



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2015 SEP -4 A 11: 41

HEARINGS OFFICE

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

| | | |
|--------------------------------|---|----------------------------------|
| In the Matter of |) | PDH-2015-006 |
| |) | |
| NAN, INC., |) | FINDINGS OF FACT, CONCLUSIONS OF |
| |) | LAW, AND DECISION; |
| Petitioner, |) | ATTACHMENTS 1-2 |
| |) | |
| vs. |) | Senior Hearings Officer: |
| |) | David H. Karlen |
| DEPARTMENT OF TRANSPORTATION, |) | |
| STATE OF HAWAII |) | |
| |) | |
| Respondent, |) | |
| |) | |
| and |) | |
| |) | |
| HAWAIIAN DREDGING CONSTRUCTION |) | |
| COMPANY, INC., |) | |
| |) | |
| Intervenor. |) | |
| _____ |) | |

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 July 21, 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 July 22, 2015, a pre-hearing conference was set for July 30, 2015, and a hearing was set for August 11, 2015.

On July 23, 2015, Hawaiian Dredging Construction Company, Inc. (“Hawaiian Dredging”) filed a Motion to Intervene in this matter.

Respondent Department of Transportation, State of Hawaii (“DOT”) filed its Response to the RFAH on July 28, 2015.

A prehearing conference was held on July 30, 2015. Nan was represented by Wil K. Yamamoto, Esq., and the DOT was represented by Deputy Attorney General Laura Y. Kim, Esq., and Deputy Attorney General John H. Price Esq. Potential Intervenor Hawaiian Dredging was represented by Keith Y. Yamada, Esq., Eaton S.K. O’Neill, Esq., and Megan A. Suehiro, Esq. Pursuant to agreement, the hearing date was continued to August 20, 2015, and, shortly after the conclusion of the prehearing conference, the parties filed a stipulation to the intervention of Hawaiian Dredging. A formal Prehearing Order was filed June 31, 2015.

Nan, the DOT, and Hawaiian Dredging filed their Motions for Summary Judgment on August 5, 2015. The parties filed their memoranda in opposition to the various Motions for Summary Judgment on August 14, 2015.

A hearing before the undersigned Hearings Officer on all Motions for Summary Judgment was held on August 17, 2015. At the conclusion of argument on the motions, all motions were taken under advisement by the Hearings Officer. The Hearings Officer did allow additional memoranda to be submitted on particular issues, and all parties filed their supplemental memoranda on August 19, 2015.

The matter came on for an evidentiary hearing on August 20, 24, 25, and 26, 2015. Nan was represented by Wil K. Yamamoto, Esq., and (on August 24, 2015), Jody Shin Yamamoto, Esq. The DOT was represented by Deputy Attorney General Laura Y. Kim, Esq., and Deputy Attorney General John H. Price, Esq. Hawaiian Dredging was represented by Keith Y. Yamada, Esq., David F.E. Banks, Esq., and Megan A. Suehiro, Esq.

Nan’s Exhibits A-FF, the DOT’s Exhibits 1-58, and Hawaiian Dredging’s Exhibits 1-57 were all admitted into evidence pursuant to stipulation.

The evidentiary hearing was concerned with three major issues generally summarized as follows: (1) Whether the DOT had jurisdiction to rescind its notice of intent to award the contract in question to Nan and, instead, issue a notice of intent to award the contract to Hawaiian Dredging (“jurisdiction issue”); (2) Whether Nan violated the subcontractor listing requirements with respect to subcontractor Commercial Plumbing (“subcontractor issue”); and (3) whether Nan’s bid was unbalanced in violation of Section 2.8(5) of the General Provisions (“the unbalanced bid issue”).

At the conclusion of Nan’s case on August 25, 2015, both Hawaiian Dredging and the DOT moved to dismiss Nan’s entire RFAH. See HAR §3-126-70(a). The Hearings Officer took both motions under advisement.

At the conclusion of the hearing on August 26, 2015, the Hearings Officer announced his intent to grant summary judgment in favor of the DOT and Hawaiian Dredging on the jurisdiction issue. The Hearings Officer also announced his intent to deny the DOT and Hawaiian Dredging summary judgment motions and oral motions to dismiss with respect to the subcontractor issue, and he also announced his intent to rule in favor of Nan on the subcontractor issue. The DOT and Hawaiian Dredging motions for summary judgment and oral motions to dismiss the unbalanced bid issue remained under advisement.

The parties thereafter submitted their post-hearing memoranda on the unbalanced bid issue on August 31, 2015.

This Decision, based on the record as of the conclusion of the evidentiary hearing on August 26, 2015, and the submittal of post-hearing memoranda on August 21, 2015, is the formal order with respect to all issues in this matter.

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 April 30, 2014, the DOT solicited sealed bids for the construction of roadway improvements and a consolidated car rental facility at Kahului airport on Maui, Project No. AM1032-13 (“CONRAC project”).

2. Nan, a general contractor, prepared to bid this project. Robert Iwasaki, Nan’s chief estimator, was in charge of preparing the bid.

3. In connection with preparing Nan’s bid, Mr. Iwasaki sought quotations from various subcontractors, including Commercial Plumbing, Inc. (“Commercial Plumbing”).

4. On June 11, 2014, Curt Balaney of Commercial Plumbing sent Mr. Iwasaki an e-mail stating that Commercial Plumbing had decided to pass on bidding the CONRAC project. Hawaiian Dredging Exhibit 32. Three other general contractors who were intending to bid that project were also informed by Commercial Plumbing that it would not be submitting a bid to them.

5. Warren Hiraki, president of Commercial Plumbing, did not recall Hawaiian Dredging approaching Commercial Plumbing for a quotation on the project. On this point, the Hearings Officer finds the memory of Mr. Eric Hashizume to be more accurate. Hawaiian Dredging did ask Commercial Plumbing for a quotation. Furthermore, Mr. Hashizume was “shocked” to find out, just after bid opening, that Commercial Plumbing had provided a quotation to Nan but not to Hawaiian Dredging. Because of the long standing business relationship between Commercial Plumbing and Hawaiian Dredging, Hawaiian Dredging expected Commercial Plumbing to provide it with a quotation if Commercial Plumbing provided any other general contractor with a quotation.

6. Mr. Iwasaki persisted despite Nan's e-mail and called Mr. Balanay on June 18, 2014 to see if he would reconsider and provide a quote to Nan. According to the written affidavit of Mr. Balanay dated April 13, 2015, and submitted into evidence by Hawaiian Dredging as part of its Exhibit 32, Mr. Balanay told Mr. Iwasaki during their June 18, 2014 conversation that Mr. Balanay would provide a quote for the CONRAC Project to Nan. See also Nan Exhibit D14.

7. In the morning of June 30, 2014, Mr. Iwasaki called Mr. Balanay to remind Mr. Balanay to provide a Commercial Plumbing quote to Nan. Nan Exhibit D14.

8. In the early afternoon of June 30, 2014, prior to the submission of Nan's bid to the DOT, Mr. Balanay, over the telephone, provided Mr. Iwasaki with a verbal quote on behalf of Commercial Plumbing in the amount of \$5,000,000 for the plumbing work and \$4,000,000 for the fire sprinkler work on the CONRAC project. See the affidavits from Mr. Iwasaki and Mr. Balanay admitted into evidence as part of Hawaiian Dredging's Exhibit 32 and as Nan's Exhibit D14.

9. Mr. Balanay later confirmed to Deputy Attorney General Laura Kim, Esq., (on April 15, 2015) that he was authorized to bind Commercial Plumbing and that he provided verbal quotes to Nan of \$5,000,000 for plumbing and \$4,000,000 for fire sprinkler work. Hawaiian Dredging Exhibit 32.

10. Mr. Iwasaki incorporated those two verbal quotations from Commercial Plumbing into Nan's bid for the CONRAC project. Nan Exhibit D14.

11. Mr. Iwasaki also listed Commercial Plumbing as a subcontractor on Nan's bid in the areas of "Vacuum System, Lubrication System, Compressed Air System" (which is part of plumbing) on line 27, page P-4, of Nan's bid, "Plumbing, Commissioning of Plumbing

Systems,” on line 32, page P-4 of Nan’s bid, and “Automatic Fire Sprinkler system, Standpipe Systems,” on line 33, page P-5 of Nan’s bid. Nan’s proposal is DOT’s Exhibit 15.¹

12. On behalf of Nan, Mr. Iwasaki had dealt with Mr. Balanay of Commercial Plumbing for a couple of years and several projects. There was no reason for Nan to doubt that Commercial Plumbing had changed its mind and that Mr. Balanay was authorized to quote prices for the CONRAC project. From their experience with Commercial Plumbing, and knowing the size and capability of the company plus its good track record in keeping its commitments and doing good work on many projects, including large ones, there was no reason for Nan to doubt that Commercial Plumbing was able to perform the CONRAC project work.

13. There was no reason for Nan to doubt that the verbal quotations from Commercial Plumbing, through Mr. Balanay, would not be honored despite the lack of a written quotation.

14. As of June 30, 2014, and for a while thereafter, Mr. Randal Hiraki, president of Commercial Plumbing did not know that Commercial Plumbing, through Mr. Balanay, had provided a quote on the CONRAC project to Nan. For this reason, Mr. Hiraki told Hawaiian Dredging shortly after bid opening that Commercial Plumbing had not bid the job.

15. After Mr. Hiraki discovered that Commercial Plumbing quotes for plumbing and fire sprinkler work had been provided to Nan, Mr. Hiraki did not repudiate those quotes. Instead, he testified on August 20, 2015, that:

- a. Mr. Balanay had authorization to turn in a bid. Tr. 91, lines 18-24.
- b. Mr. Balanay had the authority to bid on jobs without seeking Mr. Hiraki’s prior approval. Tr. 95, lines 19-22; Tr. 129, lines 15-19. There was no evidence that Nan knew or should have known this authority might not have extended to the CONRAC project.

¹ Several documents were submitted as exhibits by more than one party. For ease of reference, the Hearings Officer will commonly refer only to the DOT’s Exhibits. This is done solely for convenience and should not be taken as a sign of any favoritism towards the DOT’s presentation in this case.

c. He left Mr. Balanay to “work it out” with Mr. Iwasaki. Mr. Hiraki himself wasn’t quite sure what “work it out” meant because he did not want to be involved. However, it appears that at the time of the events in question, “work it out” meant work out the details of the subcontract.

16. There was no evidence that Commercial Plumbing’s quotations of \$5,000,000 for the plumbing work and \$4,000,000 for the fire sprinkler work were unreasonable.

17. On June 30, 2014, The DOT received and opened five bids responding to the solicitation for the CONRAC project. Those bids were as follows:

Watts Constructors, LLC (“Watts”) - \$280,828,410.00

Hensel Phelps Construction Co. (“Hensel Phelps”) - \$310,781,000.00

Nan - \$327,565,584.43

Hawaiian Dredging - \$331,394,176.15

Kiewit Building Group, Inc. (“Kiewit”) - \$359,086,926.80

18. The Proposal Schedule for all bidders is found at pages P-11 through P-16 and consists of over 200 individual line items. (There are also line items on pages P-16 and P-17 for alternates, but these have played no role in the present case.) There is a line on page P-16 for “Total Amount for Comparison of Bids.” This amount is supposed to be the sum of line items on pages P-11 through P-16.

19. Pursuant to Note 6 on page P-17 of the Proposal Schedule, bidders had not bid on all of the bid items as well as the “Total Amount for Comparison of Bids.” That “Total Amount” would be used by the DOT to determine the lowest responsible bidder. As noted above, Nan’s “Total Amount” \$327,565,584.43. This amount was written in by hand. DOT Exhibit 15.

20. On page P-15 of Nan’s Proposal Schedule, Bid Item 15500.1, Automatic Sprinkler System, for \$3,500,000.00, and Bid Item 15510.1, Standpipe Systems, for

\$500,000.00, correspond to the \$4 million for fire sprinkler and standpipe system work bid by Commercial Plumbing.

21. On page P-11, of Nan's Proposal Schedule, there are several items listed under "II. Site Work." The Roman numeral "II" refers to Division 2 of the project specifications, DOT Exhibit 5.

22. In this Site Work section of the Proposal Schedule, page P-11, is located Bid Item No. 02050.1, "Demolition and Removal Work." This is an "L.S." (meaning "lump sum") item and refers to the work set forth in "Section 02050-Demolition and Removal Work" included in Division 2 of the project specifications. DOT Exhibit 5. For this Bid Item, Nan typed in the figure of \$46,004,600.00. DOT Exhibit 15.

23. On pages P-15 and P-16 of Nan's Bid Proposal Schedule, there are several line items where the prices were written in by hand. The following line items all have a handwritten price of \$100,000.00:

- Item No. 13750.1 - Video Surveillance
- Item No. 15000.1 - General Mechanical Requirements
- Item No. 15070.1 - Seismic Protection for Mechanical Equipment
- Item No. 15100.1 - Commissioning of HVAC Systems
- Item No. 15200.1 - Commissioning of Plumbing systems
- Item No. 15901.1 - Testing, Adjusting and Balancing
- Item No. 16050.1 - Grounding and Bonding for Electrical Safety and Security
- Item No. 16051.1 - Fueling System Electrical Materials and Methods
- Item No. 16100.1 - Electrical Work
- Item No. 16200.1 - Commissioning of Electrical Systems
- Item No. 16210.1 - Medium Voltage Cables
- Item No. 16230.1 - Medium Voltage Transformers

- Item No. 16250.1 - Medium Voltage Metal Clad Switchgear
- Item No. 16280.1 - Low Voltage Switchgear
- Item No. 16300.1 - Underground Distribution System
- Item No. 16510.1 - Interior Lighting
- Item No. 16530.1 - Exterior Lighting
- Item No. 16610.1 - Emergency/Standby Generator Set
- Item No. 16630.1 - Automatic Transfer Switch
- Item No. 16700.1 - Building Telecommunications systems—Voice/Data/CATV
- Item No. 16722.1 - Fire Alarm System
- Item No. 16900.1 - Electrical Equipment Acceptance Testing and Start-Up
- Item No. 17932.1 - Emergency Duress Intercom System

See DOT Exhibit 15.

24. On page P-13 of Nan's Proposal Schedule, the following line items had numbers typed in that were later crossed out and replaced by significantly lower handwritten numbers:

- Item No. 03300.1 - Cast-in-place Concrete was changed from \$78,602,900.00 to \$68,602,900.00
- Item No. 03381.1 - Underground Post-Tensioned Concrete was changed from \$41,004,300.00 to \$31,004,300.00
- Item No. 0481.1 - Unit Masonry Assemblies was changed from \$13,811,500.00 to \$8,811,500.00.

See DOT Exhibit 15.

25. On page P-15 of Nan's Proposal Schedule, the following items were bid far too low:

- Item No. 11200.1 - Vacuum System for \$135.00
- Item No. 11300.1 - Lubrication System for \$75.00
- Item No. 11400.1 - Compressed Air System for \$75.00

See DOT Exhibit 15.

26. In the course of the preparation of Nan's CONRAC bid proposal, Mr. Iwasaki had inserted the figure of \$46,004,600 for Bid Item 02050.1, Demolition and Removal, on his personal worksheet for the bid. This was not intended to be the final figure for this Bid Item. Instead, Mr. Iwasaki intended it to be a "place holder" to represent all of the site and civil work for the CONRAC project.

27. There were 73 bid items comprising the site and civil work, and the estimate for those 73 items was being prepared by another Nan employee, Mr. Zaid Alshukri. August 24, 2015 transcript page 194, lines 2-15.

