City.

21. In its RFAH, Nan responded to the City and County's denial of the protest with respect to the failure to list a structural steel subcontractor by asserting that the statutory waiver of a failure to comply with subcontractor listing requirements under HRS 103D-302(b) (and HAR 3-122-21(a)(8)) should only be for mistakes and not for the intentional nondisclosure of subcontractors. By listing only nine subcontractors (in contrast to Nan and three other bidders who listed multiple subcontractors), Nan asserted that Hensel Phelps was able to improperly bid shop and reduce its overall bid price.

22. In its RFAH, Nan also complained about the City and County's investigation of this issue without providing allegedly corroborative documentation to Nan, and that there was apparently no written confirmation of a pre-bid proposal from Triton Pacific Construction to perform the structural steel work, exclusive of materials. Nan further asserted that the complicated nature of structural steel work meant that Hensel Phelps did not separate material from labor for structural steel at the time it submitted its bid.

23. In its Response to the RFAH filed June 14, 2015, the City and County asserted that it had "determined" that Triton Pacific Construction LLC would perform the structural steel work, exclusive of materials, for approximately $300,000.00

3. <u>Jet Grouting and Permeation Grouting</u>

24. Nan's protest letter of March 23, 2015, at page 5, asserted that Hensel Phelps failed to list a subcontractor to perform Jet Grouting and Permeation Grouting work. According to Nan, this work is not covered under a general engineering "A" license and requires a C-34 soil stabilization specialty license, which Hensel Phelps does not have.

25. In its June 9, 2015 letter denying Nan's protest against Hensel Phelps' bid, the City and County stated at page 9 that the specifications do not require a C-34 specialty license for this work.

24. The City and County's June 9, 2015 letter further stated that Hensel Phelps had listed Healy Tibbitts, which holds an "A" license, to perform the soil stabilization work. That letter further stated that Hensel Phelps provided "written documentation" that Frank Coluccio Construction Company would perform the jet grouting work for less than one percent of Hensel Phelps' proposed contract amount.

25. In its RFAH, at page 20, Nan asserted that Hensel Phelps did not list Healy Tibbitts as a subcontractor to perform soil stabilization work. Healy Tibbitts was listed as a

subcontractor to perform "Caissons/Pile Driving/Shoring," which Nan asserted did not include any soil stabilization work.

26. Nan's RFAH further asserted that, prior to bid, Frank Coluccio Construction Company provided bid proposals only to general contractors and not to subcontractors such as Healy Tibbitts.

4. Licensed qualified coating systems applicator

27. Nan's protest letter of March 23, 2015, at pages 5-6, challenged Hensel Phelps listing of Susan M. Phelps as a qualified coating systems applicator. Nan questioned whether this subcontractor had the requisite experience mandated by the specifications.

28. In response, the City's letter of June 9, 2015, at pages 11-12, responded that Susan M. Phelps is properly licensed. In accord with the specifications, this subcontractor's qualifications were to be submitted after contract award as part of the contractor's submittals.

29. In its RFAH, Nan asserted at pages 21-22, that the specifications of this project regarding qualifications of the coating systems applicator involve a matter of responsiveness as well as responsibility. In this particular situation, Nan asserted, the failure to set forth Susan M. Phelps' qualifications is a matter of responsiveness and Hensel Phelps bid was therefore nonresponsive.

C. Disputes over Jurisdiction

30. Nan's Motion concerned the substantive merits of its four claims. Nan's RFAH asserted at pages 2-3 that Nan's protest met the jurisdictional minimum amount of ten percent of Hensel Phelps' and Parsons' bids. The Memorandum in support of Nan's Motion, however, did not have a section devoted to demonstrating OAH had jurisdiction over its RFAH.

31. Nan's Memorandum in support of its Motion asserted at pages 16-17, that the "material facts not in genuine dispute" included the following valuations of its claims:

a. Mechanical process scope of work was between $25 million to $30 million (this is apparently based on a bid to Nan from Critchfield Pacific, Inc., dated March 18, 2015, Nan Exhibit N);

b. Structural steel scope of work amounted to $6 million (Nan had bids for structural steel materials only that ranged up to $3.5 million and a bid for the entire structural steel work, both materials and installation, for $5.8 million; Nan Exhibit Z);

c. Jet grouting and permeation grouting scope of work was nearly $11 million; and

d. Coating systems scope of work was $5 million.

