

eFiled 02/25/2021 9:00 am

HEARINGS OFFICE



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

In the Matter of:)	PDH-2021-001
)	
SITA INFORMATION NETWORKING)	HEARINGS OFFICER'S
COMPUTING USA, INC.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION; EXHIBIT 1
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On January 12, 2021, SITA Information Networking Computing USA, Inc., ("Petitioner" or "SITA"), filed a Request for Hearing to contest the Department of Transportation, State of Hawaii's ("Respondent" or "DOT") letter dated January 5, 2021 which denied Petitioner's Protest letter dated September 21, 2020. The matter was set for hearing on February 2, 2021 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On January 20, 2021, Respondent filed a Response to the Request for Hearing.

On January 21, 2021, a telephonic pre-hearing conference was held in this matter. Keith Y. Yamada, Esq. and David F.E. Banks, Esq. appeared on behalf of Petitioner with Petitioner's representatives Tom Kosh, Erik Cornelissen and Carrie Young, Esq, general counsel, present. Deputy Attorneys General Marjorie A. Lau, Esq. and Reuel S. Toyama, Esq. appeared on behalf of Respondent.

On January 28, 2021, Petitioner filed its Motion for Summary Judgment ("Petitioner's Motion for Summary Judgment"). On January 28, 2021, Respondent filed its Motion to Dismiss, or in the Alternative, Motion for Summary Judgment ("Respondent's Motion to Dismiss").

On February 1, 2021, Respondent filed its Memorandum in Opposition to Petitioner's Motion for Summary Judgment.

On February 2, 2021, Petitioner's Motion for Summary Judgment and Respondent's Motion to Dismiss came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapters 91, 92 and 103D and Hawaii Administrative Rules ("HAR") Title 16 Chapter 201, Title 3 Chapter 126 and Title 6 Chapter 22. Keith Y. Yamada, Esq. and David F.E. Banks, Esq. appeared on behalf of Petitioner with Petitioner's representatives Tony Thien and Carrie Young, Esq., general counsel, present. Deputy Attorneys General Marjorie A. Lau, Esq. and Reuel S. Toyama, Esq. appeared on behalf of Respondent with Respondent's representative Sandra Inouye present.

The parties stipulated that the Declarations and Exhibits attached to each parties' motions would be admitted into evidence. Petitioner's and Respondent's motions were heard. The Hearings Officer orally DENIED Respondent's Motion to

Dismiss and GRANTED Petitioner's Motion for Summary Judgment, in part, on the issue of Bid *responsiveness*, but furthered the hearing on the issue of remedies because the parties were not sure if the contract had been awarded.

By email dated February 2, 2021, Counsel for Respondent informed the Hearings Officer that: "We have been advised by DOT that there is no signed contract for this matter."

On February 17, 2021, a further hearing was held in this matter on the issue of the appropriate remedy. Keith Y. Yamada, Esq. appeared on behalf of Petitioner with Petitioner's representatives Tony Thien and Carrie Young, Esq., general counsel, present. Deputy Attorneys General Marjorie A. Lau, Esq. and Reuel S. Toyama, Esq. appeared on behalf of Respondent.

Having heard the evidence and arguments of counsel, and having considered the motions and memoranda, along with the declarations and exhibits attached thereto and memorandum in opposition thereto, together with the evidence, records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision, *denying* Respondent's Motion to Dismiss and *granting* Petitioner's Motion for Summary Judgment, in part.

II. FINDINGS OF FACT

1. On March 21, 2019, Respondent issued an Invitation for Bids ("IFB") in this matter. See Declaration of Sandra Inouye attached to Respondent's Motion to Dismiss.

2. On May 30, 2019, the bids were opened. Petitioner submitted a bid of \$339,112.74, including an itemization/breakout of \$13,824.74 for taxes. See Exhibit 1.

Ford Audio submitted a bid of \$354,544.00, without an itemization for taxes. See Declaration of Eric Cornelissen attached to Petitioner's Motion for Summary Judgment.

3. Included with Petitioner's Bid was a Proposal Schedule. See Exhibit 1 at page 1.7, which is attached to this Decision as Exhibit 1 (hereinafter "Exhibit 1").

4. SITA submitted its Bid using the prescribed Proposed Schedule form, but *altered* the form by adding a *Taxes* line and another *Total* line as follows:

Total for Comparison of Bids (Items 1, 2, & 3) \$325,288.00

Taxes 13,824.74

Total 339,112.74.

See Exhibit 1 (emphasis added.)

5. Over one (1) year and three (3) months later, on September 14, 2020, Respondent informed Petitioner that its bid *has been rejected* because the *proposal submitted was altered by adding a separate line item for the state excise tax*.

We regret to inform you that your bid submitted for this project on May 30, 2019, **has been rejected**.

The proposal submitted was altered by adding a separate line item for the state excise tax.

In accordance with Section 2.2 of the specifications, proposals may be rejected if they show any alterations of form, additions not called for, conditional bids, incomplete bids, erasures, or irregularities of any kind. In addition, Section 9.1 of the specifications indicate that the Contractor's bid price shall be inclusive of all costs, direct or indirect, including taxes.

See Exhibit 3 (emphasis added.)

6. On September 21, 2020, Petitioner issued its Protest Letter asserting, among other things:

SITA is an aggrieved bidder for the IFB pursuant to HRS § 103D-701 and HAR § 3-126-1.

* * *

While the IFB states that proposals may be rejected if they show any alterations of form, additions not called for, conditional bids, incomplete bids, erasures, or irregularities, the Code and opinions of the Office of Administrative Hearings (“OAH”) require that the procuring agency decisions consider the best interest of the State and overlook immaterial issues in a bid. See *Ted’s Wiring Service, Ltd. v. Hawaii Public Housing Authority*, PCH-2009-14 (July 6, 2009); *Jas W. Glover, Ltd. v City and County of Honolulu*, PCH-2001-2 (August 7, 2001) (the procurement officer shall correct or waive an obvious mistake if it is in the best interest of the government agency or for the fair treatment of other bidders); *Nan, Inc. v. Department of Transportation*, PCH-2008-9 (October 3, 2008) (an immaterial deviation of **form over substance** shall not be a basis to disqualify the bidder on responsiveness grounds).

See Exhibit 4 (emphasis added.)

7. On January 5, 2021, Respondent issued its Protest Denial letter stating, among other things, that Petitioner’s bid was “non-responsive” because:

SITA added two other amounts below the [Total for Comparison of Bids] line item: one labeled “Taxes” and another labeled “Total.” * * * SITA’s the additions to the Proposed Schedule were a material deviation from the Proposal Schedule’s format for submission of one all-inclusive Total for Comparison of Bids.