28. On the morning of June 30, 2014, Mr. Iwasaki enlisted assistance in preparing the bid proposal to be submitted to DOT. Mr. Alshukri was supposed to transfer the civil and site proposal items he had prepared from Nan's internal worksheets to the DOT bid proposal form. Mr. Iwasaki would be responsible for transferring over all of the other numbers comprising Nan's bid. This process is known as "spreading," and involves typing or handwriting the bid item numbers directly on the PDF sheet for the bid proposal sheet that was provided by the DOT. Tr. 194, line 16, to Tr. 195, line 13.

29. Mr. Iwasaki claims that he inadvertently left the \$46,004,600 figure for Bid Item 02050.1 on his own personal work sheets, so his estimating assistant transferred that figure unchanged over to the PDF form. After that occurred, the estimating assistant transferred over Mr. Alshukri's numbers to the PDF form. Tr. 195, line 15, to Tr. 196, line 5.

30. It should be noted that Bid Item 02050.1 was one of the 73 bid items supposed to be prepared and transferred over by Mr. Alshukri after Mr. Iwasaki's bid items were transferred over. There is no explanation as to why the allegedly mistaken \$46,004,600 figure was not discovered when Mr. Alshukri's bid item figures were subsequently transferred to the PDF form. Mr. Alshukri's personal spreadsheet had the allegedly correct figure of \$440,000. Tr. 197, lines 18-20.

31. It should be noted that Nan had two prices for this Bid Item--\$423,450 for Nan's direct cost and \$440,000 for the total of Nan's direct and indirect costs for this item. No margin or profit is included in either of these figures. Tr. 200, lines 11-19; Tr. 203, line 20, to Tr. 204, line 17.

32. When the figures were transferred over to the PDF form, several lines were left blank. At the time, Nan still had not received quotes from the mechanical and electrical subcontractors. The arithmetical total of the typed items on the PDF sheet was then roughly \$320,000,000. Tr. 205, lines 2-22.

33. The two missing subcontractor quotes were eventually received and together accounted for \$39,000,000. This would put Nan's proposal on the PDF form some \$32,000,000 over Nan's total target figure of approximately \$327,000,000 on Mr. Iwasaki's personal worksheets. So, in the few remaining moments before the bid had to be turned in, Mr. Iwasaki instructed his estimating assistant to hand write all the entries for \$100,000 that are listed in Finding of Fact No. 23. Tr. 205, line 2, to Tr. 206, line 17. (Mr. Iwasaki sent these instructions by telephone since he was in Nan's office and not at the site where the bids were required to be turned in to the DOT.)

34. The inordinately low prices typed in on Nan's bid proposal for the vacuum system, lubrication system, and compressed air system set forth in Finding of Fact No. 25 were the result of a transposition error and should, for example have been \$75,000.00 instead of \$75.00. Tr. 207, line 11, to Tr. 208, line 4.

35. Other numbers that had been typed in by Nan on the PDF bid proposal sheet were crossed out and new numbers were written in by hand in order to eliminate the previously mentioned extra amount of \$3,000,000 and reduce the total proposal to about \$327,000,000. Tr. 210, lines 3-19; Tr. 211, lines 4-25.

36. Mr. Iwasaki claimed that by the time he realized there was a mistake in Nan's numbers, there was insufficient time to find the mistake and the "only thing" he could supposedly do

was resort to using the above-described unilateral \$100,000 entries and the unilateral slashing of some of the typed numbers by replacing them with lower hand written numbers. Tr. 218, line 15, to Tr. 219, line 1.

37. The Hearings Officer finds that this claim in Mr. Iwasaki's testimony is not accurate. The \$46,004,600 figure for Bid Item 02050.1 is on the first page of the bid proposal sheet so it is very easy to locate, and it clearly stands out as an extraordinarily high number. It would have been far easier and less time consuming to reduce that one figure by \$23,000,000 than it was to do what Mr. Iwasaki did and reduce two other figures by \$10,000,000 each and one other figure by \$3,000,000. See Finding of Fact No.24.

38. When all the subcontractor quotes came in to Nan, Mr. Iwasaki testified that the total on the PDF sheet would have been approximately \$32,000,000 over what it should have been. However, the \$46,004,600 figure for Bid Item 02050.1 was more than \$45,000,000 greater than it should have been. At most, only \$32,000,000 of that \$45,000,000 excess can be explained by Mr. Iwasaki's testimony. There is still an excess of \$13,000,000 attributable to the stated figure of \$46,004,600 for Bid Item 02050.1 that has never been explained by Nan and must have been compensated for by some \$13,000,000 in underbid items that Nan has never identified.

39. For the items on Nan's bid proposal where figures were crossed out and new figures were written, the changes were initialed "F.F." Those are the initials of Mr. Freestone, the Nan officer who signed Nan's proposal. The authorized signer of the proposal typically initials such hand written changes made on the bid form. Tr. 220, line 25, to Tr. 221, line 12.

40. However, for this proposal by Nan, the initials on the proposal form were not made by Mr. Freestone. Instead, the initials were made by a Nan clerical person who was at the site where the bid was going to be turned in. Tr. 221, line 13, to Tr. 222, line 1.

41. Nan's bid was signed by Mr. Freestone before it was completed, and any certification by Mr. Freestone that Nan's bid was final is false. Nan did not demonstrate that Mr. Freestone ever properly signed Nan's complete bid proposal.

42. Because of all the entries on Nan's bid proposal set forth in Findings of Fact Nos. 22-25, any certification by Mr. Freestone that Nin's bid was correct is false.

43. On July 3, 2014, Nan, as the third-lowest bidder, submitted a letter to the DOT claiming that the bids of the two lowest bidders, Watts and Hensel Phelps, were nonresponsive. DOT Exhibit 18.

44. On July 8, 2014, Hawaiian Dredging, as the fourth-lowest bidder, submitted a protest ("1st Protest") to the DOT concerning the bids of the three lowest bidders, Watts, Hensel Phelps, and Nan, as well as the bid of the highest bidder, Kiewit. DOT Exhibit 19.

45. Insofar as Nan was concerned, Hawaiian Dredging's 1st Protest asserted that:

a. The proposal failed to include all mandatory submittals;

b. The proposal was unbalanced, being front loaded ("unbalanced bid issue").

Specifically, Hawaiian Dredging pointed out the amount of \$46,004,600 Nan had listed for Bid Item 02050.1, Demolition and Removal, which was \$42,959,600 more than the next highest amount for this bid item listed by any of the other bidders.

c. The car wash equipment subcontractor listed by Nan is unlicensed.

46. On July 11, 2014, the DOT forwarded a copy of Hawaiian Dredging's protest to Nan. DOT Exhibit 22.

47. On July 17, 2014, Nan responded to the DOT's concerning Hawaiian Dredging's protest. DOT Exhibit 22.

48. With respect to Hawaiian Dredging's claim of an unbalanced bid, Nan's letter of July 17, 2014 asserted:

a. There was no provision in the solicitation that mentions evaluating offers based on unbalanced bidding or otherwise suggesting the State reserved the right to reject any bid because one item in the proposal schedule may allegedly be overstated or understated.

b. There was nothing in the Procurement Code or the Hawaii Administrative Regulations providing for the State to assess bids on the basis of them being balanced or unbalanced.

c. To be challenged as unbalanced, a bid must be both mathematically and materially unbalanced. In this situation, there was only one lump sum price to be paid regardless of the values of any individual items. Thus, there was no potential risk to the State that acceptance of Nan's bid would not result in the lowest overall cost for the project.

d. Because of submission of the Escrow Proposal Documents, the State has the ability to evaluate the basis for all of the cost items. This allegedly eliminates all further risk from accepting Nan's proposal—ultimately, the State will pay no more than Nan's total bid amount.

e. The solicitation has a mechanism to protect the State from any front loading, namely the requirement to submit and obtain approval of the Schedule of Values. The Schedule of Values will be based on the cost of actual performance and will thus eliminate any risk or concerns regarding front loading.

No mention was made of any mistake in Nan's bid.

49. On August 1, 2014, Nan sent the DOT a letter supplementing its July 17, 2014, letter. With respect to the unbalanced bid issue, this second letter asserted that Hawaiian Dredging's protest failed to meet the requirements of Road Builders Corp. v. City and County of Honolulu, PCY-2012-013 (April 27, 2012), because Hawaiian Dredging failed to identify any items that were understated in Nan's bid. DOT Exhibit 23.

50. The letter went on to discuss Nan's position that there was no risk to the State because various provisions of the contract, including provisions concerning the schedule of values, progress payments, change orders, and cancellation were based on the cost of the work so that the State would never pay more due to an unbalanced bid.

51. On September 16, 2014, Hawaiian Dredging submitted another protest (“2d Protest”) concerning the bids of all the other bidders. DOT Exhibit 24.

52. Insofar as Nan was concerned, this 2d Protest of Hawaiian Dredging asserted the same protest grounds that were asserted in Hawaiian Dredging’s 1st Protest. It also added an additional ground of protest concerning Nan’s claimed 5% apprenticeship program credit.

53. On October 22, 2014, DOT sent Nan a letter requesting more information on Nan’s proposal. Among other things, it requested “documentation verifying Nan’s amount” for Bid Item 02050.1. DOT Exhibit 25.

54. Nan replied to the DOT’s letter of October 22, 2014, with a letter dated November 5, 2014. DOT Exhibit 25. In response to the DOT’s questions regarding the bid proposal line item of \$46,004,600, it repeated in summary form the relevant sections of its letters of July 17, 2014, and August 1, 2014. Nan asserted it was immaterial what Nan’s estimate was for this particular line item.

55. In its letter of November 5, 2014, Nan refused to provide the DOT with the cost or pricing basis of the \$46,004,600 line item in its bid proposal, stating as follows:

Since nothing in the HDOT’s IFB requires bidders to submit cost or pricing data, Nan is not in a position to turn over documentation associated with this one item. Nor would such documentation be useful here since, the concept of material unbalancing requires a showing of not only a significant material/substantive risk associated with alleged overpricing of some work elements, but a commensurate material understatement of other items/work elements. This is something no one from HDOT or any other bidder has ever suggested and, to Nan’s knowledge, no one has ever pointed to any other item(s) in Nan’s bid that are, in any way understated.

56. Nan’s letter went on to say on page two that:

“[a]t the same time, while Nan cannot speak for the other bidders’ estimating procedures, Nan can say the work to be performed during not only the Demolition/Removal phase of this project, but also other aspects of this project will require significant equipment investment by Nan including, but not limited to, the equipment listed below.

There followed a list of some 74 pieces of construction equipment.

57. This statement, accompanied by a detailed listing of equipment, is a statement that Nan would use the funds paid for the Demolition and Removal line item, Bid Item No. 02050.1, for major equipment purchases. As asserted by Nan on page 3, this would mean that “there is no real mathematical unbalancing either.”

58. Nan’s letter of November 5, 2014, is a statement that Nan’s bid was massively front loaded because Nan intended to use the \$46,004,600 amount for Demolition and Removal not only to pay for that work item but to also pay for major items of construction equipment to be used during other phases of the work.

59. In his testimony on August 25, 2015, Mr. Shin tried mightily to explain away the letter of November 5, 2014, but the Hearings Officer is not convinced by his attempts. Mr. Shin finally had to admit that the letter “is not really a good answer,” Tr. 199, line 16, and that the information requested by the DOT was not provided until about five months later. Tr. 201, line 19, to Tr. 202, line 5. The Hearings Officer agrees with Mr. Shin that Nan’s letter of November 5, 2014, was a “lousy answer, lousy response, not answer, lousy response.” Tr. 207, lines 16-19.

60. On December 17, 2014, Watts was allowed to withdraw its bid.

61. On January 20, 2015, the DOT determined that Hensel Phelps’ bid could not be accepted because it was nonresponsive. Hensel Phelps did not appeal this DOT determination.

62. As a result, by the end of January 2015, Nan became the apparent lowest bidder, and Hawaiian Dredging became the apparent second lowest bidder.

63. On February 3, 2015, the DOT sent identical letters to Nan and Hawaiian Engineering requesting that they waive the automatic stays initiated by their bid protests. This would allow the DOT to evaluate bids, research and verify the issues raised in the various protest filed and determine the lowest responsive and responsible bidder and issue its intent to award the contract. Nan executed its waiver on February 13, 2015, and Hawaiian Dredging executed its waiver on February 10, 2015. DOT Exhibit 27.

64. On the morning of March 16, 2015, Nan sent the DOT a letter that repeated its legal arguments on the unbalanced bid issue. Nan expressed its concern that the DOT project engineers who had “only a limited understanding of contract law” were “forwarding their ill-equipped recommendations to the Contracting Officer,” and that they were “improperly” considering allegedly unfounded allegations of an unbalanced and front-loaded bid, allegations that had “curiously captured the focus of the reviewers.” DOT Exhibits 28 and 30.

65. In other words, Nan was seriously worried about the claim that its bid was materially unbalanced and front-loaded.

66. In the afternoon of March 16, 2015, the DOT sent Nan an e-mail containing the State Engineer’s estimate for the line items and quantities for the bid item Demolition and Removal. The DOT asked Nan to fill out the unit prices and extensions and return the information to the DOT by March 20, 2015. DOT Exhibit 29. This letter was right in line with Nan’s fears about the focus of the review of Nan’s bid expressed in DOT Exhibits 28 and 30.

67. The DOT sought Hawaiian Dredging’s response to the points raised in Nan’s letter of March 16, 2015, and Hawaiian Dredging so responded in a letter to the DOT dated March 19, 2015. Among other things, this letter challenged Nan’s assertion that there was no authority allowing the DOT to accept unbalanced bids by citing to General Provision 2.8(5). DOT Exhibit 31.

68. In the DOT’s experience, there are a few situations where the bid proposal line items are not transferred straight over to the schedule of values developed after the contract is awarded:

a. For federal projects that do not allow retainage, the DOT created a demobilization line item for the schedule of values that was in the bid proposal line items. The bid proposal line items are then reduced to the extent that the new demobilization line item in the schedule of values equals 2.5% of the total bid amount.

b. A bid proposal line item is broken down into multiple components if a contract Has multiple phases.

c. On occasion, multiple bid proposal line items pertaining to the same type of work, e.g., fireproofing, are combines into one line item on the schedule of values.

August 25, 2015 testimony of Jeff Chang, Tr. 41, line 20, to Tr. 43, line 5. See also Hawaiian Dredging's Exhibit 36 regarding specification terms when a demobilization line item is added to the schedule of values.

69. On April 1, 2015, the DOT sent Hawaiian Dredging a letter denying Hawaiian Dredging's 1st Protest against Nan's bid. DOT Exhibit 32.

70. With respect to the unbalanced bid issue, the DOT's April 1, 2015 letter stated that "[a]fter evaluation of all bids and after reaching the issues brought up in your protest, the DOT determines that Nan is the lowest responsible and responsive bidder whose bid meets the project invitation for bids requirements and criteria."

71. Relying the decision of Road Builders Corporation v. City and County of Honolulu Department of Budget and Fiscal Services, PCY-2012-013 (April 27, 2012), the DOT said Hawaiian Dredging's protest identified the bid line item that was overpriced but failed to meet the requirement of identifying bid line items that were significantly underpriced.

72. The DOT's letter also asserted that for a bid to be rejected as unbalanced, the protestor must show both that it is mathematically unbalanced as well as materially unbalanced. Since this was a lump sum contract using a single price to determine the lowest responsible bidder, there was no risk to the State of paying more than that amount regardless of any line items that might be mathematically unbalanced.