32. In its Memorandum in Opposition to Nan's Motion, at page 17, Hensel Phelps raised a jurisdictional objection to Nan's RFAH on the ground that the value of the issues in dispute total less than ten per cent of the value of Hensel Phelps' bid. Hensel Phelps' assertion was based on exhibits and declarations referred to in other portions of its Memorandum.

33. At page 8 of its Memorandum in Opposition to Nan's Motion, the City and County made general legal observations about the need to meet the statutory minimum jurisdictional amount. However, there was no actual claim of lack of jurisdiction at that time and no reference to any details that would support such a claim.

34. At the prehearing conference as well as at the hearing on July 9, 2015, the City and County confirmed that it did not have sufficient funds to exercise its option to accept any additive cost bid for the Kaneohe facility.

35. In terms of base bids at the time of the hearing on Nan's RFAH, the Southland bid had been disqualified, Hensel Phelps was the lowest remaining bidder and Nan was the next lowest bidder.

36. Because Parsons' base bid was higher than Nan's base bid, and because the City was not going to accept any additive bids for the Kaneohe facility, there was no longer any need for Nan to challenge the Parsons bid.

37. Ten per cent of Hensel Phelps' bid is $14,942,900.

38. Hensel Phelps' estimate and bid for all of the mechanical process installation labor was just over $1,048,850. Hensel Phelps' Exhibits HP-11 and HP-12; Declaration of Richard W. Crago, Paragraph 6; Declaration of Brian J. Holm, Paragraph 6.

39. Hensel Phelps' estimate and bid for all of the structural steel erection labor at the Kailua site was $288,000. Hensel Phelps' Exhibit HP-17; Declaration of Michael C. Wagner, Paragraphs 4, 8.

40. The project specifications required that the contractor "design, furnish, install, and maintain a full perimeter and watertight excavation and support system for each open excavation." At the Kailua facility, the contractor was allowed to choose from a variety of open excavation support systems that the City and County deemed acceptable. Hensel Phelps decided to utilize a system at the Kailua facility that did not involve jet grouting. Jet grouting, with a value of $910,000, was going to be used by Hensel Phelps only at the Kaneohe facility. Hensel Phelps' Exhibit HP-18; Declaration of Richard W. Crago, Paragraphs 19-24; Declaration of Brian J. Holm, Paragraphs 19-24.

41. Nan's assertion that Hensel Phelps' listed a painting subcontractor that was not a qualified applicator for two specified coatings systems allegedly required on the project (the Raven and the Sauereisen systems), refers to only a portion of the painting work. Nan Exhibit AA.

42. The total value of Hensel Phelps' painting subcontractor's bid was $2,885,000. Declaration of Michael C. Wagner, Paragraph 12.

43. At the hearing on July 9, 2015, Hensel Phelps' counsel asserted that the value of the painting work pertaining to the two specified coatings at issue was approximately twenty-five per cent of the total painting subcontract amount. However, no evidence

corroborating this assertion was submitted with Hensel Phelps' Memorandum in Opposition to Nan's Motion.

44. Nan did not challenge the accuracy of the figures set forth in Findings of Fact Nos. 38, 39, 40, and 42 above as they pertain to Hensel Phelps' bid.

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. The Evidentiary Basis for Summary Judgment Motions in Procurement Protests

The City and County claimed that Nan's Motion must be denied because it lacked the proper evidentiary basis. The City and County objected to the lack of declarations or affidavits based on personal knowledge, uncertified or unsworn exhibits, and hearsay

statements. The City and County relied on Rule 56 (e) of the Hawaii Rules of Civil Procedure. City and County's Memorandum in Opposition at pages 10-12. Hensel Phelps made a similar, although less detailed, objection at page 16 of its Memorandum in Opposition.