Additionally, SITA’s additions constituted a material deviation, because its additions to the Proposal Schedule directly affected price. The additions of “Taxes” and a second “Total “ affected the total price as well as the unit price.

Finally, SITA’s additions resulted in two “total” amounts in the Proposal Schedule and created ambiguity as to SITA’s intended total bid. . . .

See Exhibit 5.

8. On January 12, 2021, Petitioner filed its Request for Hearing. See Exhibit 6.

9. Petitioner’s Request for Hearing states, among other things:

In accordance with Hawaii Revised Statutes (“HRS”) § 103D-709 and Hawaii Administrative Rule (“HAR”) § 3-126-42, SITA hereby requests a hearing for administrative review of the January 5, 2021 written determinations by the Department of Transportation, State of Hawaii (“DOT”), attached hereto as Exhibit 1, and further requests a decision by a Hearings Officer for the Office of Administrative Hearings finding and concluding the following:

1. That SITA was and is a responsive bidder for the Solicitation (the “**Contract**”).
2. That DOT, in its letter of January 5, 2021, incorrectly denied the items of relief requested and point of protests made by SITA in its letter of September 21, 2020, attached hereto as Exhibit 2.
3. That SITA’s bid proposal which included a breakout of the State excise taxes was a minor informality or mistake that should be corrected or waived by the DOT since doing so would result in the DOT awarding the contract to the lowest bidder without causing an unfair advantage over other bidders.

The bases for this Request for Hearing are set forth in Exhibits 1 and 2 hereto and in the following sections.

* * *

Hawaii Administrative Rule (“HAR”) § 3-122-31(c)(1)(B) provides that a mistake in a bid may be corrected or waived if the mistake is a minor informality which shall not affect price. The informality or “mistake” was immaterial since the alteration of the bid form was obvious and evident from the face of SITA’s bid. *Ted’s Wiring Service, Ltd. vs. Hawaii Public Housing Authority*, State of Hawaii, PCH-2009-14.

* * *

SITA is the lowest responsible and responsive bidder for the Solicitation, should receive the award of the Contract.

See Exhibit 6 (emphasis is original.)

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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.

On January 28, 2021, Petitioner filed its Motion for Summary Judgment.

On January 28, 2021, Respondent filed its Motion to Dismiss.

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. See, *Nan, Inc. vs. DOT, SOH and Hawaiian Dredging Construction Company, Inc.*, PDH 2015-006 (Sept. 4, 2015), citing *Koga Engineering & Construction, Inc. v. State*, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010). “Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact[.]” *Reed v. City & County of Honolulu*, 76 Haw. 219, 25, 873 P.2d 98, 104 (1994).

The Hearings Officer has jurisdiction in this matter

Respondent asserts that Petitioner’s failure to perfect its request for hearing requires dismissal for lack of jurisdiction. More specifically, Respondent asserts that Petitioner’s request for hearing does not “...state **plainly and precisely** the facts and circumstances of the person’s grievance, the laws and rules involved, and the relief sought.” See Respondent’s Motion to Dismiss at page 6 (emphasis in original.)

Petitioner asserts that the Hearings Officer has jurisdiction to review the determination by Respondent denying Petitioner's Protest pursuant to HRS §103D-709, HAR §§ 3-126-42 and 3-122-31 and *Ted's Wiring Service, Ltd. vs. Hawaii Public Housing Authority, State of Hawaii, PCH-2009-14*. See Exhibit 6.

The Hearings Officer is persuaded by Petitioner's arguments and legal authority.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§ 103D-310, 103D-701 or 103D-702. The Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate. See §HRS 103D-709(h).

Here, Petitioner, a bidder, was aggrieved by the determination of Respondent who, over one (1) year and three (3) months after bid opening, rejected Petitioner's Bid as nonresponsive because Petitioner included a separate line for Taxes and added another Total line including taxes on the Proposal Schedule. One week later, Petitioner filed its Protest Letter. See Exhibit 4. Over three (3) months later, Respondent issued its Protest Denial letter. See Exhibit 5. Within seven (7) days, Petitioner filed the instant Request for Hearing. See Exhibit 6.

Petitioner's Request for Hearing states, among other things:

In accordance with Hawaii Revised Statutes ("HRS") § 103D-709 and Hawaii Administrative Rule ("HAR") § 3-126-

42, SITA hereby requests a hearing for administrative review of the January 5, 2021 written determinations by the Department of Transportation, State of Hawaii ("DOT"), attached hereto as Exhibit 1, and further requests a decision by a Hearings Officer for the Office of Administrative Hearings finding and concluding the following:

4. That SITA was and is a responsive bidder for the Solicitation (the "**Contract**").
5. That DOT, in its letter of January 5, 2021, incorrectly denied the items of relief requested and point of protests made by SITA in its letter of September 21, 2020, attached hereto as Exhibit 2.
6. That SITA's bid proposal which included a breakout of the State excise taxes was a minor informality or mistake that should be corrected or waived by the DOT since doing so would result in the DOT awarding the contract to the lowest bidder without causing an unfair advantage over other bidders.

The bases for this Request for Hearing are set forth in Exhibits 1 and 2 hereto and in the following sections.

* * *

Hawaii Administrative Rule ("HAR") § 3-122-31(c)(1)(B) provides that a mistake in a bid may be corrected or waived if the mistake is a minor informality which shall not affect price. The informality or "mistake" was immaterial since the alteration of the bid form was obvious and evident from the face of SITA's bid. *Ted's Wiring Service, Ltd. vs. Hawaii Public Housing Authority*, State of Hawaii, PCH-2009-14.

* * *

SITA is the lowest responsible and responsive bidder for the Solicitation, should receive the award of the Contract.

See Exhibit 6 (emphasis in original.)

The Hearings Officer finds and concludes that Petitioner's Request for Hearing does indeed state **plainly and precisely** the facts and circumstances of the grievance, the laws and rules involved, and the relief sought. See Exhibit 6.

Accordingly, the Hearings Officer concludes that he has jurisdiction in this matter and DENIES Respondent's Motion to Dismiss for lack of jurisdiction.

Petitioner's bid was responsive

Both parties agree that the material facts are not in dispute. Petitioner submitted Exhibit 1 as part of its Bid. Exhibit 1 contains two (2) additional entries - "Taxes 13,824.74" and "Total 339,112.74" – below the "Total for Comparison of Bids" line. See Exhibit 1.

The law allows a procuring officer to reject nonresponsive bids. A bid is nonresponsive if it "does not conform in all **material** respects to the invitation for bids." See HRS §103D-302(h) and HAR § 3-122-97 (emphasis added.)

The issue for determination by this Hearings Officer is whether Respondent's determination that Petitioner's Bid was nonresponsive was proper. The more specific issue is whether the addition of "Taxes 13,824.74" and "Total 339,112.74" below the "Total for Comparison of Bids" line was a *material* nonconformity.