73. As an additional reason for rejecting Hawaiian Dredging's 1st Protest, the DOT's letter also stated that it could review Nan's cost items contained in the Escrow Documents. How this specifically, in and of itself, protected the State was not explained.

74. The DOT's letter further stated that there was a mechanism to protect the State from any risk of overpayment in comparison with actual performance, namely the requirement to submit and obtain approval of a Schedule of Values. This would ensure that proper payment amounts would be made "that are reflective of actual performance and placement of work. The Schedule of Values approved by the State "effectively eliminates any risks or concerns whatsoever regarding 'front loading'."

75. Overall, the letter stated that "[t]his decision is final and conclusive," and provided instructions on how to appeal by means of filing an RFAH with the Office of Administrative Hearings.

76. This DOT letter was mistaken when it said the State was protected by the Schedule of Values from Nan's massively front loaded bid proposal schedule. As set forth in detail below, the Schedule of Values cannot be used in the manner proposed by Nan and mistakenly agreed to by the DOT.

77. What the DOT was faced with in Nan's bid was an enormously overstated payment to Nan (an excess of over \$45,000,000) right at the beginning of the project.

78. This would result in major risks to the State: (1) there would be less incentive for the contractor to finish the job, or to do a quality job on the latter portion of the job, because the contractor received all of its payment earlier in the job; (2) the contractor's surety would probably have grounds to claim that the DOT had materially impaired the value of the surety's collateral (i.e., DOT funds to pay for the later portion of the job) because those funds had already been improvidently spent on the \$46,004,600 line item early in the job. Testimony of Jeff Chang on August 25, 2015, Tr. 78, line 13, to Tr. 80, lines 9-19.

79. The Hearings Officer finds Mr. Chang's testimony on this point credible considering his experience with DOT projects. The Hearings Officer also finds these risks to be

present without the need to utilize Mr. Chang's testimony because of the inherent consequences of the situation created by Nan's unbalanced bid.

80. Acceptance of Nan's unbalanced bid would result in the State providing interest free financing to Nan to perform on this project. Nan's letter of November 5, 2014, shows that Nan recognized that this would be beneficial to Nan because it could finance the purchase of equipment with the early overpayment for the demolition and removal line item. Besides playing havoc with the DOT's cash flow, such a situation is not fair to the other contractors bidding the job and is impermissibly detrimental to the open and free competition that is a major purpose of the State's procurement system. See Mr. Chang's testimony cited above.

81. Once again, the Hearings Officer finds Mr. Chang's testimony on this point credible considering his experience with DOT projects. The Hearings Officer also finds detrimental consequence to be present without the need to utilize Mr. Chang's testimony because of the inherent consequences of the situation created by Nan's greatly unbalanced bid.

82. By another letter dated April 1, 2015, the DOT dismissed Hawaiian Dredging's 2d Protest. Insofar as the unbalanced bid issue was concerned, this second DOT denial letter was identical to the DOT's dismissal of Hawaiian Dredging's 1st Protest. DOT Exhibit 33.

83. In this second letter of April 1, 2015, the DOT also dismissed Hawaiian Dredging's 2d Protest as untimely.

84. The DOT sent Nan a letter dated April 1, 2015, stating that the DOT intended to award the contract to Nan as the lowest responsive, responsible bidder. DOT Exhibit 34. Another DOT letter dated April 1, 2015, told Hawaiian Dredging the same thing. DOT Exhibit 35.

85. On April 2, 2015, Hawaiian Dredging sent a letter to the DOT stating that it intended to file an RFAH to contest the denials of Hawaiian Dredging's two protests. The letter

stated that it also was a protest to the DOT against the awarding of the contract to Nan. The letter did not provide the basis for this alleged protest.

86. On April 3, 2015, Hawaiian Dredging called Commercial Plumbing into its office to, in essence, require Commercial Plumbing to explain the situation surrounding Commercial Plumbing's quotation to Nan and its failure to quote to Hawaiian Dredging.

87. On April 8, 2015, Hawaiian Dredging filed its RFAH with the OAH appealing the determinations of the DOT in its two letters of April 1, 2015. The OAH assigned Case No. PDH-2015-003 to this RFAH.

88. On April 9, 2015, Hawaiian Dredging filed its 3rd Protest with the DOT. The subject of the protest was the April 1, 2015 DOT announcement of its intent to award the contract to Nan. Insofar as the grounds of the protest were concerned, Hawaiian Dredging did not rely on any grounds previously asserted in its 1st and 2nd protests. Instead, a new allegation was made—the allegedly incorrect and improper listing in Nan's bid of a purported subcontractor, Commercial Plumbing, Inc. Hawaiian Dredging claimed that it learned on April 3, 2015 that Commercial "did not submit a formal proposal to Nan or any other bidder to perform these items of work on the Project." According to Hawaiian Dredging, this made Nan's bid nonresponsive. DOT Exhibit 37.

89. On April 14, 2015, Nan sent a letter to the DOT disputing Hawaiian Dredging's allegations in its April 9, 2015, protest, i.e., its 3rd Protest. According to Nan's letter, it did receive a verbal quotation from Commercial Plumbing on June 30, 2014, before Nan's bid was submitted to the DOT. In addition, Nan urged the DOT to dismiss Hawaiian Dredging's 3rd Protest as untimely. DOT Exhibit 39.

90. On April 14, 2015, the DOT sent Nan an e-mail. Among other things, it stated that the DOT had yet to receive the breakdown cost figures for demolition and removal, Bid Item 02050.1, as well as the Commercial Plumbing quotes. DOT Exhibit 40.

91. A meeting was set up at Nan's request for the afternoon of April 14, 2015, when Nan was supposed to provide the DOT with the Commercial Plumbing quotes and the breakdown of the demolition line item. DOT Exhibit 41.

92. On April 16, 2015, the DOT sent a letter to Nan informing Nan that the DOT was rescinding the award of the project to Nan. This was being done "in light of new information brought to the attention of the Department of Transportation (DOT) and upon further review." DOT Exhibit 42.

93. The DOT letter then went on to explain this decision, stating "[t]his determination is based on the following."

94. The letter first recited Section 2.8(5) of the general provisions concerning unbalanced proposals. Other than this brief reference the letter contained no explanation of its decision with respect to unbalanced bids and cited no new information on this issue.

95. The DOT has admitted that it obtained no new information between April 1, 2015, and April 16, 2015, that caused the DOT to reconsider and then rescind its notice of intent to award the contract to Nan. Instead, the DOT changed its position because it rethought the arguments previously presented:

HEARINGS OFFICER: ...they're [Nan] claiming that you changed your position for no apparent reason because the information that you had at the time of the first decision was basically the same as you had at the time of the second decision.

MR. PRICE: I guess the explanation is new eyes looked at it and people get a little older, a little wiser, a little smarter as you move on, and basically it appeared that wrong—a wrong call had been made earlier and had to be fixed.

HEARINGS OFFICER: So you are saying that there was in fact no new information, that you just recognized that a mistake had been made by the DOT and you had it corrected?

MR. PRICE: In a nutshell, yeah, there was obviously additional research performed and a lot of thought given to it, but the conclusion was reached that you can't fix this kind of thing on a schedule of values that requires an agreement that you may never reach.

96. The letter then cited HRS 103D-302(b) regarding the listing of subcontractors “to be engaged” on the project and stated “[i]t is our understanding that a verbal rather than a binding written quote was used” for at least one listed subcontractor. This had led the DOT to determine that Nan did not comply with the requirement to list a subcontractor “to be engaged” for the work.

97. The DOT sent another letter to Nan on April 16, 2015, stating that “in light of new information brought to[its] attention,” the DOT intended to award the contract to Hawaiian Dredging, the lowest responsive, responsible bidder. DOT Exhibit 43.

98. On April 23, 2015, Nan submitted its protest letter to the DOT. DOT Exhibit 45. It protested both the rescission of the award to Nan and the notice of intent to award the contract to Hawaiian Dredging. This letter challenged the DOT’s rescission action and also challenged Hawaiian Dredging’s bid as being non-responsive.

99. On May 4, 2015, Hawaiian Dredging sent a letter to the DOT disputing Nan’s protest to the DOT. DOT Exhibit 46.

100. On July 14, 2015, the DOT send Nan a letter denying the protest raised in Nan’s letter of April 23, 2015. DOT Exhibit 47.

101. With respect to the unbalanced bid issue, the DOT’s letter first cited to Section 2.8(5) of the General Provisions. It then summarized the figures for Bid Item No. 02050.1, Demolition and Removal Work, in Nan’s bid, the other bids, and the State’s estimate.

102. The letter then stated that: “Nan has refused or has been unable to substantiate its cost for the Demolition and Removal Work.” As an example of Nan’s conduct in this regard, the letter cited Nan’s letter of November 5, 2014 where it refused to turn over documentation and instead focused on purchasing equipment. The DOT letter stated that only 26 of the 74 listed equipment items were to be used during the demolition work.

103. The letter then referred to a meeting between the DOT and Mr. Patrick Shin, owner of Nan, on April 14, 2015, at which meeting the “DOT discovered that Nan’s price for Bid Item No. 02050.1, Demolition and Removal Work, was due to a significant math error.” At this meeting, Mr. Shin related the process by which Nan’s estimator made the mistake. Mr. Shin also stated that Nan’s actual cost for the Demolition and Removal work was around \$500,000.

104. The DOT letter went on to discuss mathematical and material unbalancing in bids and determined that Nan’s bid was unbalanced in both regards. Nan would be receiving substantially more than the work was worth when completing the work under Bid Item 02050.1. In addition, the DOT would be financing the project for Nan by providing an interest free loan. The DOT could not accept this, stating: “These consequences are detrimental to the concepts of competitive bidding—turning the bidding process into a tactical game, and giving a competitive advantage to the front-loaded bid.”

105. The DOT’s letter then rejects Nan’s assertion that the Schedule of Values protects the State from any risk of overpayment as well as Nan’s assertion that the obligation to compensate Nan is completely unrelated to the unbalanced line item amounts in the bid proposal schedule.

106. The DOT letter stated that the schedule of values is used to determine payment for the line item scope of work within divisions that have lump sum payment as a measurement of payment. According to the letter, to accept Nan’s interpretation would render meaningless the entire pricing requirement for each line item in the bid proposal schedule.

107. The DOT’s letter then stated that what Nan proposed would be in violation of HRS §103D-302(g) which prohibited post-bid changes in bid prices or other provisions of bids that were prejudicial to the interest of the public or to fair competition.

108. With respect to the subcontractor issue, the DOT’s letter found that Nan’s listing of Commercial Plumbing as a subcontractor “was not proper under HRS §103D-302(b)” because

Commercial Plumbing was not “engaged by” Nan as a subcontractor. The letter stated: “When a challenge to a subcontractor quotation is called into question, the challenged contractor should be able to provide evidence of a written quotation.”

109. The DOT found that Hawaiian Dredging’s 3rd Protest was timely because it was submitted within five working days after Hawaiian Dredging supposedly became aware of “Nan’s failure to receive a written quotation from Commercial Plumbing.”

110. The DOT letter then went on to discuss Nan’s protest of Hawaiian Dredging’s bid. It first stated that the protest was untimely because it was not made until July 17, 2014 even though bids were opened and made available on July 3, 2014. In addition, the DOT’s letter also stated that it found the substantive claims of Nan regarding the Hawaiian Dredging bid to be without merit.

111. On July 21, 2015, Nan filed its RFAH with the OAH. The RFAH raised the following grounds:

a. The DOT lacked jurisdiction to rescind the April 1, 2015 notice of intent to award to Nan and to issue the April 16, 2015 notice of intent to award to Hawaiian Dredging (the “jurisdiction issue”).

b. The DOT’s decision of July 14, 2015, incorrectly denied Nan’s protest of the rescission of the notice of intent to award to Nan because (i) Nan’s bid was not materially unbalanced (the “unbalanced bid issue”), and (ii) Nan did not violate the subcontractor listing requirement with respect to Commercial Plumbing (the “subcontractor issue”).

c. The DOT incorrectly denied Nan’s protest that Hawaiian Dredging’s bid was nonresponsive.

d. The DOT improperly engaged in post-bid negotiations with Hensel Phelps.

112. The following provisions of the solicitation for bids for the CONRAC project are also of special relevance to Nan’s RFAH

113. Proposal – Page P-5:

The undersigned [bidder] hereby certifies that the bid prices contained in the attached proposal schedule have been carefully checked and are submitted as correct and final.

This declaration is made with the understanding that the undersigned is subject to the penalty of perjury under the laws of the United States and is in violation of the Hawaii Penal Code, Section 710-1063, unsworn falsification to authorities, of the Hawaii Revised Statutes for knowingly rendering a false declaration.

114. Immediately below these provisions is the space for bidders to sign their proposals. Through a corporate officer, Nan signed the proposal on June 30, 2014.

DOT Exhibit 15.

115. GENERAL PROVISIONS – DOT Exhibit 2

Article II – Proposal Requirements and Conditions

Section 2.8 – Irregular Proposals

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

...

(5) Unbalanced proposals in which the prices for some items are out of proportion to the prices for others.

ARTICLE IX – MEASUREMENT AND PAYMENT

Section 9.1 – Measurement of Quantities

The term “lump sum” when used in connection with an item of payment, means payment for the complete item described in the contract.

Section 9.8 – Progress Payments

The Director will make an estimate in writing each month based on the items of work performed and materials incorporated in the work and the value therefor at the unit prices or

lump sum prices set forth in the contract. All progress estimates and payments will be approximate only and shall be subject to correction at any time prior to or in the final estimate and payment. (This provision was modified by the Special Provisions –see below).

Airports Division Supplement to Special Provisions – DOT Exhibit 3

Article IX – Measurement and Payment

Section 9.8 – Progress Payment. Delete the first sentence [of General Provision 9.8] and substitute the following in lieu thereof:

Prior to application for the first progress payment under the contract, the Contractor shall submit to the Engineer a complete detailed schedule of values of the various divisions and subdivisions of the work entering into the contract. Such form, as may be approved by the Engineer, shall be used to determine the monthly progress payment estimate and shall aggregate the total contract price.

116. Specifications – Part II – Technical Provisions

DIVISION 1 – GENERAL REQUIREMENTS

Section 01300 – SUBMITTALS - See DOT Exhibit 4

Part 1.22 – SCHEDULE OF VALUES

- A. The Contractor shall submit the Schedule of Values to the Engineer for review, no later than thirty (30) calendar days after award of the Contract.
- B. Format and Content: Use the Proposal Schedule and Project Specifications table of contents as a guide to establish the format for the Schedule of Values. Provide at least one line item for each Specification Section. Provide a breakdown of the contract sum in sufficient detail to facilitate continued evaluation of Applications for Payment and progress reports. Break principle work or subcontract amounts down into several small identifiable items of work.

...

D. Arrange the Schedule of Values in tabular form with separate columns to indicate the following items listed:

1. Related Specification Section or Division
2. Description of work
3. Dollar value and percent complete

117. SECTION 01350 – ESCROW PROPOSAL DOCUMENTATION (EPD)

This section was finalized in Bid Addendum 6, which is contained in Hawaiian Dredging Exhibit 4. A copy of the entire Section 01350 is contained in Attachment 1 to this Decision.

118. A specification requiring a contractor's internal bidding documentation to be put in escrow a few days after bids are opened is a relatively new provision that has been used in some of the major projects for the Airports Division of the DOT. It is a relatively new provision, and it has been used only in the last two years. Testimony of Nan's expert witness Aaron Fujii on August 20, 2015, Tr. 181, lines 1-12.