The City and County and Hensel Phelps fail to take into account the amendment to HRS §103D-709(c) by Act 173 of the 2012 Legislature. The prior version of the statute made procurement protest proceedings very formalistic when it stated: "The rules of evidence shall apply." As part of the streamlining process mandated by Act 173, that sentence was eliminated from the statute. It was replaced by the following sentence: "Fact finding under section 91-10 shall apply."

HRS §91-10, when referencing the form of evidence to be utilized in contested case proceedings, provides that "any oral or documentary evidence" is allowed. The Hawaii Supreme Court has held that this means that evidence cannot be excluded due to a party's failure to support the presentation of that evidence by affidavits or declarations. Diamond v. Dobbin, 132 Haw. 9, 33, 319 P.3d 1017, 1041 (2014). To the contrary, the statute allows "any evidence" as long as it is not irrelevant, immaterial or unduly repetitious. This would also allow the introduction of hearsay evidence.

Attorney's arguments are, of course, not evidence. However, the general objections of the City and County and of Hensel Phelps to Nan's method of presenting actual evidence and failure to follow the standards set in Rule 56(e) of the Hawaii Rules of Civil Procedure are without merit.

3. Documents and Arguments Not Previously Presented to the City and County

The City and County also objected to Nan's presentation of "all documents and argument not previously presented" in Nan's original protest to the City and County.

Although this argument at pages 11-12 of the City and County's Memorandum in Opposition is contained within a section of the memorandum primarily devoted to challenging Nan's failure to follow Rule 56(e) of the Hawaii Rules of Civil Procedure, this objection is more properly considered one of "failure to exhaust administrative remedies."

When a party initially submits a procurement protest to the procuring agency, there is no requirement that the party demonstrate its protest involves a matter in excess of any jurisdictional amount. No statute contains such a requirement, and the City and County has not cited any administrative rule that contains such a requirement. A demonstration that a procurement protest involves a certain amount only comes into play when the protesting party appeals an adverse administrative decision to the Office of Administrative Hearings. At that point, and not before, HRS §103D-709(d) requires that the RFAH "concerns a matter" in excess of the minimum jurisdictional amount.

The City and County relies upon a statement from Alii Security Systems, Inc., PCY 2012-002 (February 24, 2012), that a hearings officer can only make a decision about matters that were previously the subject of a determination by a chief procurement officer. That statement, however, was not made in the context of a determination of the specific jurisdictional question, unique to the RFAH proceeding, of the minimum jurisdictional amount.

Given the present structure of the procurement protest process, it follows that Nan was not required to submit evidence or argument to the City and County regarding the minimum jurisdictional amount set forth in HRS §103D-709(d) when it submitted its March 23, 2015 protest letter. Further, since jurisdiction is the only issue decided herein, the Hearings Officer need not consider the City and County's "failure to exhaust" argument insofar as it might pertain to any other issue raised in Nan's RFAH.

4, Timing of the Determination of the Issue of the Minimum Jurisdictional Amount

While Nan had the burden of establishing that its RFAH involved a matter or matters exceeding the minimum jurisdictional amount, it was not required to do so by means of its Motion for Summary Judgment. If there was any question concerning Nan's fulfillment of that burden, it could also attempt to demonstrate jurisdiction at the evidentiary hearing.

Similarly, neither the City and County nor Hensel Phelps were required to raise any jurisdictional objections in the form of a motion to be heard before the scheduled evidentiary hearing. While raising such an objection by means of a motion, rather than, as here, in an opposition to Nan's motion, might have been more efficient, there was no such requirement. Questions of jurisdiction can be raised at any time by any party, or by the hearings officer *sua sponte*, and jurisdiction cannot be conferred by agreement, stipulation, or a delay in raising the issue. Kiewit Infrastructure West v. Department of Transportation; Goodfellow Brothers v. Department of Transportation, PCX 2011-2 and PCX 2011-3 (June 6, 2011); Exhibit B.

Having said that, there still remains the question of procedural fairness. When jurisdictional questions are raised, the protesting party should be accorded a fair opportunity to respond. This was discussed in some depth in Exhibit B to Kiewit Infrastructure West v. Department of Transportation; Goodfellow Brothers v. Department of Transportation, PCX 2011-2 and PCX 2011-3 (June 6, 2011).