The intent of the Procurement Code, as expressed in the Senate Committee's Report, is to allow for *flexibility and common sense* which will *benefit the people of the state*:

This Bill lays the foundation and sets the standards for the way government purchases will be made, but allows for **flexibility and the use of common sense** by purchasing officials to implement the law in a manner that will be economical and efficient and will **benefit the people of the State.**"

See, *The Systemcenter, Inc. v. State Dept. of Transportation*, PCH 98-9 (December 10, 1998) as annotated in Hawaii Procurement Code Desk Reference at page 8 (2020 version) (Emphasis added.)

Saving public funds can sometimes outweigh *technical violations*.

A savings of \$21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of Hawaii Administrative Rules (“HAR”) §3-122-108(a) (footnote omitted) was not meant to cost the public bodies thousands of dollars by requiring acceptance of higher bids for mere **technical violations**.

See, *Standard Electric, Inc. vs. City & County of Honolulu et al.*, PCH 97-7 (January 2, 1998) as annotated in Hawaii Procurement Code Desk Reference at page 8 (2020 version) (Emphasis added.)

Typically, a bid rejected as nonresponsive is for *missing information*. For example, failure to list a subcontractor, or listing a subcontractor who did not have the requisite experience, omission of 10-foot shoulders on both sides of road, failure to include a forward wheelchair door, failure to list a specialty contractor and General did not possess the required specialty license, and omission of a required subsection of the Bid, even inadvertently. See generally, Hawaii Procurement Code Desk Reference, pages 47-51, 2020 version.

Petitioner’s reliance on *Ted’s Wiring*¹ is also persuasive. If anything, the facts of *Ted’s Wiring* are comparatively more *nonresponsive* than the facts of this case because the taxes and total were *omitted* from the bid in *Ted’s Wiring*, an obvious

¹ *Mistake in bid; minor informality may be waived*; Petitioner’s failure to specify the dollar amounts of the General Excise Tax and the Total Base Bid in its bid were mistakes that were obvious and evident from the face of the IFB; correction or waiver of those mistakes would allow Respondent to award the contract to the lowest bidder and would therefore be in Respondent’s best interest; and because correction or waiver of those mistakes would not affect price or any other material term of Petitioner’s bid, such measures would not provide Petitioner with an unfair advantage over the other bidders. For these reasons, Respondent should have waived these obvious mistakes or allowed those mistakes to be corrected pursuant to HAR §3-122-31(c)(1)(C). *Ted’s Wiring Service, Ltd. v. Hawaii Public Housing Authority*, PCH-2009-14 (July 6, 2009). See 2020 Hawaii Procurement Code Desk Reference at page 24.

mistake that the Hearings Officer found and concluded *should have been waived in the interest of the public.*

Looking at the subject Proposal Schedule, Exhibit 1, it's real clear that there are no omissions. If anything, SITA provided too much information, they did not have to breakout the taxes, but did, and admittedly wrongfully so. The Hearings Officer understands DOT's argument that the breakout of taxes "was not called for", they just wanted "one all-inclusive Total For Comparison of Bids." The Hearings Officer also understands DOT's argument that the breakout of taxes also affected unit prices. However, the Bid is not ambiguous. Petitioner did not submit two (2) bids. It's evident just by looking at the Proposal Schedule that Petitioner intended \$325,288.00 to be a subtotal, \$13,824.74 to be for Taxes and \$339,112.74 to be the grand Total. SITA's grand Total is over \$15,000,000.00 below Ford Audio's bid.

Indeed, Section 9.1 of the IFB does state: "the Contractor's bid price shall be **inclusive of all costs**, direct or indirect, **including all taxes**, required for the fulfillment of the Contract." (Emphasis added.) Petitioner's Bid *did include all taxes*, albeit on a separate line. Accordingly, the Hearings Officer concludes that the addition of "Taxes 13,824.74" and "Total 339,112.74" – below the "Total for Comparison of Bids" line did not affect price, quantity, delivery or any other material term of the IFB and, therefore, was not a *material* nonconformity. There was no evidence that Petitioner's Bid gave Petitioner an unfair advantage over other bidders, nor that Ford Audio's bid was disadvantaged by Petitioner's Bid. Respondent should have waived the obvious mistake. Respondent should have simply asked Petitioner to correct their Bid form to

include the taxes in their unit prices without affecting the grand Total. Respondent had over a year and three months to do so.

At the end of the day, the Procurement Code was meant to ensure that government purchases will be made in an economical and efficient manner that will *benefit the people of the State*. Here, a more flexible and a common-sense approach would have saved the public over \$15 Million thereby fostering public confidence in the integrity of the procurement system. The Hearings Officer concludes that Respondent's determination that Petitioner altered the Proposal Schedule is merely a "technical" violation, at best. Under the unique circumstances of this case, that alteration should not stand in the way of the public saving over \$15 Million in public funds. Furthermore, the Hearings Officer concludes that the addition of "Taxes 13,824.74" and "Total 339,112.74" – below the "Total for Comparison of Bids" line was *not* a material nonconformity. The Hearings Officer concludes that Respondent's rejection of Petitioner's Bid based on the *altered* Proposal Schedule was placing *form over substance* and an insufficient basis to disqualify SITA on responsiveness grounds.

The Hearings Officer concludes that Petitioner has established, even viewing the facts in the light most favorable to Respondent, that Respondent's determination that Petitioner's Bid was nonresponsive was improper. Accordingly, the Hearings Officer GRANTS Petitioner's Motion for Summary Judgment.

IV. REMEDY

The parties agree that although the contract was *awarded* to Ford Audio, there is *no signed contract*. The application of Remedies sections, HRS §103D-706 (Prior to Award) or HRS §103D-707 (After an Award), is dependent on whether the

contract has been *executed*. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431, 946 P.2d 1 (1997); *Jas. W. Glover, Ltd. v. BWS, PCH 2001-002* (August 7, 2001).

Since the contract has *not* been *executed*, pursuant to HRS §103D-706(1), the Hearings Officer has two options, cancellation or revision:

§103D-706 Remedies prior to an award. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (1) Canceled; or
- (2) Revised to comply with the law.

The term “revise” in the context of HRS § 103D-706 includes *remand and reconsideration*. *Arakaki v. State*, 87 Haw. 147, 952 P.2d 1210 (1998).

Petitioner asserts that cancellation is not in the best interest of the public and that the Hearings Officer should order Respondent to award the contract to Petitioner. Respondent asserts that neither option is in the best interest of the state and “objects” to both options - cancellation or revision.