119. There was no evidence that the DOT had ever used a contractor's internal bidding documentation submitted pursuant to this escrow specification to review, much less accept, any schedule of values, much less a schedule of values so radically different from the bid proposal schedule as Nan proposes here..

120. DIVISION 2 – SITE WORK DOT Exhibit 4

Section 02050 – DEMOLITION AND REMOVAL WORK. This is the specification section to be priced in Bid Item No. 02050.1 on the Bid Proposal form, and which Nan priced at \$46,004.600. The entire Section 02050 is contained in Attachment 2 to this Decision. Of particular note is the concluding portion of that section:

PART 4 – MEASUREMENT AND PAYMENT

4.01 BASIS OF MEASUREMENT AND PAYMENT

Work under this Section will not be measured for payment but will be paid for at the Contract Lump Sum Price. The Contract Price Paid shall be full compensation for all labor, tools, equipment, and all other incidentals necessary to complete the work.

| <u>Item No.</u> | <u>Item</u> | <u>Unit</u> |
|-----------------|-----------------------------|-------------|
| 02050.1 | Demolition and Removal Work | Lump Sum |

121. The only “Contract Lump Sum Price” for this work is, as stated in this specification, Item No. 02050.1 in the bid proposal schedule. Upon full completion of this work item, this lump sum price would be paid to the contractor.

122. Nan left the first sentence of Part 4.01 out of its discussion of this section in its Motion for Summary Judgment (see page 23 thereof).

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

In its Memorandum in Opposition to Nan's Motion for Summary Judgment, the DOT objected to all of the affidavits in support of Nan's Motion because of claimed irregularities in the affidavits and because of failure to comply with the strictures of Rule 56 (e) of the Hawaii Rules of Civil Procedure.

The DOT failed 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 of the 2012 Legislature, 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.

Accordingly, the DOT's objections to Nan's affidavits were overruled.

3. The role of expert witness testimony in this case

Prior to the start of the evidentiary hearing, the Hearings Officer informed the parties that expert witness testimony would not be allowed if it concerned the interpretation of the terms of the solicitation. The same rule would hold true for non-expert testimony as well. The construction of the terms of the specification is a question of law. Cf. Foundation International, Inc., v. E.T. Ige Construction, Inc., 102 Haw. 487, 494-5, 78 P.3d 23, 30-31 (2003). Expert or non-expert testimony as to legal conclusions should not be admitted into evidence since the determination of legal questions is solely the province of the Hearings Officer. Lahaina Fashions, Inc. v. Bank of Hawaii, 131 Haw. 437, 454, 319 P.3d 356, 373 (2014).

While the DOT and Hawaiian Dredging occasionally attempted to contravene this rule by trying to elicit testimony on the interpretation of the terms of the specifications, Nan attempted to do so an inordinate number of times. Numerous objections to the introduction of such testimony were sustained. Nevertheless, not all instances were the subject of objections or the exclusion of such testimony.

In the rendering of this Decision, however, the Hearings Officer has not accepted any testimony as to the interpretation of the solicitation's terms even though that testimony can be found in the record.

Where the Hearings Officer found expert testimony to possibly be helpful was in the area of matters had worked out in other DOT contracts. This testimony was not excluded.

B. Because Nan failed to exhaust its administrative remedies, there is no jurisdiction in this proceeding to consider Nan's claim the DOT lacked jurisdiction to rescind the notice of intent to award the contract to Nan and instead issue the notice of intent to award the contract to Hawaiian Dredging.

1. There is no excuse for Nan's failure to exhaust administrative remedies

Nan admits that it never filed a protest with the DOT asserting the DOT had no jurisdiction to rescind the award to Nan and instead make an award to Hawaiian Dredging:

As admitted in Nan's Motion for Summary Judgment at page 7:

Except for the claim that the DOT lacked jurisdiction to rescind the award to Nan and grant the award to HDCC, all of the claims asserted in the RFAH were also asserted in the protest letter.

Under the Procurement Code, the Hearings Officer has the jurisdiction to consider and Nan's protest pursuant to HRS §103D-709(a). In relevant part, the statute provides that the hearings officer:

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.

This jurisdiction, however, is not unlimited. Instead, it is specifically limited by HRS §103D-709(h), which provides:

The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

As pointedly stated in OAH decisions:

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer.

See, e.g., Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-2 (June 6, 2011), Exhibit B at pages 3-4.

Nan asserts that its jurisdiction claim did not have to first be presented to the DOT because the claim is based on an alleged lack of jurisdiction by the DOT and a "lack of jurisdiction claim, however, need not have been included in the protest to the procurement officer." As support for this assertion, Nan cites to the case of Certified Construction, Inc. v. Department of Accounting and General Services, State of Hawaii, PDH-2014-013 (November

21, 2014). Nan's Motion for Summary Judgment, at page 7. That case, however, involved, pursuant to statute, the jurisdiction of the Office of Administrative Hearings. The statutory provisions in question in that case do not pertain to any procuring agency and provide no support for Nan's assertion on this motion.

Nan returns to this topic at pages 9 through 12 of its Motion when it asserts that the "fundamental law on jurisdiction" deprived the DOT of jurisdiction once Hawaiian Dredging filed its RFAH on April 8, 2015. That assertion, however, is founded on the law pertaining to the relationship between the trial courts and the appellate courts in Hawaii. Nan does not cite any authority, however, that the filing of an RFAH with the OAH deprives the procuring agency of any jurisdiction in the same manner as the filing of an appeal from Circuit Court affects the later jurisdiction of the Circuit Court.

During the motions hearing on August 17, 2015, the Hearings Officer mentioned the possibility that exhaustion of administrative remedies could be excused on this issue pursuant to the "futility" doctrine. However, at pages 8-9 of its supplemental memorandum of August 19, 2015, Nan declined to assert that the futility doctrine excused its failure to exhaust its administrative remedies. See also the Transcript of August 20, 2015, page 12, lines 16-19. Accordingly, the Hearings Officer will not consider whether the futility doctrine would be applicable in this case.

There being no excuse or justification for Nan's failure to first submit this claim for administrative review by the DOT, the OAH is without jurisdiction to review this claim and it should be dismissed for failure to exhaust administrative remedies.

2. There was, in any event, no automatic stay prohibiting the DOT's actions

Nan's second argument at pages 12 through 14 of its Motion is based on the automatic stay provision of HRS §103D-701(f). As stated therein:

In the event of a timely protest [to the procuring agency] under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief

procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.

This statutory provision governs events while a procurement protest is pending before the procuring agency. Another statute comes into play if a procurement protest is denied in some manner by the procuring agency and the protestor appeals that denial to the OAH under HRS §103D-709(a). In that case, an automatic stay originally in place due to the provisions of HRS §103D-701(f) remains in effect during the pendency of the OAH proceedings, as HRS §103D-709((g) provides that:

No action shall be taken on a solicitation or an award of a contract while a proceeding is pending [before the OAH] if the procurement was previously stayed under section 103D-701(f).

The complicated procedural history of this case can be summarized as follows. Following bid opening, both Nan and Hawaiian Dredging filed procurement protests with the DOT. Those protests both triggered the provisions of the automatic stay under HRS §103D-701(f). The result was that the two protests stymied the DOT's ability to move the procurement forward while the protests were still pending.

The DOE thereafter negotiated waivers of the stays created by the Nan and Hawaiian Dredging protests. By letters dated February 3, 2015, the DOT requested Nan and Hawaiian Dredging to waive the automatic stay initiated by their protests. The letters stated the following terms of these waivers:

Therefore, the DOT is requesting a waiver of the automatic stay that your protest has initiated. This will not dismiss your protest nor will it deliver a binding decision on the award of the contract. It will however, allow the DOT to evaluate bids, research and verify the issues raised in the various protests filed and determine the lowest responsive, responsible bidder. Once the determination of the lowest responsive and responsible bidder is established, the DOT will notify you in writing of the intent to award the contract.

Nan signed its waiver on February 13, 2015, and Hawaiian Dredging signed its waiver on February 10, 2015. See Exhibit 7 to Nan's Motion and Exhibit 27 to the DOT's Motion.

Accordingly, no automatic stay was in place with respect to either Nan's or Hawaiian Dredging's protests when the DOT issued its notice of intent to award the contract to Nan in the DOT's letter of April 1, 2015.

By filing its RFAH with the OAH on April 8, 2015, Hawaiian Dredging did not thereby create an automatic stay on any further processing of the procurement by the DOT.

First, any automatic stay generated by Hawaiian Dredging's earlier procurement protests had ended as of February 10, 2015, when Hawaiian Dredging waived the provisions of the automatic stay.

Second, filing of an RFAH does not itself create a new automatic stay. Filing of an RFAH only extends an automatic stay previously created by filing an administrative protest. In the words of HRS §103D-709(g), there is an automatic stay during pendency of the OAH proceedings "if the procurement was previously stayed under section 103D-701(f)." Since the procurement in question was not "previously stayed" by Hawaiian Dredging's protests filed in 2014, because that stay had been waived months earlier, filing the RFAH by Hawaiian Dredging on April 8, 2015 could not extend a stay that no longer existed.

At page 6 of Nan's RFAH, Nan stated that the DOT should have maintained the status quo "pending resolution of HDCC's protests and request for administrative hearing." According to Nan, the stay was "triggered by HDCC's protest of the Intent to Award to Nan," and the stay was "continued by the HDCC RFAH regarding the denial of HDCC's protest."

No dates are provided in this section of Nan's RFAH. In the narrative portion of Nan's RFAH, at pages 2-3, Nan refers to the Hawaiian Dredging protests of July 8, 2014, and September 16, 2014, and the Hawaiian Dredging RFAH of April 8, 2015, appealing the denial of Hawaiian Dredging's two protests and the resulting notice of intent to award the contract to Nan. As discussed above, however, Hawaiian Dredging had waived the protections of the automatic stay with respect to these two protests, and its RFAH did not revive the automatic stay.

Nan's RFAH also relied on Hawaiian Dredging's letter of April 2, 2015. In that letter, Hawaiian Dredging announces its intent to appeal the denial of its two protests by filing an RFAH with OAH by the statutory deadline of April 8, 2015. As already discussed above, this announcement, as well as the filing of the RFAH, did not create any automatic stay.

The letter further states that it is a protest of the DOT's decision on April 1, 2015, to award the contract to Nan. Despite the use of the term "protest," however, this letter was not sufficient to create an automatic stay because the decision it was protesting—the award to Nan—was already the subject of Hawaiian Dredging's waiver in February of 2015. In addition, the letter is not sufficient to be an actual protest because no substantive grounds for a protest were asserted. See HAR §3-126-3(c) requiring a protest to include, at a minimum, several elements including a statement of the reasons for the protest.

In its supplemental memorandum on this matter, filed August 19, 2015, Nan makes a new argument. It relies for the first time on the Hawaiian Dredging protest of April 9, 2015, and asserts that it created a new automatic stay. Since at least one new ground of protest was raised on April 9, 2015, that was not in the first two Hawaiian Dredging protests, it will be assumed for purposes of argument that Hawaiian Dredging's third protest was not covered by the waiver in February of 2015 and thus created a new automatic stay seven days before the DOT issued its rescission of its intent to award the contract to Nan.

The problem for Nan here, however, is that this new claim was not raised in Nan's RFAH. Hawaiian Dredging's third protest is not mentioned in the RFAH's narrative or in its substantive discussion. The only mention of April 9, 2015 is in connection with the appointment of a hearings officer and the issuance of a hearing notice in a previous, and subsequently dismissed, Hawaiian Dredging RFAH proceeding, a proceeding that had nothing to do with Hawaiian Dredging's third protest. It should also be noted that the 3rd Protest of Hawaiian

Dredging is not mentioned in Nan's argument on the jurisdiction issue in its Motion for Summary Judgment filed August 3, 2015.

Nan cannot, in essence, amend its RFAH filed July 21, 2015, by raising a new claim for the first time in its supplemental memorandum filed August 19, 2015. Cf. Exhibit C to Sumitomo Corporation of America v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, PCX-2011-005 (August 13, 2011) (New claim previously "reserved" could not be added to RFAH).

The Hearings Officer need not render an opinion on the assertions of the DOT and Hawaiian Dredging that the rescission of the award to Nan was not the type of action that is a subject of an automatic stay that existed. Based upon the aforesaid, Nan's Motion for Summary Judgment on the jurisdiction issue should be denied. The Motions for Summary Judgment of the DOT and of Hawaiian Dredging on the jurisdiction issue should be granted, and the jurisdiction claim in Nan's RFAH should be dismissed.

C. Nan is entitled to prevail on the Commercial Plumbing subcontractor issue

The DOT's letter of April 16, 2015 announcing rescission of the award to Nan asserted that Nan's bid violated the provision of HRS §103D-302(b) because it listed an unidentified subcontractor as having provided "a verbal rather than a binding written quote," and, therefore Nan did not list a subcontractor "to be engaged by the bidder." The Hearings Officer has concluded that the DOT's rescission of the award to Nan on the basis of this subcontractor issue is without merit.

The unidentified subcontractor referred to by the DOT is clearly Commercial Plumbing. This is clear from Hawaiian Dredging's 3rd Protest which identifies that firm as the subcontractor in question (DOT Exhibit 31), the DOT's inquiry to Nan on April 14, 2015 regarding quotes from Commercial Plumbing (DOT Exhibit 40), and the notes of the conversation between Deputy Attorney General Laura Kim and Curt Balanay on April 15, 2015 (part of Hawaiian

Dredging Exhibit 32). The Nan protest letter to the DOT of April 23, 2015, identified Commercial Plumbing as the subcontractor in question. Accordingly, while it is unclear why the DOT did not provide the name of the subcontractor in its April 16, 2015, letter to Nan, the omission of the name did not prejudice Nan.

Throughout these proceedings, the DOT has insisted that this is an issue of responsiveness. For example, on page 2 of its summary judgment motion filed August 5, 2015, the DOT frames the issue as follows:

The issues are as follows:

A. Was Nan's bid nonresponsive?

...

3. Was Nan's bid [sic] was nonresponsive because it failed to receive a written quote from its subcontractor, Commercial Plumbing.

The DOT's counsel confirmed at the August 17, 2015 hearing on the summary judgment motions that the DOT considered this issue to be one of responsiveness.

HEARING OFFICER: Is that the basis of the decision [regarding the subcontractor issue], that Nan's bid was not responsive.

MR. PRICE: Yes.

Hearing Transcript for August 17, 2015, page 27, lines 11-13.

HRS 103D-§302(b) provides, in relevant part:

If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. (Emphasis supplied).

On its face, Nan's bid complies with this statute. It lists Commercial Plumbing as a subcontractor three times and summarizes the nature and scope of the work Commercial Plumbing will perform. By filling out the portion of the Proposal concerning subcontractors, the terms of the Proposal at P-4, to which Nan has acceded, state that this subcontractor "will be engaged" by Nan.

Nothing in the statute or the terms of the proposal require that Nan have a written quote from Commercial Plumbing at the time of bid.

The DOT asserts, however, that Commercial Plumbing was not going to take on the CONRAC job. According to the DOT, “obtaining a price quote from someone who will not take on the job is not what is meant by providing a bid from a subcontractor “to be engaged” for the work. DOT Motion for Summary Judgment at page 22. The DOT concedes, as it must, that the post award refusal or inability of a subcontractor to honor its agreement with the bidder would not render the bid nonresponsive. DOT Motion for Summary Judgment at page 23. But here, asserts the DOT, we have a situation where the subcontractor was never going to perform.