In this case, the Hearings Officer gave Nan two options in terms of responding to the jurisdictional objection raised by Hensel Phelps. First, it could respond at the motion hearing held on the morning of July 9, 2015. Alternatively, it could respond in the afternoon of July 9, 2015, at the time scheduled for the evidentiary hearing. (Nan would have had to demonstrate jurisdiction at that later hearing in any event.) Nan could have also asked for additional time beyond July 9, 2015.

In the end, Nan chose to respond during the hearing on its motion on the morning of July 9, 2015. Further, during the course of that hearing and at the end of the argument on jurisdiction, a forty minute recess was held for the specific purpose of allowing Nan and its counsel to consult and determine, again, if they would present evidence on the jurisdictional issue at the time of the previously scheduled evidentiary hearing. At the conclusion of that recess, Nan decided that it would not present any additional evidence.

The Hearings Officer concludes that Nan had a sufficient opportunity to respond and argue against the assertions of Hensel Phelps that there was no jurisdiction in this matter.

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.

As noted in the Findings of Fact, the bids in this procurement provided two prices—a "base" price and an "additive" price. The "base" price was for the Kailua facility, and the "additive" price was for the construction of a Kaneohe facility if the City and County, in its discretion, decided to build that additional facility. Due to the lack of sufficient funds, however, the City represented in the hearing that it would not be constructing the Kaneohe facility.

Accordingly, the "additive" price for the Kaneohe facility became irrelevant for purposes of determining the minimum jurisdictional amount. The parties at the hearing agreed, and the Hearings Officer so concludes, that the "estimated value of the contract" with respect to determining the minimum jurisdictional amount for this procurement protest is Hensel Phelps' "base" bid of $149,429,000. Since this value is in excess of $1,000,000, pursuant to HRS §103D-709(d)(2), the minimum jurisdictional amount is ten per cent of the "base" bid. That minimum jurisdictional amount is therefore $14,942,900.

It should be noted that this situation makes moot Nan's Motion with respect to the Parsons bid.

2. The Total Value of the Mechanical Process Work is $1,048,850

Nan's biggest claim is that Hensel Phelps does not have the proper license to perform the mechanical process work at the facilities in question, and that Hensel Phelps failed to list any properly licensed subcontractor that Hensel Phelps would utilize to perform that mechanical process work. Nan has consistently asserted in its initial protest letter and in its RFAH that the total value of the mechanical process work is in the range of $25 million to $30 million. Presumably, that figure would include both the Kailua and Kaneohe facilities.

Hensel Phelps, on the other hand, asserts that the appropriate analysis here depends solely on the amount of labor necessary to install the mechanical process equipment. If the value of the mechanical process equipment/materials to be installed is excluded from consideration, the amount at issue, i.e., the amount for labor, is only $1,048,850. See Hensel Phelps Exhibit HP-12.

Looking, as we must, to the exact words of the statute, the Hearings Officer concludes that the Nan protest "concerns a matter" of licensing—Hensel Phelps lack of its own allegedly necessary license and its failure to list a subcontractor with the allegedly necessary license. Licensing involves the ability to perform the work, i.e., the labor, and not the ability to buy the materials.

At the hearing, the Hearings Officer commented that there theoretically may be situations where a contractor or subcontractor needs a certain license in order to buy materials because of, for example, design concerns that are inextricably combined with the purchase of the materials. In this case, however, Nan did not point to anything in the Project specifications that might arguably call out the need for a license in order to purchase the mechanical process equipment/materials.

Given the opportunity to present its own evidence on labor costs, Nan declined to do so. Instead, it argued that when a contractor plans to self-perform a certain scope of work, the entire value of that work, both labor and materials, is the "matter of concern" for purposes of complying the minimum jurisdiction amount requirement. However, Nan provided no authority for this position, and its argument failed to counter the analysis set forth above that the licensing issue here involves only labor.

3. The Total Value of the Steel Erection Claim is $288,000

Nan asserted that the structural steel work involved a matter of $6 million. Hensel Phelps, on the other hand, demonstrated that the total amount of its bid for all steel items at the Kailua site was $3,969,000, and the amount for erection of the structural steel, i.e., labor, was only $288,000.