The Hearings Officer concludes that Petitioner should be given the opportunity to have its proposal properly evaluated by Respondent. Accordingly, the matter is remanded to Respondent to reconsider Petitioner’s Bid in light of this decision. Notwithstanding Petitioner was the successful protestor, the Hearings Officer concludes that HRS §103D-706 does not expressly give the Hearings Officer authority to order Respondent to award the contract to Petitioner.

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V. DECISION

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

1. Petitioner's Motion for Summary Judgment is GRANTED, in part, on the issue of responsiveness, and DENIED in part, as to the remedy requested (order Respondent to award contract to Petitioner);

2. Respondent's Motion to Dismiss for lack of jurisdiction is DENIED;

3. Respondent's alternative Motion for Summary Judgment is DENIED;

4. The matter is remanded to Respondent for reconsideration of Petitioner's Bid in light of this Decision.

5. Each party shall bear its own attorneys' fees and costs; and

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

Dated at Honolulu, Hawaii: February 25, 2021.



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

*Hearings Officer's Findings of Fact, Conclusions of Law, and Decision;
In Re SITA Information Networking Computing USA, Inc. v. Department of Transportation, State
of Hawaii, PDH-2021-001.*

PROPOSAL SCHEDULE

MAINTENANCE OF FLIGHT INFORMATION DISPLAY SYSTEM AND PAGING
SYSTEM

ELLISON ONIZUKA KONA INTERNATIONAL AIRPORT AT KEAHOLE
Project No. BH2923-53

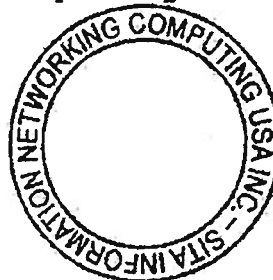
Item No. (a)	Qty. (b)	Description (c)	Unit Price (d)	Amount (b x d)
1	12 months	Monthly Maintenance and Associated Repairs of Flight Information Display System, And Paging System (Sections 10 and 11)	\$ 22,075.28 /mo	\$ 264,903.39
2	Allowance	Replacement of parts caused by abuse, vandalism, natural disaster, and elective, or upgrade work	Allowance	\$25,000.00
3	150 hours	Regular working hours per man-hr. (technician) for repair work caused by abuse, vandalism, natural disaster, and elective or upgrade work.	\$ 235.90 /hr	\$ 35,384.61
Total for Comparison of Bids (Items 1, 2, & 3)				\$ 325,288.00

NOTES:

Taxes 13,824.74

Total 339,112.74

1. Payment will be made on the basis of services performed and the unit bid price.
2. Refer to Sections 10 and 11 for requirements for servicing, maintaining and repairing of the FIDS and Paging System.



BH2923-53
PF-6

05/22/19

1.7

EXHIBIT 1

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII,

Appellant,

vs.

DEPARTMENT OF COMMERCE AND
CONSUMER AFFAIRS, OFFICE OF
ADMINISTRATIVE HEARINGS; RODNEY
K.F. CHING, HEARINGS OFFICER; and
SITA INFORMATION NETWORKING
COMPUTING USA, INC.,

Appellees.

CIVIL NO. 1CCV-21-0000270 (GWBC)

Agency Docket/Case No. PDH-2021-0001

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Oral Argument: March 30, 2021
Time: 10:30 a.m.
Judge: The Honorable
GARY W. B. CHANG

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-entitled agency appeal matter came on for oral argument hearing on March 30, 2021, at 10:30 a.m., before the Honorable Gary W.B. Chang, Judge of the Above-entitled Court; Appellant DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII being represented by Reuel S. Toyama, Esq., Deputy Attorney General, and Appellee SITA INFORMATION

NETWORKING COMPUTING USA, INC., being represented by Keith Y. Yamada, Esq., and Jeffrey M. Osterkamp, Esq. Also present at the hearing were Carrie Young, Esq., general counsel, Americas, for SITA, and Anthony Thien, Account and Sales Director for SITA, but they did not present any argument.

Upon review of the briefs filed by the parties, having heard the argument of counsel, being duly advised in the premises, and good cause appearing therefor, the court hereby respectfully issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

I. THE HEARING AND THE PARTIES

1. This case is an agency appeal, filed pursuant to Hawaii Revised Statutes (“**HRS**”) § 103D-710, of a decision rendered by hearings officer Rodney K.F. Ching (the “**Decision**” and the “**Hearings Officer**”) in a Department of Commerce and Consumer Affairs, Office of Administrative Hearings (“**DCCA**”) administrative hearing (the “**Administrative Hearing**”) held pursuant to HRS § 103D-709, a section of the Hawai‘i Public Procurement Code (the “**Procurement Code**”).

2. The Department of Transportation, State of Hawaii (“**DOT**” or, as referenced in the Administrative Hearing, the “**Respondent**”) is the Appellant herein.

3. SITA Information Networking Computing USA, Inc. (“**SITA**” or, as referenced in the Administrative Hearing, the “**Petitioner**”) is an Appellee herein. DCCA and the Hearings Officer are the other Appellees but did not actively participate in the instant Appeal.

4. On March 30, 2021, after the submission by DOT of its Notice of Appeal to the Circuit Court, a Statement of the Case, an Opening Brief and a Reply Brief; and by SITA of a

Statement of the Case and an Answering Brief, this Court heard the oral argument by counsel for DOT and SITA regarding the issues raised therein.

II. PROCEDURAL HISTORY

A. The Solicitation

5. On March 21, 2019, the DOT issued a Notice to Bidders, Special Provisions and Specifications for the Maintenance of Flight Information Display System and Paging Systems at the Ellison Onizuka Kona International Airport at Keahole, Island of Hawaii, Project No. BH2923-53 (the “**Solicitation**” or the “**IFB**”; and the “**Project**”). Record on Appeal (“**ROA**”) Docket (“**Dkt**”) 22 at Exh. 7, p. 7.3.

6. The Solicitation provided that the bids for the Project would be received by the DOT Contracts Office and publicly opened and read on April 25, 2019. ROA Dkt 22 at Exh. 7, p. 7.3. The Solicitation also specifically provided that:

The State reserves the right to reject any or all proposals and to waive any defects in said proposals for the best interest of the public.

Id. at Exh. 7, p. 7.5.

7. DOT later issued Addenda Nos. 1 through 4, which, among other things, postponed the date of receipt of sealed bids until May 30, 2019 and provided a revised proposal page PF-6. *Id.* at Exh. 8, p. 8.1 - Exh. 11, p. 11.4.

8. A person or entity who is interested in submitting a bid must submit that bid using the state’s PF-6 form. That form has pre-printed blanks on which bid information to be filled to complete the bid. However, while the bidder is allowed to include taxes as part of the bid amount, there is no pre-printed line or place on PF-6 to indicate the taxes that are included as part of the bid amount. The bidder is left to “be creative” to figure out how and where on the PF-6 form to include taxes, such as general excise tax, which is assessed on all business income, such as the

amounts that the DOT will pay the successful bidder under a contract that is issued by DOT to the lowest responsible and responsive bidder.