The Hearings Officer must put aside the DOT’s disparagement of Commercial Plumbing’s bid as being one at “the last minute.” The testimony of Mr. Robert Iwasaki demonstrated that it is the common practice of many subcontractors to wait until “the last minute” before submitting quotations to general contractors. While this practice may cause extreme stress to the estimators for the general contractor, subcontractors follow this practice for what they perceive as good business reasons. In the present case, Nan received Commercial Plumbing’s quotation in sufficient time to list Commercial Plumbing as a subcontractor in three places in its bid proposal and to incorporate quotations for the plumbing and fire sprinkler work into Nan’s proposal. “Last minute” or not, Nan’s proposal was timely submitted, and that is all that matters with respect to the timing of its communications with Commercial Plumbing.

In addition, the DOT has not cited any authority for the proposition that a written quotation is necessary in order for Nan’s bid to be responsive. Merely asserting that the quotation must be in writing is not equivalent to establishing that assertion as a legal principal under Hawaii law. Actually, the law in Hawaii is to the contrary of the DOT’s assertion.

In Okada Trucking Co., Ltd. v. Board of Water Supply, 101 Haw. 68 63 P.3d 631 (Haw. App. 2003), the Court first considered the issue of whether a bidder’s failure to “line up” and

have a subcontractor contractually bound to perform its portion of the project work at the time of bidding made that bidder nonresponsive. Since responsibility was determined at the time of contract award, the fact that the bidder had no licensed subcontractor lined up at the time of the bid opening did not render the bidder nonresponsive. Since it retained a subcontractor before award of the contract, it was held to be responsible.

The next question in the case was whether the bidder was responsive, an issue determined based on the situation at the time of bid opening. The hearings officer had held that the bidder was nonresponsive for two reasons: (1) it failed to list in its bid proposal the name of the subcontractor it intended to use for perform the portion of the work requiring a licensed subcontractor; and (2) it “did not have, at bid opening, a subcontractor lined up and contractually bound” to do the portion of the work requiring a licensed subcontractor.

The Court quickly dismissed the second reason for finding nonresponsiveness as an invalid conclusion. Since a contractor did not have to have a licensed subcontractor “lined up” at the time of bid to be found responsible, it did not have to have a licensed subcontractor “lined up” at the time of bid to be found responsive. 101 Haw. at 75-76, 62 P. 3d at 638-639. Similarly in this case, Nan did not have to have Commercial Plumbing “lined up” at the time of bid in order to be responsive.

The Okada Trucking opinion then concluded with an analysis of the hearings officer’s first reason for finding the bidder nonresponsive, namely the failure to list the subcontractor on its bid proposal form. As discussed above, Nan complied with the listing requirement (and a literal failure to list was not the basis of the DOT’s decision of April 16, 2015).

Nan’s bid proposal being responsive insofar as Commercial Plumbing is concerned, the DOT’s rescission of its intent to award the contract to Nan on the claim of nonresponsiveness with respect to the status of Commercial Plumbing cannot be accepted or affirmed.

At the conclusion of the hearing on the parties' summary judgment motions, the Hearings Officer mentioned the possibility of considering the subcontractor issue to also be one of responsibility. The theory was that if the decision on Nan's RFAH was limited to reversing the DOT on the issue of responsiveness, the DOT could later make a decision that the situation with Commercial Plumbing made Nan nonresponsible. This would trigger another Nan protest to the DOT, possibly another RFAH filed with the OAH on the nonresponsibility, and a further lengthy delay on a project already delayed over a year since bid opening. In order to avoid that situation, it would be in the public interest to decide the nonresponsibility issue in the present proceeding.

The basis for upholding a procuring agency's denial of a bid protest on a ground not previously asserted by the agency is set forth in Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH 2013-011 (November 27, 2013). The grounds for applicability of the Aon rule are present here—the factual basis for the new ground of decision is well known to Nan (only the label of nonresponsibility attached to the DOT's decision is to be considered new), and, through the evidentiary hearing, the parties have had a full and fair opportunity to contest the issue.

However, even giving the DOT the full benefit of the doubt by considering a possible additional, although previously unstated, legal basis for its decision on the subcontractor issue, Nan should still prevail.

Finally, the Hearings Officer will briefly consider Nan's assertion that Hawaiian Dredging's 3d Protest was not timely filed. The Hearings Officer agrees with Nan that Hawaiian Dredging's 3d Protest was indeed late. The basics were known to Hawaiian Dredging shortly after bid opening on June 30, 2014—Commercial Plumbing had not provided a quotation to Hawaiian Dredging, and, after the bids became public Hawaiian Dredging knew that Commercial Plumbing was not listed by any other bidder except Nan. Since Hawaiian Dredging

did a lot of work with Commercial Plumbing, Hawaiian Dredging was upset, and even “shocked,” that Commercial Plumbing had bid to Nan but not to Hawaiian Dredging.

Nevertheless, Hawaiian Dredging waited until April 3, 2015, before it summoned Commercial Plumbing to essentially demand an explanation of Commercial Plumbing’s actions some ten months earlier. It was at that meeting that Commercial Plumbing learned about the verbal quotation. No new facts triggered Hawaiian Dredging’s call for this meeting other than the fact that it looked like Nan was going to get the contract then. Basically, when Nan and Hawaiian Dredging were third and fourth bidders, Hawaiian Dredging was not that concerned, but when it looked like Nan would end up being first bidder, Hawaiian Dredging set out on a last minute attempt to find additional reasons to challenge Nan’s bid.

The key here, however, is that Hawaiian Dredging needed to, and in fact did, challenge Nan’s bid back in July of 2014. There is no reasonable excuse for it delaying the inquiry into the Commercial Plumbing situation. Since the statutory standard set forth for the deadline in HRS §103D-701(a) is “known or should have known” and Hawaiian Dredging “should have known” long before April 3, 2015, its 3rd Protest was untimely.

The DOT nevertheless claims that its decision is not constrained by any lack of timeliness with respect to Hawaiian Dredging’s 3rd Protest. Insofar as the DOT was concerned, the allegations concerning Commercial Plumbing were truly “new” allegations which it could not have been reasonably expected to have discovered earlier. Therefore, concludes the DOT, the public interest gives it the ability to reject Nan’s bid proposal because of this new ground irrespective of the fate of Hawaiian Dredging’s 3^d Protest. In this regard, it should be noted that the DOT’s letter of April 16, 2015 rescinding the award to Nan and based in part on the Commercial Plumbing situation was not stated to be based on Hawaiian Dredging’s 3rd Protest. In fact, the record does not reflect that the DOT ever issued a final decision on Hawaiian Dredging’s 3rd Protest.

In this regard, the DOT has raised an interesting and important issue. Under the facts of this case, however, the Hearings Officer does not need decide if the DOT had the authority to use the information provided by Hawaiian Dredging to rescind the award to Nan and announce its intent to award the contract to Hawaiian Dredging even though Hawaiian Dredging's 3rd Protest was not timely. Assuming solely for the purposes of argument in this matter that the DOT indeed had that authority, the Hearings Officer has nevertheless concluded that, in the end, there was no valid basis for the DOT's actual decision.

The motions for summary judgment and the motions to dismiss by the DOT and Hawaiian Dredging on this issue are denied. Nan's motion for summary judgment on this issue is moot, as Nan has established by a preponderance of the evidence that it is entitled to prevail on this issue.

D. Nan's Bid Was Materially Unbalanced and Was Properly Rejected by the DOT

The first basis for the DOT's rescission of the notice of intent to award the contract to Nan, as stated in the DOT's letter of April 16, 2015, was that Nan's bid violated Section 2.8(5) of the General Provisions, which states:

2.8 IRREGULAR PROPOSALS—Proposals will be considered irregular and may be rejected for any of the following reasons:

(5) Unbalanced proposals in which the prices for some items are out of proportion to the prices for other items.

There is no Hawaii case law interpreting what constitutes an "unbalanced" proposal. In two previous OAH decisions, the Hearings Officer looked to federal procurement cases in analyzing claims of an unbalanced proposal. See Road Builders Corporation v. City and County of Honolulu, Department of Budget and Fiscal Services, PCY-2012-013 (April 27, 2012) (proposal allegedly "front loaded"); Nan, Inc. v. Honolulu Authority for Rapid Transportation, PDH-2015-004 (May 28, 2015) (proposal allegedly "back loaded").

Neither of these two OAH decisions were based on General Provision 2.8(5). However, it is clear from the terms of General Provision 2.8(5), including the specific reference to

“unbalanced” as well as the focus on prices being “out of proportion,” that the federal concept of an unbalanced bid is extremely helpful in defining an unbalanced proposal within the meaning of this General Provision.

In order to prove a claim that a bid is unbalanced, the protestor must show that bid is both “mathematically” unbalanced and “materially” unbalanced. McKnight Construction Co. v. Department of Defense, 85 F.3d 565, 567 (11th Cir. 1996).

A bid is “mathematically” unbalanced “when each line item in the bid in the bid does not reflect the actual costs to the bidder.” Id.

After initially denying any imbalance in its bid proposal, Nan has now admitted at page 27 of its Motion for Summary Judgment that its bid was “mathematically” unbalanced:

Nan admits that its bid is mathematically unbalanced because certain line items do not reflect the actual cost to Nan, such as the Demolition and Removal line item.

The unbalanced situation, however, goes beyond just the Demolition and Removal line item. The imbalance is claimed by Nan to be initially attributable to the \$46,004,600.00 figure for demolition and removal (Bid Item 02050.1). However, per Mr. Iwasaki’s testimony, several other line items were arbitrarily and significantly underpriced in order retain the \$46,004,600.00 line item and still make the overall bid amount equal to Mr. Iwasaki’s total in-house bid estimate.

Establishment that a bid is mathematically unbalanced is not sufficient, however, to establish that a bid is fatally unbalanced. The federal cases hold that the protestor must also show that the bid is “materially” unbalanced. McKnight Construction Co. v. Department of Defense, *supra*; SMS Data Products Group, Inc. v. United States, 900 F.2d 1553, 1557 (Fed. Cir. 1998).

The DOT does assert that the terms of General Provision 2.8(5) allow it to reject a mathematically unbalanced bid as nonresponsive without regard to whether or not the bid is

materially unbalanced. The Hearings Officer concludes, however, that this proposition cannot be accepted.

Under Hawaii law, an absolute strict responsiveness requirement is not imposed on bids. Instead, bids can only be rejected if they are materially nonresponsive. Southern Foods Group LP v. Department of Education, 89 Haw. 443, 974 P.2d 1033(1999).

The concept of material nonresponsiveness corresponds closely to the concept of “materially unbalanced.” The Hearings Officer concludes that Hawaii law requires that a bid be materially unbalanced before it can be rejected pursuant to General Provision 2.8(5).

Nan asserts, however, that the concept of “materially unbalanced” should not be utilized to evaluate the instant situation. Instead, argues Nan, the terms of the CONRAC solicitation allow Nan to materially change the unbalanced line items in its bid proposal. The Hearings Officer does not agree with Nan’s position, and, instead, concludes that Nan’s position is contrary to the terms of the solicitation.

The starting point for the interpretation of the solicitation with respect to this issue is the Bid Proposal. The Bid Proposal required all bidders to fill out over 200 line items in the bid proposal schedule that corresponded to specific portions of the work. Those portions are identified by numbers that correspond to the numbers applied by the technical sections of the solicitation. The bid could possibly even be rejected if one of the line items in the proposal was left blank.

Accordingly, while the submittals of the various bidders were to be compared based solely on the total bid amount of each proposal, the individual line items comprising that total bid amount definitely cannot be ignored.

The second point for the interpretation of the solicitation is that the “bid prices” inserted by bidders such as Nan into the proposal schedule were required to be “certified” as “carefully checked” and “are submitted as correct and final.” It is important to note that this certification

requirement is stated in the plural. It clearly applies to all prices in the proposal schedule and not to just the total price used for purposes of comparing bids.

The Hearings Officer concludes that Nan's bid was falsely certified. This false certification, moreover, is not limited to the one \$46,004,600 figure for Demolition and Removal (Bid Item No. 02050.1) line item in the proposal schedule. As reflected in Findings of Fact Nos.22-25, there were a total of 30 false certifications.

The third point for interpretation of the solicitation is that certification of the individual items of the proposal schedule was not an idle exercise. The purpose for detailing all of those items went beyond merely checking that all areas of the work were included in the contractor's bid or checking that the arithmetical total of the individual items equals the total amount of the bid as entered by the contractor. The figures entered for the items on the bid proposal schedule also determine how much the contractor is to be paid for those items of work.

With respect to the work item of Demolition and Removal Work, Bid Item No. 02050.1, the relevant Technical Provisions of the specifications (Section 02050, Part 4.01 state that it will be paid in a "lump sum." That means one payment for that work item will be made when all work required by that work item has been completed.

The aforesaid Part 4.01 further details exactly how Item 02050.1 will be paid for by the DOT:

a. "Work under this Section will not be measured for payment" –that is, payment will not be made on the basis of measured milestones of completion (e.g., payment of 50% when 50% of the work has been done); "but"

b. "will be paid for at the Contract Lump Sum Price."

The term "Contract Lump Sum Price" refers to the lump sum for Item 02050.1 entered on the bid proposal schedule.

The specifications thus set up a comprehensive system to determine how much the contractor is to be paid for each work item: (a) the contractor certifies under penalty of perjury that the individual prices for the items on the bid proposal schedule are correct and final; and (b) the contractor is paid for each work item on the basis of its certified price.

The specifications also set forth the payment schedule for the contractor by requiring the submittal of a Schedule of Values no later than thirty days after contract award. Technical Specification 01300, Part 1.22. The Schedule of Values is not a bid document and thus cannot determine a “Contract Lump Sum Price” for Bid Item 02350.1 or any of the other contract prices for lump sum items on the proposal schedule.

Since the “Contract Lump Sum Price” for Bid Item 02350.1 has already been determined, and since it can be the subject of only one lump sum payment at the conclusion of all of the work required by that item, the contractor has no discretion as to payment—the schedule of values must reflect the contract sum established by other provisions of the specification before the schedule of values is even created.

There is nothing in the Technical Specifications concerning the Schedule of Values that allows for a rewriting of any contract price for any contract item. If the Schedule of Values was to be used for a massive rewriting of the contract lump sum prices, as Nan proposes, there would have been a provision stating something to that effect. There obviously is no such provision.

Technical Provision 01300, Part 1.22B, does allow the Schedule of Values to “break down principle work or subcontract amounts down into several small identifiable items of work.” This sentence is inapplicable to items required to be paid as one lump sum item. However, even if this sentence could be interpreted to apply to Bid Item 02350.1, it does not allow a repricing of that item. It only allows a breakdown of the item’s price into small segments—no language allows a change to the total price of that item.

Nan's argument essentially ignores all of these contract provisions. Nan does not feel itself bound by the solicitation to submit "correct and final" prices, and it does not feel itself bound by the payment provisions for Bid Item No. 02050, Part 4.01. Nan feels it can do anything it wants because other provisions in the solicitation supposedly excuse all false certifications and allow Nan to refigure its bid proposal on a massive scale after all of the bids are opened. Somehow, Nan can reformulate its bid to eliminate all the falsely certified items and switch to a cost basis for all bid items. The Hearings Officer concludes that such an interpretation of the CONRAC solicitation and specifications is untenable.