In accord with the analysis above, this aspect of Nan's protests "concerns a matter" of Hensel Phelps alleged lack of licensing to erect structural steel and its alleged failure to list a licensed subcontractor that could properly do this work. The matter concerns only labor because no license was needed to purchase the structural steel.

Nan agreed with the foregoing analysis because, according to Nan, Hensel Phelps never planned to use its own forces to erect the structural steel. In Nan's view, retaining a licensed subcontractor (although not listing it in the bid) makes this situation different from that involving the mechanical process equipment.

Irrespective of Nan's concession on valuing the structural steel claim, the Hearings Officer has concluded that $288,000 is the proper value of this claim as defined by the statute. The analysis here has nothing to do with whether or not Hensel Phelps was hiring a subcontractor or doing the structural steel erection work itself.

4. The Jet Grouting Claim Has No Value Because Hensel Phelps Did Not Plan to Utilize Jet Grouting in the Work at the Kailua Facility

Nan valued the jet grouting claim as involving a scope of work of $11 million. However, Hensel Phelps demonstrated that the Specifications provided for alternative methods of accomplishing the shoring portion of the work and that the alternate method chosen by Hensel Phelps and priced in its bid did not use any jet grouting at the Kailua Facility.

Under Hensel Phelps' plan, as reflected in its bid, jet grouting would only be used in construction at the Kaneohe facility. According to Hensel Phelps, the value of that work at Kaneohe was only $910,000. However, there is no need to determine the value of this anticipated work at Kaneohe because the City and County has chosen not to award a contract for that work. Accordingly, the value of this aspect of Nan's claim, insofar as the minimum jurisdictional amount is concerned, is zero.

5. The Value of the Painting Subcontractor's Work is $2,885,000

The total value of the painting subcontract in Hensel Phelps' bid was $2,885,000. The specific matter of concern in Nan's RFAH was the subcontractor's lack of certification as an approved applicator on certain epoxy coatings that formed only a portion of the painting work.

Hensel Phelps estimated that this specific epoxy coating work was approximately one fourth of the entire painting subcontract. This estimate was presented by Hensel Phelps' attorney during the course of oral argument on Nan's motion and was not supported by any declarations or exhibits. For purposes only of this Decision, therefore, the Hearings Officer will assume that the value of this claim by Nan is the full value of the painting subcontract.

6. The Total Value of Nan's Claim is Less than 10% of the

Giving Nan the benefit of the doubt on the painting subcontractor claim, the value of Nan's overall claim is as follows:

a.	Mechanical process claim	$1,048,850
b.	Steel erection claim	288,000
c.	Jet grouting claim	0
d.	Painting subcontractor claim	2,885,000
Total claim value		$ 4,221,850

Individual claims can be aggregated in order to determine if a protest brings into questions matters totaling the required jurisdictional amount. Nan, Inc. v. Hawaii Authority for Rapid Transportation, PDH 2015-004 (May 28, 2015). Here, however, the aggregation of Nan's claims totals well below the required jurisdictional amount. Accordingly, Nan's RFAH should be dismissed for lack of jurisdiction.

7. Summary Judgment for the Non-Moving Parties is Appropriate

A party's opposition to a motion for summary judgment can demonstrate that it is itself entitled to summary judgment on an issue under contention. In that situation, the Hearings Officer can, *sua sponte*, grant summary judgment to the non-moving party as long as the moving party has had adequate notice and an opportunity to respond to the possibility that its motion will instead result in a ruling against it. Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014), citing Robert's Hawaii School Bus, Inc. v. Matayoshi et al., PDH-2013-009 (October 29, 2013).

In the present situation, as discussed in more detail above, Nan had ample opportunity to make its case concerning jurisdiction. Under these circumstances, there was no impediment to granting summary judgment to the non-moving parties.

IV. DECISION

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

1. Summary judgment is granted to Hensel Phelps Construction Co. and the Department of Budget and Fiscal Services, City and County of Honolulu, on the issue of jurisdiction.

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

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

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

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

DATED: Honolulu, Hawaii, July 14, 2015.

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