9. On or before May 30, 2019, SITA timely submitted its bid proposal (the “**Bid**”), which included its Proposal Schedule, PF-6 dated May 22, 2019. ROA Dkt 20, Part 4 at 000088; ROA Dkt 20, Part 1 at 000016.

10. SITA submitted the Bid using the prescribed Proposal Schedule form. However, since there is no space on the PF-6 form to indicate where to include the amount for general excise taxes, SITA altered the form by adding a “Taxes” line and another “Total” line in the space on the PF-6 form that bore the pre-printed label: “Total for Comparison of Bids (Items 1, 2, &3),” as follows:

Total for Comparison of Bids (Items 1, 2, & 3)	<u>\$325,288.00</u>
<hr/>	
	Taxes 13,824.74
	Total 339,112.74

ROA Dkt 20, Part 1 at 000016.

This was a transparent and unmistakable way for general excise taxes to be included, particularly in light of the deficient and confusing PF-6 form on which DOT requires all bids to be submitted.

DOT opened the sealed bids on or about May 30, 2019.

11. The other bidder, Ford Audio-Video Systems, LLC (“**Ford Audio**”), submitted a bid price that was higher than both SITA’s subtotal amount (without GET) and SITA’s total bid price (with GET). ROA Dkt 20, Part 1 at 000003-000004, ¶ 2. That is to say, that Ford Audio’s bid was higher than both of SITA’s “total” bid price amounts on its PF-6 form of \$325,288.00 and \$339,112.74. See paragraph 10, *supra*.

B. Post-Bid Communications and SITA's Protest

12. In a September 26, 2019, letter to Jade Butay and Shaun Yamaki of the DOT, SITA described the following occurrences:

Shortly after submission, SITA was initially advised that it was the low bidder, but its Proposal Schedule was under review due to a minor addition in the line item "Total for Comparison of Bids". SITA had included a breakout of the State Excise Taxes to the Proposal Schedule. Approximately two weeks later SITA was advised that the Proposal Schedule was acceptable and that a Contract would be prepared and sent to SITA.

On September 19, 2019 SITA contacted the State to inquire about the contract preparation and was advised that the State had disqualified SITA for the minor addition and that the State intended to award the contract to the only other bidder, Ford Audio-Video Systems, LLC It is SITA's understanding and belief that the total cost of Ford's bid was higher than SITA's.

ROA Dkt 22, Exh. 2 at pp. 2.1-2.2. DOT did not dispute the representation that DOT initially advised SITA that it was the low bidder, that its bid was acceptable, and that a contract would be prepared and sent to SITA.

13. SITA's September 26, 2019, letter went on to assert that its proposal was responsive and that SITA intended to contest any determination to the contrary:

SITA maintains that its Proposal Schedule was accurate and complete with the required information to allow the State to compare its bid to any other bids submitted to determine the lowest bidder, which was the criteria for award in this solicitation. SITA did not include any conditions to its bid and SITA's Total Price was clear and unambiguous. SITA provides the best value to the State and its residents. SITA is also the best company to maintain these systems since they are SITA-owned products and were initially installed and maintained by SITA.

If it is confirmed that the Project was awarded to Ford, SITA intends to appeal the determination that its bid was conditioned and to protest the award of the contract to Ford. SITA understands that the State may use its discretion under 103D-701, HRS and § 3-126, HAR to overturn the

disqualification of SITA's bid and to award a contract to SITA. SITA's additional detail including the amount of Excise Tax was immaterial. Further, SITA was the lowest bidder and best qualified for this work, which benefits the State and its residents.

Id., Exh. 2 at p. 2.2.

14. On September 14, 2020, more than one year and three months after Bid opening, DOT informed SITA that its bid had been rejected for one reason: SITA's alteration of its Proposal Schedule to add the "Taxes" line item:

We regret to inform you that your bid submitted for the subject project on May 30, 2019, has been rejected.

The proposal submitted was altered by adding a separate line item for the state excise tax.

In accordance with Section 2.2 of the specifications, proposals may be rejected if they show any alterations of form, additions not called for, conditional bids, incomplete bids, erasures, or irregularities of any kind. In addition, Section 9.1 of the specifications indicate that the Contractor's bid price shall be inclusive of all costs, direct or indirect, including taxes.

Id., Exh. 3 at p. 3.1.

15. On September 21, 2020, SITA submitted its protest of the DOT's intention to award the contract to the other bidder, Ford Audio, and requested that the DOT exercise its discretion under HRS § 103D-701, Hawaii Administrative Rule ("HAR") 3-122-31(c) and *Ted's Wiring Service, Ltd. v. Hawaii Public Housing Authority*, PCH-2009-14 (July 6, 2009) (Appendix 5 to SITA's Answering Brief) to waive the minor informality of SITA's inclusion of general excise taxes.

SITA's bid contained a minor alteration to the bid proposal form which was obvious and evident from the face of the IFB. Correction of SITA's bid proposal form (to include the applicable GET) or a waiver by the DOT of the alteration would allow the DOT to award the contract to the lowest responsive and responsible bidder and would therefore be in DOT's best interest. SITA's correction of its bid proposal form or waiver of the minor alteration does not affect price or any other material term of SITA's bid, and would not provide SITA with an unfair advantage over the other

bidders. For these reasons, SITA respectfully requests that its protest be sustained and that it be awarded the contract as the lowest responsible and responsive bidder.

ROA Dkt 22, Exh. 4 at p. 4.3.

16. On January 5, 2021, more than one year and seven months after the Bid opening, the DOT responded to SITA's protest letter and claimed that the inclusion of GET resulted in two total amounts (\$325,288.00 and \$339,112.74) in its Proposal Schedule, rendering SITA's bid non-responsive. *Id.*, Exh. 5 at p. 5.2.

C. SITA's Request for Administrative Hearing

17. On January 12, 2021, SITA timely submitted its request for Administrative Hearing (the "**Request for Hearing**"), asking the Hearings Officer to find and conclude:

1. That SITA was and is a responsive bidder for the Solicitation.
2. That DOT, in its letter of January 5, 2021, incorrectly denied the items of relief requested and point of protests made by SITA in its letter of September 21, 2020.
3. That SITA's bid proposal which included a breakout of the State excise taxes was a minor informality or mistake that should be corrected or waived by the DOT since doing so would result in the DOT awarding the contract to the lowest bidder without causing an unfair advantage over other bidders.

ROA Dkt 20, Part 4 at 000093.

18. On January 21, 2021, the Hearings Officer presided over a pre-hearing conference, ROA Dkt 20, Part 7 at 000120-21, during which he asked the DOT whether Ford Audio had been contacted and whether Ford Audio intended to intervene in the request for administrative hearing. The DOT responded that it was unaware of whether Ford Audio would intervene.