Additionally, Nan relied "more importantly" at page 10 of its RFAH on Article 9.8 of the General Provisions, entitled "Progress Payments." According to Nan, this Provision establishes the following:

a. Progress payments allegedly "will be based only upon an estimate each month based on detailed Schedule of Values as approved by the Engineer." However, absolutely nothing in that General Provision authorizes a Schedule of Values to ignore the contractually mandated amount for each bid item.

b. "These payments, as well as any withholdings made by the DOT, in turn, revolve around the actual percentages of completion of the approved Schedule of Values, rather than on individual work elements that may have been identified in the Proposal Schedule." There is no basis in the language of the specifications for this bald conclusion. In fact, just the opposite is true. As concluded above, the Schedule of Values must be based on the contract prices "identified in the Proposal Schedule."

The scenario contemplated by Nan here might be appropriate if this contract had been bid as a lump sum contract with no individual bid items. In that case, the schedule of values might be used to establish the percentages of the total bid that should be allocated to major

items such structural, electrical, or mechanical work. The actual percentage of completion of those items might then determine the amount of the monthly payment.

However, whether or not that would be possible with respect to such a lump sum contract is irrelevant because here the solicitation contractually binds the contractor and the DOT to measuring payment for individual work items at the contract prices established in the certified bid proposal schedule.

Nan's RFAH also relied on General Provision Article 9.7 concerning payment for materials to the extent they were delivered to the jobsite or stored at acceptable storage places in the vicinity of the site. This has been a payment method used in past contracts, but it is not a relevant payment method for Bid Item 02350.1. This bid item is contractually mandated to be a lump sum payment for everything, including, but not limited to materials, related to that bid item.

Nan's RFAH further relied on General Provisions relating to compensation for adjustments in prices, e.g., change orders, and relating to payment in the event of a termination for convenience on the part of the DOT. While those provisions may to some extent not be based upon the bid proposal schedule (and there are a myriad of possible situations covered by these provisions), they are irrelevant to the issue here of how Bid Item 02050.1 is to be paid for under the contract.

Nan also relies upon the escrow documentation (EPD) provision in the specifications as a means of creating a schedule of values to solve the problems with Nan's bid. However, the EPD provision is not meant to function in that way and to solve problems with falsely certified bid proposals. As stated in Part 1.02 of the EPD section of the specifications:

The EPD of the successful bidder will be held in escrow for the duration of the contract and will be used solely for the purpose of determining the Contractor's proposal concept, if necessary, for price adjustments as provided in the contract or to resolve any claim by the Contractor. (Emphasis supplied)

There is no “proposal concept” in the lump sum closed bid procurement, so the first possible use of the EPD documents is not involved in this case. In addition, this case does not involve any “price adjustments as provided in the contract,” it does not involve any “claim by the Contractor.” Further, in practice, the DOT has never used the EPD provision in the manner advocated by Nan. The Hearings Officer concludes that the EPD provision cannot be used as a tool to keep a schedule of values “honest” and save a falsely certified bid proposal on a scale involved in this case.

Nan submitted a detailed Closing Memorandum marshaling its arguments based upon the evidentiary hearing. The Hearings Officer will examine those arguments insofar as they may arguably bear upon the proper interpretation of the terms of solicitation. To some extent, this discussion may duplicate earlier discussions. However, since Nan’s Closing Memorandum provided Nan with its first opportunity to coordinate all of its legal arguments with all the evidence from four days of hearings, the Hearings Officer will take the risk of possible duplication.

1. Material unbalancing only occurs when an unbalanced bid “will result in an advance payment.” Nan’s Closing Memorandum, page 6. The term “advance payment” refers to a practice explicitly prohibited by a federal statute that plays a role in some of the earlier federal procurement cases cited in the parties’ briefs. The more current federal standard is that a materially unbalanced bid is one that poses substantial risks to the government.

2. There will be no advance payment because the \$46,004,600 bid line item will not be paid in that amount. Instead, Nan will be paid “based on” its actual costs to perform the demolition and removal work, which actual costs are confirmed by its escrow documents. Nan’s Closing Memorandum, page 6. The support for the proposition that Nan will be paid “based on” its actual costs of \$423,450 is cited in footnote 34 on that page.

The first citation in footnote 34 is to testimony by Brian Bowers, an expert witness called by Hawaiian Dredging on August 26, 2015, at page 88, lines 1-14. The cited testimony relates, however, only to a “normal” schedule of values based upon a bid that properly establishes the certified prices in the bid proposal schedule—a type of bid Nan most demonstrably did not submit. The testimony of Mr. Bowers at Tr. 91, lines 1-11, and Tr. 93, line 19, to Tr. 94, line 11. confirms he was referring proper bid prices being consistent with items in the schedule of values.

The last three citations in this footnote are to “Cristobal Testimony; Nagao Testimony; Lynch Testimony.” These citations are not helpful in the absence of some specific portion of the testimony of these witnesses. Nevertheless, the Hearings Officer has reviewed the complete testimony of each of these witnesses, and concludes as follows:

a. Loreto Cristobal testified on August 24, 2015. He has worked for Nan for approximately ten years. Tr. 88, lines 22-24. He testified that on another project for the DOT that he managed for Nan, the project documents showed construction to take place in phases. The bid pricing did not reflect these phases, so a schedule of values was created that broke down the project into phases. This resulted in a more detailed schedule of values that contained more line items than the bid proposal schedule. Tr. 93, lines 1-22.

That one type of event is consistent with Mr. Chang’s testimony concerning limited modification to the bid proposal schedule. It does not establish that the sum of the prices for the phases was different from the lump sum price for all phases in the bid proposal schedule.

Mr. Cristobal had not worked on any other DOT projects. Tr. 94, lines 19-21. He did not work on the CONRAC project. Tr. 97, lines 14-15. Later, he testified that he did work on another DOT project where the schedule of values had not yet been approved. On that project, it appears, although it is not clear, that the Nan estimate missed a line item in specifications. Tr. 107, lines 14-21. The Hearings Officer notes that missing a line item on the proposal schedule is prohibited by the terms of the CONRAC proposal.

The Hearings Officer deems Mr. Cristobal's vague testimony on a UH project to be irrelevant to how the DOT has handled the schedule of values on its projects. His testimony on his experience with DOT projects was a bit vague as to the second project, and, in the first case his experience merely confirmed Mr. Chang's testimony. Overall, he had no experience with bid pricing problems of the magnitude, or even half the magnitude, of those involved in this case. It was insufficient to establish that the DOT has in the past allowed the massive changes between the falsely certified bid proposal schedule and the schedule of values that Nan proposes to make in this case.

b. Mr. Nagao testified that he worked on a DOT project where the bid proposal did not take into account phasing of the work. When the project consultant decided that phasing should be utilized on the job, the schedule of values reflected that new situation by adding several lines that were not in the bid proposal schedule. He claimed the new schedule of values items were based on actual cost. Tr. 172, lines 4-16. He also testified somewhat vaguely that the "Phasing is just a way of splitting up the money into more detailed payments." Tr. 190, lines 8-10. Further, he could not point to any item in his project's schedule of values that changed from the bid proposal amount because of an actual mistake in bidding. Tr. 190, lines 14-21. In addition, he confused the term actual cost from the way Nan carries it in its proposal or internal estimate sheets (direct cost, or total of direct and indirect cost) with how he thought of it as including other items such as profit. Tr. 187, lines 20-25. This muddled any clarity in his earlier testimony about determining the items in the expanded schedule of values.

Mr. Nagao further testified on cross examination that the bid proposal schedule did not include any line item for demobilization, but the project specifications required the contractor to include an item in the schedule of values of 2.5% of the total bid amount (this figure being mandated by the project solicitation). This led to an adjustment of some, but not all, of the bid proposal items. This adjustment was not done on a proportional basis, e.g., some of the small bid

proposal items were apparently not changed, but the witness could not explain on what basis over \$1.4 million was taken from the bid proposal items and put into a schedule of values line item for demobilization. Tr. 179, line 3, to Tr. 186, line 23; Hawaiian Dredging Exhibit 36.

Importantly, when the bid proposal schedule was being changed to accommodate the 2.5% demobilization item now being added to the schedule of values, the terms of the solicitation stated that the deduction would be “as negotiated by the Contractor and the State.” Hawaiian Dredging Exhibit 36. There is no such “as negotiated” language in the solicitation for the CONRAC project.

Mr. Nagao’s experience merely confirmed Mr. Chang’s testimony about the limited types of situations where the bid proposal schedule is not totally and directly moved over into the schedule of values. His testimony was vague even as to how things had worked on the one DOT project where he experience with this situation. Overall, he had no experience with bid pricing problems of the magnitude, or even half the magnitude, of those involved in this case. It was insufficient to establish that the DOT has in the past allowed the massive changes between the falsely certified bid proposal schedule and the schedule of values that Nan proposes to make in this case.

c. Michael Lynch testified on August 24, 2015, that he has been a senior project manager for Nan for five years and has 29 years of overall experience as a senior project manager. Tr. 112, lines 8-19. On one project for the DOT, the construction manager requested a change in the schedule of values that initially approximated the bid proposal schedule because some items would be deliver well before installation and the DOT could pay for delivery earlier in the project than originally anticipated. Tr. 112, line 20, to Tr. 114, line 9.

It should be noted that, consistent with the DOT’s position and contrary to Nan’s position, the two schedule of value items pertaining to the materials added up to the one figure used in the bid proposal schedule. Tr. 114, line 15, to Tr. 115, line 14; Tr. lines 14-18.

On another DOT project, Mr. Lynch testified there were some problems with the bid due to overlapping values between subcontractors, but that the schedules of values that might correct this problem had not yet been developed. Tr. 115, line 16, to Tr.116, line 23.

Mr. Lynch's experience primarily confirmed Mr. Chang's testimony about the limited types of situations where the bid proposal schedule is not totally and directly moved over into the schedule of values. Overall, he had no experience with bid pricing problems of the magnitude, or even half the magnitude, of those involved in this case. It was insufficient to establish that the DOT has in the past allowed the massive changes between the falsely certified bid proposal schedule and the schedule of values that Nan proposes to make in this case.

3. Nan is careful to say that its actual payments under its scenario will not be the same as the figures in its estimate submitted to escrow. As noted above, on page 6 of its Closing Memorandum, it stated that it will be paid "based on" its actual costs. Shortly thereafter, it says that its actual costs are "supported" by the escrow documents. It then uses footnote 35 to illustrate that the estimate in escrow refers to direct work cost. In other words, the figures that Nan wants to utilize to establish the Schedule of Values do not contain indirect or overhead costs and they do not contain an element of margin or profit. Since Nan did not demonstrate that the total cost of the bid item could be readily determined, Nan's proposed procedure is an invitation to endless controversy over what can or should be added to its direct costs to come up with an acceptable Schedule of Values.

The DOT admitted that all five CONRAC bids were to some degree unbalanced. According to Nan, this means all bids must fail if unbalanced bids were "truly determinative" of responsiveness. Nan's Closing Memorandum at page 6. However, Nan ignores its own statement here that it is a "question of degree." Nonresponsiveness, *per se*, does not mean the bid is rejected. Material nonresponsiveness, which is a question of degree, leads to the rejection of the bid. Here, Nan's falsely certified bid was severely and materially unbalanced. Nan did

not demonstrate that the other bids had anywhere near the degree of problems of Nan's bid. To the extent it discusses specific numbers, Nan has demonstrated the opposite of what it needed to show—Nan's \$46,004,600 figure is 32 times greater than Hawaiian Dredging's supposedly unbalanced bid for the demolition and removal item.

At page 7 of its Closing Memorandum, Nan cites testimony from the evidentiary hearing that it asserts supports its reading of the solicitation and contradicts the Hearings Officer's conclusions as to the interpretation of the relevant specification terms.

a. "The Schedule of Values is approved only if it reflects the value of actual work to be performed." Allegedly relevant testimony in support of this proposition is listed Nan's footnote 38 and consists entirely of a few lines of testimony from Mr. Aaron Fujii on August 20, 2015. Mr. Fujii stated that his conclusion was based on his experience with DOT contracts. Tr. 176, lines 6-10.

Looking over Mr. Fujii's entire testimony, it is clear that Nan attempted to impermissibly present him as an expert witness on the interpretation of contract provisions. See, e.g., Tr. 157, line 1, to Tr. 158, line 15; Tr. 161, lines 4-22; Tr. 162, line 3, to Tr. 163, line 15; Tr. 163, line 17. Tr. 164, line 8; Tr. 164, line 22, to Tr. 165, line 24. Even with the help of the Hearings Officer, the witness was unwilling to answer directly about his experience with any similar situations and eventually admitted that he didn't remember any, and specifically could not recall any such situations with a DOT contract. Tr. 166, line 1, to Tr. 168, line 10; Tr. 169, line 12, to Tr. 171, line 22. His following testimony which is cited by Nan is thus either impermissible generalizations about the interpretation of contract terms or vague statements about unspecified instances that he can't directly recall and which the witness admits do not relate to the type of situation at issue in this case. The Hearings Officer gives Mr. Fujii's cited testimony no weight under these circumstances.

Nothing in the IFB or the Specifications allegedly requires the SOV to mirror the bid proposal schedule of values. Footnote 39 is cited as providing the support for this proposition.

Footnote 39 first contains a legal argument as to the reading of the solicitation that has already been rejected. Footnote 39 then refers to brief testimony from Mr. Aaron Fujii to which the Hearings Officer again gives no weight for the reasons stated above for the immediately preceding assertion in Nan's Closing Memorandum.

The SOV allegedly must reflect the actual value of the work to be performed and the payment requests must cover only the actual value of the work (the actual value being different from the bid proposal line item figures).

As discussed in detail above, this reading of the specifications is not correct. It does not apply when there is falsely certified bid proposal where several bid items have no relationship to the actual value of the work covered by those bid items. The same analysis applies to some brief testimony of Mr. Nan (Patrick) Shin on August 26, 2015, cited in Nan's footnote 40.

As discussed in Finding of Fact No. 68, there are three situations where the schedule of Values does not directly duplicate the bid proposal schedule: (a) where the contractor makes its bid knowing the terms of the solicitation require an amount in the schedule of values for demobilization that does not reflect a line item in the bid proposal; (b) where a line item in the bid proposal is broken down into several items in the schedule of values to reflect the phasing of a project; and (c) where some items in the bid proposal are consolidated into one item in the schedule of values. This was Mr. Chang's testimony which Nan incorrectly tries to present in footnote 43 as being testimony of a general practice of always allowing the schedule of values to change the figures from the bid proposal. None of those situations described by Mr. Chang are involved in the present matter.

Nan also relies in footnotes 41, 42, 43, and 44 on generalized testimony that is short on specifics. In addition, there was no showing that any of the situations referred to by the witnesses had any similarity to the present case involving massive changes to a falsely certified bid proposal.

Nan's brief discussion of the escrow documents on page 8 of its Closing Memorandum does not demonstrate that the interpretation of the relevant solicitation provisions above is incorrect. In addition, its blanket reference to fifty pages of Mr. Iwasaki's testimony in footnote 46 is not helpful. Further, this testimony does not pertain to any actual use of escrow documents in negotiations between a contractor and the DOT over determining the schedule of values. The undisputed evidence at the hearing was that the escrow provisions started to show up in some, but not all, Airports Division contracts in the last two years. The evidence further established that there had never been an actual instance where the escrow documents provision in the solicitation had been utilized in any context.

Nan's discussion on page 8 of its Closing Memorandum that it will not utilize information from other contractors' opened bids to generate Nan's schedule of values is beside the point. The point is that the bid proposal sheets of four other contractors have been made available to Nan very shortly after bid opening. Nan can utilize that information as a check or a yardstick with respect to evaluating its own bid proposal items. It can utilize that information to determine whether, and how, it wants to deal with its falsely certified bid compared to the as yet unformulated schedule of values. In that respect, Nan has an advantage over a contractor who submitted a properly certified bid proposal and will be required to utilize the proposal's figures to create a schedule of values.

Beginning at the bottom of page 8 of its Closing Memorandum, Nan goes through 5 areas where it asserts that its opponents' claims are without merit.

a. Delivery of the information that Nan's actual cost for Bid Item No. 02050.1 was less than \$500,000. It makes no difference to the Hearings Officer whether or not the DOT received this information before or after the DOT's initial decision on April 1, 2015 in favor of Nan.

b. The DOT's and Hawaiian Dredging's Claims make the Schedule of Values provision meaningless in a lump sum contract situation while Nan's argument does not make the bid proposal superfluous. Nan's second and third arguments will be considered together.

The Schedule of Values is more pertinent in a lump sum contract where there are no line items in the bid proposal. While it has less utility where, as here, there are line items in the bid proposal as well as a lump sum amount, it has been shown that there are some situations where it is still useful. While all of the bid proposal items in a large contract such as the present one may not be exact measures of cost (and, it should be pointed out, they are never that exact anyway since the bid proposal items carry margin or profit as well as actual costs), there is no basis for Nan's rhetorical proposition that all future DOT projects will have significant payment issues.

Nan seems to think that the proposal line items are useful only to provide a basis for designing the next project. Leaving aside the fact that Nan wants to apply this principal to all DOT contracts even though there will possibly be, at most, only three or four more CONRAC projects, its proposition is without merit. What kind of a guide for the design for future projects is provided by a bid proposal schedule that is false, inaccurate, and materially unbalanced?

Further, to adopt Nan's position would render superfluous the Proposal's instructions and all of the payment provisions for each line item that are in the solicitation's technical provisions. Contrary to Nan's arguments, the line items are not irrelevant because the only thing that matters is the total lump sum amount. The line items are directly relevant to the payment instructions in the solicitation's technical provisions.

In addition, adoption of Nan's argument would have the highly disturbing effect of rendering the requirement of a certified bid where the proposal contains line items totally meaningless, and, instead, encourage the submission of false and/or inaccurate bids because there would be no consequence to the contractor if it could always under virtually all circumstances correct its errors or transgressions through the post-bid schedule of values. The Hearings Officer cannot endorse such a situation that is contrary to core of the competitive bidding system and to honesty in the procurement process.

3. There is a distinction between the permissive "may be rejected" language of General Provision 2.8.5, and the mandatory "shall" be rejected in the "submit only one bid" instructions at issue in the Southern Food Groups case.

4. Nan tries to downplay the discussion of equipment in its November 5, 2014 letter. This situation has already been discussed above.

5. Nan is not requesting a "correction" of its bid proposal schedule or its bid line item error. Literally, this may be true because Nan did not specifically "request" a correction pursuant to the terms of the Hawaii Administrative Rules concerning corrections that were discussed above.

However, as a practical matter Nan is actually requesting multiple corrections through the use of the schedule of values. It cannot "fix" only the \$46,004,600 in Bid Item 02050.1. As discussed above, wholesale corrections of its proposal schedule would need to be made, and this is not acceptable. Nan's argument here that, despite all the problems with its falsely certified bid, its bid is not materially unbalanced is explicitly dependent on using the schedule of values to fix multiple items in its proposal schedule.

In addition, Nan's assertion ignores the Hawaii Administrative Regulation pertinent to the correction of mistakes in bids. HAR §3-122-31(c) governs mistakes discovered after bid opening and prior to contract award. That regulation first covers the traditional types of mistakes

that can be corrected, namely arithmetical errors and minor informalities such as typographical errors or transposition errors that don't affect "price, quantity, quality, delivery, or contractual conditions." Nan's mistake does not fit into these categories.

For all other alleged mistakes, HAR §3-122-31(c)(1)(C) provides: "The procurement officer may correct or waive the mistake if it is not allowable [as a type of mistake described above], but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the purchasing agency and is fair to other bidders."

In this situation, the \$46,004,600 entry was not an "obvious" mistake given that Nan never claimed it was a mistake until just before the DOT's letter of April 1, 2015, and Nan's letter of November 5, 2014 deliberately asserted, in essence, that the figure was correct because the amount of that line item would be used to purchase many pieces of equipment. Furthermore, the multiple line items on Nan's bid proposal schedule that were all listed at \$100,000.00 were not mistakes—they were deliberately chosen by Nan knowing full well they were not accurate. Further the three line items on Nan's bid proposal schedule where the original entries were crossed out and new numbers were asserted are not "obvious" mistakes because there is no way for a procurement officer to know they were mistakes without researching other documents, and, again, they were deliberate entries and not mistakes in the first place.

Nan never cites HAR §3-122-33 and makes no attempt to satisfy the criteria for correction of mistakes that is set forth therein. The Hearings Officer concludes that Nan should not be allowed to bypass the only established method for correction of mistakes in an attempt to rid itself of the burden and the adverse consequences of its big mistakes in its bids.

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

For all of the reasons stated above, the Hearings Officer concludes that Nan's Motion for Summary Judgment on the unbalanced bid issue should be denied. Taking into account all of the

evidence, Nan has not sustained its burden of proof to demonstrate that it is entitled to relief on the unbalanced bid issue. As a result of this decision, the DOT's and Hawaiian Dredging's motions for summary judgment and for dismissal on the unbalanced issue are moot.

E. The DOT is Not Bound by Its First Decision of April 16, 2015, in Favor of Nan

Nan's Closing Memorandum presents very effectively that there was no new information coming into the possession of the DOT after the issuance of the DOT's decision of April 1, 2015, in favor of Nan that would justify the DOT's subsequent reversal of its position on the unbalanced bid issue. It is not necessary for the Hearings Officer to evaluate every detail of this presentation because the DOT, through Deputy Attorney General Price, admitted at oral argument on the summary judgment motions on August 17, 2015, that there was no information on the unbalanced bid issue. According to Mr. Price, the DOT just realized that it had made a mistake on that issue.

While the phrase "new information" is utilized in the second sentence of the April 1, 2015, letter as a basis for rescission, that second sentence also refers to "further review" as another basis for rescission. Further, the only new information mentioned in the letter as a basis for the rescission decision pertains to the subcontractor issue.

Nan's claim that an agency decision reversing a previous agency decision is arbitrary and capricious if no new information is presented to justify the second decision.

In support of this proposition, Nan cites to the case of Boily v. Commissioner of Economic Security, 532 N.W. 2d 607 (Minn. App. 1995). The agency there reversed a previous decision even though no new information had been presented in the interim period between the two decisions. Nan is mistaken, however, in interpreting the decision to hold that the lack of new information made the second decision arbitrary and capricious. The actual holding of the case was that the entire sum of information presented in the case did not support the second decision, thus making it arbitrary and capricious. This opinion does not stand for any

proposition that the issuance of the second decision in the absence of new information was in and of itself arbitrary and capricious.

Moreover, Nan fails to take into account the fact that this opinion of the Minnesota Court of Appeals was significantly modified when the decision was affirmed by the Minnesota Supreme Court in Boily v. Commissioner of Economic Security, 544 N.W. 2d 295 (Minn. 1996). The Minnesota Supreme Court explicitly stated that it was expressly rejecting any characterization of the agency's second decision as being arbitrary and capricious.

Nan also has lost sight of the fact that the OAH Hearings Officer does not review a procuring agency's decision in the traditional sense of deferring to a decision that is not arbitrary and capricious. Further, the OAH Hearings Officer's review is not the same as the review of an agency decision under HRS Chapter 91. Instead, the Hearings Officer's review of the procurement in question is the rather unique one of *de novo* review.

Under the doctrine of *de novo* review, the Hearings Officer has the power to deny a procurement protest upon any legal basis contained in the record, and that power can be exercised even if the procuring agency was incorrect in how it determined in the first why the protest should be denied. The constraint upon the power to sustain the denial in those circumstances is that the protesting party cannot be practically prejudiced by such a procedure. Cf. Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH-2013-011 (November 27, 2013). No prejudice has been alleged or is apparent in the present case. Nan had a full opportunity to litigate the issues in an evidentiary hearing. Further, Nan did not allege any actual prejudice occurring outside of the hearing, e.g., detrimental reliance on the April 1, 2015 decision in incurring expenses in furtherance of anticipated contract performance such as the purchase of materials that were wasted because of inability to use them due to the April 16, 2015 decision.

The DOT and the Attorney General's office would be the first to admit that the decision making process on the multiple procurement protests in connection with the CONRAC project was not necessarily of the highest quality. Nan's RFAH, however, is not to be decided upon the absence of "style points" for the DOT. In the end, the Hearings Officer has concluded that the correct result was reached on the unbalanced bid issue.

For all of these reasons, the Hearings Officer concludes that the DOT cannot be bound by its April 1, 2015, decision in favor of Nan such that it could not issue the April 16, 2015 decision.

G. Nan Has Failed to Prove Claims that Cumulatively Equal the Minimum Jurisdictional Amount

A procurement protest must do more than satisfactorily allege that the cumulative value of its claims exceeds the minimum jurisdictional amount set by HRS 103D-709(d). In order to be successful and have the procuring agency's decision denying the protest be completely reversed so that the protestor is entitled to relief under HRS 103D-706 or 103D-707, the protestor must also be successful on claims that have a cumulative value exceeding that minimum jurisdictional amount.

Here, Nan has been successful on only one of its three claims, and that claim is too small to be equal to the minimum jurisdictional amount set by statute in this matter to be at least ten percent of either Nan's or Hawaiian Dredging's bid (so there is no need to decide which is the correct figure to utilize). Accordingly, Nan's procurement protest must be dismissed. See Nan, Inc. v. Honolulu Authority for Rapid Transportation, PDH-2015-004 (May 28, 2015) at pages 27-30.

H. Nan's Protest Against Hawaiian Dredging's Bid is Moot

The structure of Nan's RFAH is meant to challenge the position expressed by the DOT and Hawaiian Dredging that Nan must do more than challenge the decision to rescind the DOT's first decision of its notice of intent to award the contract to Nan. Those parties also asserted that

Nan must challenge the subsequent decision in favor of Hawaiian Dredging because that subsequent decision was the currently operative decision.

While Nan did not agree with this position, Nan could not take a chance that the DOT and Hawaiian Dredging were correct on this point. The RFAH challenges the position of the DOT and Hawaiian Dredging by: (1) first challenging the DOT's July 14, 2015 decision denying Nan's protest of the rescission of the award to Nan, and (2) then challenging the DOT's July 14, 2015 denial of Nan's protest of the notice of intent to award the contract to Hawaiian Dredging.

As a result of the Decision herein, Nan has failed to sustain the first challenge in Nan's RFAH. Accordingly, Nan's second challenge in its RFAH is moot.

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 the DOT and to Hawaiian Dredging on the issue of jurisdiction. Accordingly, the claim in Nan's Request for Administrative Hearing that the DOT did not have jurisdiction to issue its decision of April 16, 2015, rescinding the award to Nan and instead providing a notice of intent to award the contract to Hawaiian Dredging, is dismissed with prejudice for lack of jurisdiction due to failure to exhaust administrative remedies. Nan's Motion for Summary Judgment on this claim is denied.

2. Insofar as the subcontractor issue concerning Commercial Plumbing and the unbalanced bid issue are concerned, the summary judgment motions of Nan, the DOT, and Hawaiian Dredging are all denied for the reasons stated above.

3. With respect to the subcontractor issue involving Certified Plumbing, the DOT's denial of Nan's procurement protest in the DOT's letter of April 16, 2015, on the basis of this is vacated. Nan's procurement protest on this issue is sustained.

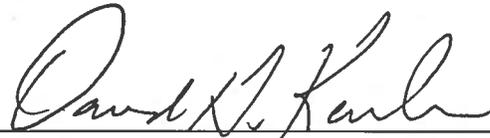
4. With respect to the unbalanced bid issue, the DOT's denial of Nan's procurement protest in the DOT's letter of April 16, 2015, on the basis of this issue is affirmed. Nan's procurement protest on this issue is denied.

5. Because Nan has failed to sustain its procurement protest on matters that cumulatively amount to at least ten percent (10%) of Nan's bid amount, Nan's Request for Administrative Hearing in this matter is dismissed with prejudice.

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

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

DATED: Honolulu, Hawaii, September 4, 2015.



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

SECTION 01350 -ESCROW PROPOSAL DOCUMENTATION (EPD)

PART 1- GENERAL

1.01 RELATED DOCUMENTS

The General Provisions, Special Provisions, Supplemental Special Provisions, Airports Division Supplement to Special Provisions and General Requirements of the Specifications, apply to the work specified in this section.

1.02 ESCROW PROPOSAL DOCUMENTATION (EPD)

- A. General: "Each bidder shall submit the EPD spread sheets in a sealed container, separate from the envelope containing the proposal, which shall contain the summary information and calculations used to determine the proposal for this project. Within five (5) **working** days after the bid date, the three (3) lowest bidders shall submit to:

Contracts Office
Department of Transportation (DOT)
869 Punchbowl St., Honolulu, HI 96813

Submittal shall include all supporting information and calculations used by the bidders to determine the proposal for this project. This documentation is hereafter referred to as "Escrow Proposal Documentation" or EPD. The EPD of the successful bidder will be held in escrow for the duration of the contract and will be used solely for the purpose of determining the Contractor's proposal concept, if necessary, for price adjustments as provided in the contract or to resolve any claim by the Contractor. The EPD of all other bidders, except the three lowest bidders, will be returned unopened after determination of low bidder is made. If the contract is not awarded to the lowest bidder, EPD of the next lowest bidder will be processed as specified herein. Upon award of the contract to the lowest bidder, the remaining bidders' EPD will be returned.

The Department stipulates and expressly acknowledges that the EPD as defined herein, constitutes trade secrets. This acknowledgment is based on the Department's express understanding that the information contained in the EPD is not known outside bidder's business, is known only to a limited extent and by a limited number of employees of the bidder, is safeguarded while in bidder's possession, is extremely valuable to bidder and could be extremely valuable to bidder's competitors by virtue of it reflecting bidder's construction strategies, assumptions and intended means, methods and techniques of construction. The Department further acknowledges

that bidder expended substantial sums of money in developing the information included in the EPD and further acknowledges that it would be difficult for a competitor to replicate the information contained therein and are being provided to the Department only because it is an express prerequisite to award of the contract. The Department further acknowledges that the EPD includes a compilation of information used in bidder's business, intended to give bidder an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation. The Department further agrees to safeguard the EPD against disclosure to the fullest extent permitted by law.

The apparent successful bidder agrees, as a condition of award of the contract, that the EPD constitutes all the Information used in the preparation of his bid, and that no other bid preparation information shall be considered in evaluating disputes or claims.

- B. Format: Bidders are encouraged to submit EPD in their usual cost estimating format; a standard format is not required. It is not the intention of this specification to cause the bidder extra work during the preparation of his proposal, but to ensure that the documentation will be adequate to enable complete understanding and proper interpretation for the intended use.

The EPD will clearly itemize the costs for each pay item. The EPD shall be in English. Each pay item shall be broken down into components small enough to allow a detailed cost estimate. Costs allocated to each component shall be broken down into the bidder's usual estimate categories such as direct labor, repair labor, equipment parts and supplies, expendable materials, permanent materials, and subcontractor costs as appropriate. Plant and equipment and indirect cost allocations shall be made to each bid item as appropriate and broken down in the bidder's usual format. All costs shall be identified.