19. On January 29, 2021, the Parties stipulated to submit motions for summary judgment and to consider the arguments of counsel at the administrative hearing scheduled for

February 2, 2021, without the need for oral testimony. *See* ROA Dkt 20, Part 1 at 000002. Following, the Hearings Officer approved the stipulation. *See id.*

20. On February 2, 2021, and February 17, 2021, the Hearings Officer heard SITA's Motion for Summary Judgment and DOT's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. *Id.* at 000002-000003.

21. On February 25, 2021, the Hearings Officer issued his Findings of Fact, Conclusions of Law and Decision (the "**Decision**"), sustaining SITA's protest, granting SITA's Motion for Summary Judgment and denying DOT's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. *Id.* at 000001-000020.

CONCLUSIONS OF LAW

I. STANDARD OF REVIEW

1. Under HRS § 103D-710(e), when reviewing an appeal from a decision made under HRS § 103D-709, the Circuit Court is to grant significant deference to the hearings officer's decision. The Circuit Court "may affirm the decision of the hearings officer ... or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion[.]

HRS § 103D-710(e)

2. “When mixed questions of law and fact are presented, an appellate court must give deference to the agency’s expertise and experience in the particular field.” *S. Foods Grp., L.P. v. Haw. Dep’t of Educ.*, 89 Haw. 443, 452, 974 P.2d 1033, 1042 (1999) (citation omitted). Thus, a hearings officer only abuses his or her authority where he or she “clearly exceeds bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.” *Id.* (citation omitted). When reviewing a final administrative decision, “*a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise* and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.” *Id.* at 453, 974 P.3d at 1043 (citation omitted) (emphasis in original).

3. Accordingly, a presumption of validity must be accorded to the Hearings Officer’s Decision, which could only be disturbed if DOT had met its “heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.” In order to meet that burden, DOT needed to show that the Decision was “clearly erroneous” or “arbitrary, ... capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

II. THE HEARINGS OFFICER HAD JURISDICTION TO DECIDE THE MATTER BEFORE HIM.

4. DOT has not expressed a colorable argument that the Hearings Officer lacked jurisdiction to determine SITA’s request for hearing.

5. Under HRS § 103D-709(i), “[t]he 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.” Accordingly, “hearings officers have jurisdiction and authority to act on protested solicitations and awards in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS § 103D-701.” *CARL Corp. v. State, Dept. of Educ.*, 85 Hawai‘i 431, 456, 946 P.2d 1, 26 (1997).

6. Further, as the Hearings Officer recognized at page 8 of the Decision, “HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder ... aggrieved ... by a determination of the chief procurement officer” under HRS § 103D-701. ROA Dkt 20, Part 1 at 000008.

7. As the Hearings Officer also determined at page 9 of the Decision, the “Request for Hearing does indeed state plainly and precisely the facts and circumstances of the grievance, the laws and rules involved, and the relief sought.” *Id.* at 000009.

8. Because SITA filed a protest under HRS § 103D-701; the protest was denied by DOT; and SITA filed a timely and sufficient request for administrative hearing under HRS § 103D-709, the Hearings Officer had jurisdiction to hear and rule on the issues raised in SITA’s Request for Hearing.

III. THE HEARINGS OFFICER DID NOT ERR BY CONCLUDING THAT DOT COULD HAVE AND SHOULD HAVE WAIVED OR CORRECTED SITA’S BIDDING ERROR.

A. SITA’s Alteration of the Proposal Form Was a Mistake.

9. As a general matter, the Procurement Code allows State agencies to establish rules and procedures that apply to bids for State projects. DOT was therefore authorized to set certain rules for the Solicitation, including a provision against altering the DOT’s Proposal Form.

10. By adding a new line for “Taxes” on the Proposal Form, SITA failed to comply with DOT’s provision against altering the DOT’s Proposal Form. DOT recognized SITA’s

mistake in its September 14, 2020, rejection of SITA's bid, when it stated that the Proposal Form "was altered by adding a separate line item for the state excise tax."

11. Nevertheless, no statute or rule exists prohibiting bidders from altering their bid forms.

12. Moreover, the court notes that DOT's PF-6 form is inadequate, deficient, and confusing, to the extent that fails to include a line or space for the bidder to indicate an amount for taxes to be included in the total bid amount for comparison. This invites a (1) lack of transparency¹ in the bid process and (2) confusion² on the part of bidders regarding how and where the bidder is to include taxes in its bid amount. Additionally, the inadequacy of DOT's PF-6 form also invited bidders such as SITA, who wish to be transparent about the effect of adding the general excise tax to its bid, to understandably alter DOT's PF-6 form in order to show the exact amount of general excise taxes that were added to the bid. It is patently unfair to penalize SITA for DOT's failure to

¹. During oral argument, DOT argued that a bidding party can arbitrarily factor in general excise taxes in the unit price values. DOT argued that it does not care what the bidder indicates for its unit price. However, this kind of cavalier attitude by DOT invites padding and manipulating a bid by artificially inflating or deflating the unit price to any amount, regardless of what the actual estimated unit price actually may be. This undermines the ability of one examining a bid to determine how legitimate the values the bidder is using when it submits its bid. Clever bidders may exploit this "flexibility" in the bid process to use the change order process to eventually increase the successful bidder's costs (and thereby increasing its profits and the cost of the project to the state). This could lead to a bidding process that lacks transparency and public confidence, thereby corrupting the bid process.

². All bids were required to be submitted on the PF-6 form. The DOT required all taxes to be included in any bid that was submitted. However, the DOT did not provide any space or line on the PF-6 form on which to indicate the amount of taxes that were to be included in the bid. This resulted in confusion to a bidder regarding how and where on the PF-6 form to indicate the taxes that are included in the bid, all because DOT failed to provide a means and method of clearly including the taxes it required to be stated in the bid. It appears to the court that SITA did a reasonable and transparent thing to expressly indicate in an available space on the PF-6 form, the amount of general excise taxes that are assessable to the project price would affect the bid price, instead of burying those taxes in some undisclosed, hidden amount somewhere on the PF-6 form.

make available to the bidders, an adequate bid form, particularly when DOT requires all bidders to exclusively use DOT's PF-6 form on which to submit its bid. The absence of a line or space on the PF-6 form to show the amount of taxes that are included in a bid is tantamount to setting a virtual trap for the unwary and then penalizing the victim of such a trap.

13. The question for the Court therefore is whether the Hearings Officer abused his authority by determining that DOT (a) could have and (b) should have corrected or waived SITA's obvious mistake despite the Solicitation's provision against altering the Proposal Form under the facts and circumstances of this case.