The EPD shall include quantity takeoffs, calculations of rates of production and progress, copies and quotes from subcontractors and suppliers, and memoranda, narratives, reference material and all other information used by the bidder to arrive at all of the prices contained in his proposal.

- C. Submittal: The EPD shall be submitted in a sealed container, separate from the envelope containing the proposal, and shall be clearly marked with the bidder's name, date of submittal, project name and 'ESCROW PROPOSAL DOCUMENTATION.' The EPD shall be accompanied with an affidavit, in the form following this section.

Failure to submit EPD will be cause for rejection of the proposal.

- D. Examination: The EPD of the apparent successful bidder will be examined by the Department in the bidder's presence prior to award of the contract. At least one member of the bidder's staff who is knowledgeable in how the bid was prepared shall be present. This examination is to ensure that the EPD is complete and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of contract documents. Incomplete and/or missing data shall be promptly supplied, but in all cases prior to award of contract. Examination does not alter any condition or term of the contract. After examination, the EPD will be resealed, in the presence of both the Department and the bidder, and stored. Receipt of EPD will be acknowledged by the Department by return of the bidder of the countersigned affidavit as specified below.
- E. Storage: The EPD is, and shall remain, the property of the Contractor, subject to use as provided herein. The EPD shall be placed in escrow, during the life of the contract.
- F. Review: The EPD may be reviewed at any time deemed necessary by the Department or the Contractor, in conjunction with settling disputes, claims or change orders. Review of the EPD is subject to the following conditions:
1. As trade secrets as described herein, the EPD is proprietary and confidential and shall be treated as such.
 2. The Department and the Contractor shall each designate in writing three representatives who are authorized to review the EPD on their behalf. When considered necessary by both the Department and the Contractor, members of the Disputes Review Board may review the EPD.
 3. The Department and the Contractor shall each designate in writing a representative to receive notice of review of the EPD on their behalf.
 4. Prior to reviewing the EPD, 24 hours written notice shall be given by the Department or the Contractor to the other party, so that the review can be witnessed by the other party.
 5. No representative of the Department or the Contractor shall be allowed to gain access to the EPD without an authorized representative of the other party being present.

6. Following each review, the EPD will be returned to the escrow institution.
-
- G. Return: The EPD will be returned to the Contractor after all claims and disputes have been resolved, and final payment on the contract has been made and accepted.

ESCROW PROPOSAL DOCUMENTATION AFFIDAVIT

THE UNDERSIGNED HEREBY CERTIFIES THAT THE ESCROW PROPOSAL DOCUMENTATION CONTAINED HEREIN CONTAINS ALL OF THE INFORMATION WHICH WAS USED TO DEVELOP THE PROPOSAL AND THAT THE ESCROW PROPOSAL DOCUMENTATION IS ACCURATE, CORRECT AND COMPLETE.

By: _____

TITLE: _____

FIRM: _____

DATE: _____

COUNTERSIGNED BY THE DEPARTMENT AFTER EXAMINATION OF ESCROW PROPOSAL DOCUMENTATION.

By: _____

TITLE: _____

DATE: _____

END OF SECTION

DIVISION 2 – SITE WORK

SECTION 02050 - DEMOLITION AND REMOVAL WORK

PART 1 – GENERAL

1.01 RELATED DOCUMENTS

The General Provisions, Special Provisions, and General Requirements of the Specifications shall apply to the work specified in this section. See Section 01010 Description of Work, paragraph 1.12, Archeological Monitoring.

1.02 RELATED SECTIONS

Section 01352 LEED and SHPG Certification Requirements, Construction Waste Management.

1.03 DESCRIPTION OF WORK

- A. Extent of selective demolition work is indicated on drawings. Work shall be phased to allow for the continued use airport facilities.
- B. It shall be the responsibility of the Contractor to examine the project site and determine for himself the existing conditions.
- C. Selective demolition work includes but is not limited to selective demolition, removal, and subsequent disposal of all materials indicated or required to be removed and salvaged for reuse and for the State.
- D. Execute all work in an orderly and careful manner with due consideration for all items of work to remain.
- E. Concrete coring shall be a part of this section, and shall be accomplished by personnel experienced in type of work. Obvious conditions which exist on the site shall be accepted as part of the work, even though they may not be clearly indicated on the Drawings and/or described herein, or may vary therefrom.
- F. All barricades and phasing shall allow NFPA 101 and ICBO UBC safe exiting of the remaining facilities at all times unless otherwise allowed in writing by the Engineer. Provide temporary features as necessary to conform to this requirement. Barricades are specified in Section 01533 - BARRICADES. All debris of any kind accumulated from the work of this Section shall be disposed off the site.

- G. Burning of any debris on-site will not be permitted.
- H. Clean and deliver salvaged items not reinstalled on location as directed by the Engineer.
- I. The contractor shall coordinate with the Engineer to determine salvageable items.
- J. Permits, Notice, Etc.:
 - 1. The Contractor shall procure and pay for all necessary permits or certificates that may be required in connection with this work.
 - 2. The Contractor shall serve proper notice and consult with the Engineer regarding any temporary disconnections of electrical or other utility lines in the area which may interfere with the removal work, and all such lines where necessary shall be properly disconnected or relocated before commencing with the work.

1.04 SUBMITTALS

- A. Submit under provisions of Section 01300 - SUBMITTALS.
- B. Schedule: Submit six copies of schedule indicating proposed methods and sequence of operations for selective demolition work to the Engineer for review prior to commencement of work. Include coordination for temporary shut-off and continuation of utility services as required, together with details for dust and noise control protection. All demolition and removal work must be coordinated with the Engineer.

1.05 JOB CONDITIONS

- A. Condition of Structure: The State assumes no responsibility for actual condition of items or portions of structure and appurtenances to be demolished or removed.
- B. Conditions existing at time of commencement of contract will be maintained by the State insofar as practicable.
- C. Do not interfere with use of adjacent occupied spaces. Maintain free and safe passage to and from occupied spaces.
- D. Partial Demolition and Removal: Items indicated to be removed but not indicated for either reinstallation at the same or new location or for salvage

by the State but of salvageable value to Contractor, may be removed from structure as work progresses. Materials to be reinstalled or for salvage by the State shall be carefully removed by workmen skilled in the installation of similar materials. Transport salvaged items for the State from site to a storage location as they are removed.

1. Store materials indicated to be reinstalled in a manner that protects the material from damage or deterioration.
 2. Deliver materials to be salvaged for the State to a location at the airport as directed by the Engineer.
 3. Storage or sale of removed items on site will not be permitted.
- E. Protections: Provide temporary barricades and other forms of protection as required to protect the general public from injury due to selective demolition work and to maintain airport security.
1. Provide interior and exterior shoring, bracing, or support to prevent movement, settlement, or collapse of structure or elements to be demolished, and adjacent facilities or work to remain.
 2. Protect from damage existing finish work that is to remain in place and becomes exposed during demolition operations.
 3. Life safety procedures and provisions shall be in conformance with all applicable Federal, State, and City and County regulations, including HOSHA. Remove protections at completion of work.
- F. Damages: Promptly repair damages caused to adjacent facilities by demolition work at no cost to the State.
- G. Traffic: Conduct selective demolition operations and debris removal in a manner to ensure minimum interference with roads, streets, walks, and other adjacent occupied or used facilities. Do not close, block or otherwise obstruct streets, walks, or other occupied or used facilities without written permission from the Engineer. Provide alternate routes around closed or obstructed traffic ways if required by governing regulations, as directed by the Engineer.
- H. Explosives: Use of explosives will not be permitted.
- I. Utility Services: The existence of above and below ground utility lines other than those shown on the drawings is not definitely known. Should any other utility lines be encountered, the Contractor shall immediately notify

the Engineer and follow his direction as to procedure. Maintain existing utilities indicated to remain, keep in service, and protect against damage during demolition operations. Do not interrupt existing utilities serving occupied buildings or facilities, except when authorized in writing by the Engineer. Outages and interruptions must be approved in advance by the Engineer. Submit written notice of outages and interruptions not less than fourteen days in advance of intended outage. Report damage, however slight, immediately. Do not repair or reconstruct any pipe, conduit, or installation without authorization, except perform emergency repairs immediately.

J. Dust Control:

1. Keep dust within acceptable levels at all times, including non-working hours, weekends, and holidays, in conformance with Chapter 60.1 - Air Pollution Control of the State Department of Health, Public Health Regulations, latest edition.
2. Only wet grinding or cutting of concrete and masonry will be allowed on exterior surfaces.
3. Mechanical dry sweeping not permitted. Vacuuming, wet mopping, approved limited dry hand, wet, or damp sweeping is acceptable.
4. During loading operations, water down debris and waste materials to allay dust.
5. The method of dust control and all cost incurred thereof shall be the responsibility of the Contractor.

K. Noise Control:

1. Noise shall be kept within acceptable levels at all times in conformance with State Department of Health, Title II, Administrative Rules, Chapter 46 - Community Noise Control.

The Contractor shall obtain and pay for community noise permit from the State Department of Health when the construction equipment or other devices emit noise at level exceeding the allowable limits.

2. All internal combustion engine powered equipment shall have mufflers to minimize noise and shall be properly maintained to reduce noise to acceptable levels.

3. Starting up of on-site vehicular equipment meeting allowable noise limits shall occur from 10:00 p.m. to 6:30 a.m. Contractor shall coordinate other work activities with the Engineer for the hours between 6:30 a.m. to 1:30 p.m. Equipment exceeding allowable noise limits shall be coordinated with the Engineer.

L. Other Controls:

1. Wherever trucks and/or vehicles leave the site and enter surrounding paved streets, the Contractor shall prevent any material from being spilled onto the pavement. Wastewater shall not be discharged into existing streams, waterways, or drainage systems such as gutter and catch basins unless treated to comply with Department of Health pollution regulations.
2. Trucks hauling materials shall be covered as required by PUC regulation. Trucks hauling fine materials shall be covered.
3. Noxious fumes and offensive odors shall be kept within acceptable levels at all times including non-working hours. Sufficient ventilation shall be employed, especially in confined areas, to minimize the effects of the fumes and odors.
4. Whenever truck and/or vehicles cross any hardstand, taxiway, runway or other area utilized by aircraft, the Contractor shall prevent any material from being spilled. Should any material be spilled, it shall be removed immediately to prevent a Foreign Object Debris (FOD) problem.

1.05 CONTRACT ZONE LIMITS

The Contract Zone Limits shall generally be as indicated on the key plans and/or site plans, however, work outside the Zone Limits necessary to complete the project shall be included.

1.06 MAINTAINING TRAFFIC

- A. The Contractor shall conduct operations with minimum interference to airport concourse, streets, driveways, sidewalks, etc.
- B. When necessary, the Contractor shall provide, erect and maintain lights, barriers, etc., as required by traffic and safety regulations with special attention to protection of life.

PART 2 – PRODUCTS (Not Used)

Roadway Improvements and
Consolidated Car Rental (ConRac) Facility
Kahului Airport
State Project No. AM1032-13

MARCH 2014
DEMOLITION AND REMOVAL WORK
02050-5

PART 3 - EXECUTION

3.01 INSPECTION

Prior to commencement of selective demolition work, inspect areas in which work will be performed. Inventory existing conditions of structure surfaces, equipment or surrounding properties, which could be misconstrued as damage resulting from selective demolition work; photograph, video or otherwise document and file with the Engineer prior to starting work.

3.02 PREPARATION

- A. Provide temporary security and phasing barriers as indicated or as directed by the Engineer.
- B. Refer to notes on drawings regarding work on exterior utilities. Provide by-pass connections as necessary to maintain continuity of service to adjacent occupied buildings.
- C. Water and sewer facilities shall be available and in operating condition at all times. All dust shall be suppressed by a fog spray or other approved method.
- D. The Contractor shall visit the project site, examine the premises and note all existing conditions and the extent involved for the complete and proper execution of all work as called for on the plans and as herein-after specified.

3.03 BARRICADES

- A. Erect temporary barricades as required, to prevent people from entering into project area to the extent as acceptable to the Engineer. The extent of barricade may be adjusted as necessary with the acceptance of the Engineer. This work shall be accomplished at no extra cost to the State.
- B. When necessary, the Contractor shall provide, erect and maintain lights, barriers, etc., as required by traffic and safety regulations with special attention to protection of life.

3.04 SELECTIVE DEMOLITION

- A. Perform selective demolition work, including all exterior improvements indicated on the drawings, in a systematic manner. Use such methods as required to complete work indicated on drawings in accordance with demolition schedule and governing regulations.

1. Demolish concrete, masonry, and stone work in small sections. Cut concrete and masonry at junctures with construction to remain using power-driven masonry saw or hand tools; do not use power-driven impact tools.
 2. Provide services for effective air and water pollution controls as required by local authorities having jurisdiction. All dust shall be suppressed by a fog spray or other methods acceptable to the Engineer.
 3. Water and sewer facilities shall be available and in operating condition at all times.
- B. Demolish and remove existing materials as required within the Contract Zone Limits, with the exception of any structures to remain and any active water, drainage, electrical, etc., lines, and boxes, unless otherwise directed by the Engineer.
 - C. If unanticipated mechanical, electrical or structural elements which conflict with intended function or design are encountered, investigate and measure both nature and extent of the conflict. Submit report to the Engineer in written, accurate detail. Pending receipt of directive from the Engineer rearrange selective demolition schedule as necessary to continue overall job progress without delay.
 - D. Abandoned utility lines shall be removed if within the demolition depth, and plugged and abandoned in place if below this depth.
 - E. Trenches, holes, depressions, and pits left by the removal of miscellaneous improvements shall be backfilled to the satisfaction of the Engineer. Backfill with suitable material and compact to 95% maximum dry density as determined by ASTM Test Method D 1557.
- 3.05 DISPOSAL OF DEMOLISHED MATERIALS: Remove debris, rubbish, and other materials resulting from demolition operations from building site daily. Transport and legally dispose of materials off site.
- A. If hazardous materials are encountered during demolition operations, comply with applicable regulations, laws, and ordinances concerning removal, handling, and protection against exposure or environmental pollution.
 - B. Burning of removed materials is not permitted on project site, Section 01560 – ENVIRONMENTAL CONTROLS, paragraph 3.05-Hazardous Materials Control.

3.06 CLEAN-UP AND REPAIR

- A. Upon completion of demolition work, remove tools, equipment, and demolished materials from site. Remove protections and leave interior areas broom clean.
- B. Repair demolition performed in excess of that required. Return structures and surfaces to remain to condition existing prior to commencement of selective demolition work. Repair adjacent construction or surfaces soiled or damaged by selective demolition work.
- C. All existing grass areas disturbed or damaged due to construction or ingress or egress to the site shall be repaired to its original conditions. Grass areas shall be recultivated, topsoiled, and then grassed with the same kind and type of material as existing, in a manner acceptable to the Engineer.

PART 4 - MEASUREMENT AND PAYMENT

4.01 BASIS OF MEASUREMENT AND PAYMENT

Work under this Section will not be measured for payment but will be paid for at the Contract Lump Sum Price. The Contract Price Paid shall be full compensation for all labor, tools, equipment, and all other incidentals necessary to complete the work.

| <u>Item No.</u> | <u>Item</u> | <u>Unit</u> |
|-----------------|-----------------------------|-------------|
| 02050.1 | Demolition and Removal Work | Lump Sum |

END OF SECTION