B. DOT Could Have Corrected SITA's Mistake.

14. HAR § 3-122-31(c) permits an agency, under certain circumstances, to correct "[a] mistake in a bid discovered after the deadline for receipt of bids but prior to award." Those circumstances include when a bidder makes "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." HAR § 3-122-31(c)(1)(C).

15. DOT has taken the position that it could not have corrected SITA's mistake because HAR § 3-122-31(c)(1)(B) provides for correction if "the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions." More specifically, DOT contends that the inclusion of the word "price" in Section 3-122-31(c)(1)(B) precludes correction in this case, because SITA's mistake was to add a new line for "Taxes," which is part of SITA's price.³

³. DOT's argument also fails because a common sense interpretation of SITA's Bid is that the amount of \$325,288.00 is not the final Bid total amount, but is a subtotal amount, to which simple arithmetic shows, when GET of \$13,824.74 is added, yields a grand total for comparison of bids in the amount of \$339,112.74. Viewed through this common sense lens, the addition of GET to SITA's Bid price did not affect SITA's final, clearly intended, Bid price, quantity, quality, delivery, or contractual conditions.

16. DOT's argument fails to account for two important issues. First, SITA has sought correction not under subparagraph (B) of HAR § 3-122-31(c)(1), but under subparagraph (C), which permits correction of certain mistakes that are "not allowable under subparagraphs (A) and (B)." ROA Dkt 22, Exh. 4 at p. 4.3. Second, the language of HAR § 3-122-31(c)(1) and the procurement decisions which follow that rule indicate that corrections may be made to items that relate to pricing so long as the corrections do not affect the bidder's overall price.

B.1. HAR § 3-122-31(c)(1)(C) Does Not Preclude Changes Affecting Price.

17. Under HAR § 3-122-31(c)(1)(C), "[t]he procurement officer may correct or waive the mistake if it is not allowable under subparagraphs (A) and (B), 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" (emphasis added).

18. Accordingly, although HAR § 3-122-31(c)(1)(B) only allows for corrections of "minor informalit[ies] which shall not affect price, quantity, quality, delivery, or contractual conditions," that provision is not relevant to whether a correction can be made under HAR § 3-122-31(c)(1)(C).

19. Instead, DOT could have corrected SITA's error if it was an "obvious mistake" and correction was "in the best interest of the purchasing agency and is fair to other bidders." HAR § 3-122-31(c)(1)(C). These issues will be addressed in Section C, below.

It is also significant to note that (1) DOT allows taxes to be included as part of the bid total and that (2) HAR § 3-122-31(c)(1)(B) must be read to mean that the mistake must not affect the bidder's **final** bid price, quantity, quality, delivery, or contractual conditions. It cannot be read to prohibit the affect upon a subtotal because that is the nature of a subtotal: to be affected by other values and yielding a different grand total.

Finally, there was no chicanery involved in SITA's Bid process because SITA's Bid was timely submitted and it included SITA's altered PF-6 form that showed all GET amounts SITA added to the subtotal and yielding a different grand total. There were no further amounts that changed or affected SITA's grand total amount that was clearly and transparently indicated on SITA's timely submitted PF-6 Bid form that was dated 5/22/19.

B.2. HAR § 3-122-31(c)(1) and Procurement Law Indicate That Changes to Price Terms Are Permissible to Effectuate the Bidder's Intended Bid Price.

20. SITA's basis for its Protest and its current argument is HAR § 3-122-31(c)(1)(C), not HAR § 3-122-31(c)(1)(B). ROA Dkt 22, Exh. 4 at p. 4.3.

21. Even under HAR § 3-122-31(c)(1)(B), however, an agency may correct pricing terms. It appears that Subparagraph (B)'s restriction against corrections that "affect price" is intended to prevent changes to the bidder's total intended bid price—not to changes in the way that the bidder *characterized* its bid price or expressed its components.

22. This is clear from the language of Subparagraph (B), which specified "transposition errors" as examples of mistakes that can be corrected. This is also clear from Subparagraph (A), which directs agencies to correct mistakes "attributable to an arithmetical error."

23. This point is further supported by various decisions from DCCA procurement officers, including *Site Engineering, Inc. v. DOT*, PCH-2003-12, pp. 6-9 (Sept. 15, 2003) (Appendix 1 to SITA's Answering Brief) (vacating DOT's denial of bid protest and directing DOT to correct a unit price from \$25,700 to \$257); *Philip G. Kuchler, Inc. v. DOT*, PCH-2003-21, p. 8 (Mar. 18, 2004) (Appendix 2 to SITA's Answering Brief) (DOT should have corrected bidder's proposed fee from .0084% to .84%); *Nan, Inc. v. DOT*, PCH-2008-9, pp. 9-10 (Oct. 3, 2008) (Appendix 3 to SITA's Answering Brief) (vacating DOT's denial of bid protest because DOT should have allowed bidder to submit the calculations behind its bid price shortly after bid opening even though solicitation required submission with the bid); *Jas. W. Glover, Ltd. v. City & County of Honolulu, Board of Water Supply*, PCH-2001-2, p. 12 (Aug. 7, 2001) (Appendix 4 to SITA's Answering Brief) (correcting a unit price from \$400 to \$40).

These authorities even allow corrections or waivers of mistakes to be made when the total bid prices are changed or affected. This is true where the mistakes are obvious and the change or waiver is in the best interest of the DOT and is fair to the other bidders. All of these conditions and criteria are met in the case at bar. The DOT should have changed or waived SITA's mistake in this case. That would reflect a fair and common sense approach to the instant circumstances.

C. The Hearings Officer Did Not Abuse His Discretion.

24. The above analysis shows that DOT clearly *could have* corrected SITA's mistake. The next step in the analysis is to determine whether the Hearings Officer erred by determining that DOT *should have* waived or corrected SITA's mistake.

25. It is not necessary or appropriate for the Court to decide *de novo* whether DOT should have corrected SITA's mistake. Rather, the Court must decide whether the Hearings Officer's determination to that effect "clearly exceed[ed] bounds of reason or disregard[ed] rules or principles of law or practice." *S. Foods Grp., L.P. v. Haw. Dep't of Educ.*, 89 Haw. 443, 452, 974 P.2d 1033, 1042 (1999) (citation omitted).

26. In his Decision, the Hearings Officer relied in part on *Ted's Wiring Service, Ltd. v. Hawaii Public Housing Authority*, PCH-2009-14, p. 4 (July 6, 2009) (Appendix 5 to SITA's Answering Brief), a DCCA procurement decision in which the Hearings Officer held that a bid was responsive even though the bidder entirely omitted numbers for GET and the Total Base Bid. The bid form required bidders to submit those items as well as the pre-tax Base Bid, but the bidder provided a dollar amount only for the Base Bid. *Id.* Nevertheless, the hearings officer determined that "[a] literal application of [the] definition leads to only one reasonable conclusion - that Petitioner's Total Base Bid consists of its Base Bid ... plus an additional 4.712%, for a Total Base Bid" *Id.* at pp. 3-4. Despite the fact that the omitted numbers were price terms, the hearings officer concluded that correction or waiver of those mistakes

would not affect price or any other material term of the petitioner's bid, and would not provide the petitioner with an unfair advantage over the other bidders. *Id.* at p. 4. Accordingly, the hearings officer held, under HAR § 3-122-31(c)(1)(C), that the agency should have corrected or waived the bidder's mistakes. *Id.*

27. The Hearings Officer therefore stated at pages 11 to 12 of his Decision that he found *Ted's Wiring Service* to be "persuasive":

If anything, the facts of *Ted's Wiring* are comparatively more *nonresponsive* than the facts of this case because the taxes and total were *omitted* from the bid in *Ted's Wiring*, an obvious mistake that the Hearings Officer found and concluded *should have been waived in the interest of the public*.

ROA Dkt 20, Part 1 at 000011-000012.

28. The Hearings Officer's reliance on *Ted's Wiring*, which involved similar facts and sound analysis, was reasonable and did not "disregard rules or principles of law or practice."

29. The Hearings Officer also reasonably concluded that SITA's mistake was obvious, that correction or waiver was in DOT's best interest and that correction or waiver is fair to other bidders. The Hearings Officer explained his reasoning on page 12:

Looking at the subject Proposal Schedule, Exhibit 1, it's real clear that there are no omissions. If anything, SITA provided too much information, they did not have to breakout the taxes, but did, and admittedly wrongfully so. The Hearings Officer understands DOT's argument that the breakout of taxes "was not called for", they just wanted "one all-inclusive Total For Comparison of Bids." The Hearings Officer also understands DOT's argument that the breakout of taxes also affected unit prices. However, the Bid is not ambiguous. Petitioner did not submit two (2) bids. It's evident just by looking at the Proposal Schedule that Petitioner intended \$325,288.00 to be a subtotal, \$13,824.74 to be for Taxes and \$339,112.74 to be the grand Total. SITA's grand Total is over \$15,000,000.00 [sic] below Ford Audio's bid.⁴

ROA Dkt 20, Part 1 at 000012.

⁴ The Hearings Officer should have stated that SITA's bid was \$15,000, not \$15,000,000, lower than Ford Audio's bid.

30. The Hearings Officer's analysis boils down to his conclusion that SITA "intended \$325,288.00 to be a subtotal, \$13,824.74 to be for Taxes and \$339,112.74 to be the grand Total" for comparison of bids. What SITA did in altering the PF-6 form to present in an extremely transparent manner, exactly how and in what amount the general excise taxes would affect the total bid price. With this conclusion and his accompanying analysis, the Hearings Officer did not "clearly exceed bounds of reason or disregard rules or principles of law or practice." Indeed, the Hearings Officer's conclusion is in accord with a common-sense interpretation of SITA's Bid. Common sense dictates that, by adding a line for "Taxes" and an additional "Total" line, SITA intended for the "Taxes" number to be part of its Bid price and for the additional "Total" number to represent its total Bid price.

31. It also appears that DOT initially adopted the same or a similar analysis as the Hearing Officer did, when DOT first advised SITA that its bid was acceptable, that SITA was the low bidder, and that a contract would be prepared and sent to SITA, only to subsequently reject SITA's bid nearly a year later. ROA Dkt 22, Exh. 2 at pp. 2.1 – 2.2.

32. Upon a simple glance at SITA's bid on the DOT's PF-6 form, one can easily see that (1) the PF-6 form lacks an express line or place where taxes that are part of the bid can be stated, (2) that the alteration of SITA's PF-6 bid form is clearly for the purpose of indicating the general excise taxes that comprise a portion of SITA's total Bid price, and (3) that simple math shows that the \$325,288.00 figure is a subtotal, to which GET in the amount of \$13,824.74 is added, and that the \$339,112.74 figure is the grand total that is to be compared with other bids.⁵

⁵. In order to overcome this common sense interpretation of SITA's PF-6 Bid, the DOT engages in a tortured analysis to justify its rejection of SITA's bid. It even conjured up an argument that the DOT must be able to determine by looking at items 1 and 3 of SITA's PF-6 Bid form what DOT must pay SITA each month of the 12 month contract. However, counsel for DOT was candid enough, to his credit, to state during the oral argument that DOT does not

33. The Hearings Officer's focus on common sense was proper. If there were any doubt that a common-sense interpretation of the Bid is preferred to a tortured, strained, illogical, and non-transparent construction, the Hearings Officer resolved the issue by citing relevant procurement decisions, and Procurement Code legislative history.

34. As cited by the Hearings Officer at page 10 of the Decision, a Senate Committee Report stated that the intent of the Procurement Code was to allow "for **flexibility** and the use of **common sense** ... in a manner that will be economical and efficient and will **benefit the people** of the State." ROA Dkt 20, Part 1 at 000010 (emphasis added). There is no question that DOT accepting a bid that is \$15,000 lower than the closest other bid for the subject project, does benefit the people of Hawaii.

35. In this case, flexibility and common sense dictate (a) the recognition that SITA intended to bid a total of \$339,112.74; (b) that SITA erred by altering the Proposal Form, but this obvious error was immaterial to its intended bid amount and to the determination of the low bidder; and (c) correction or waiver of the mistake was in the best interest of DOT and the State's taxpayers, and was in accord with the intent of the Procurement Code.

36. The court concludes that the Hearings Officer's decision was as follows:

- (1) The decision is not in violation of constitutional, statutory, or rule provisions;
- (2) The decision is not in excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
- (3) The decision was not made upon unlawful procedure;

actually engage in such an analysis of the amount of each month's payment to SITA under its bid. Instead, that idea of determining each month's payment was merely an argument that was created for the purpose of illustrating a point during the oral argument hearing, and not to represent to the court what DOT actually does in evaluating a monthly payment amount under SITA's Bid.

- (4) The decision is not affected by other error of law;
- (5) The decision is not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and
- (6) The decision is not arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

37. For the reasons set forth hereinabove, the Hearings Officer's Decision must and hereby shall be affirmed.

ORDER

1. The Court hereby **dismisses with prejudice** Appellant Department of Transportation, State of Hawai'i's instant Notice of Appeal to the Circuit Court.

2. The Court hereby **affirms** the Hearings Officer's Findings of Fact, Conclusions of Law, and Decision.

3. DOT shall **proceed** in accordance with the Hearings Officer's Decision.

DATED: Honolulu, Hawai'i, April 5, 2021 _____.

/s/ Gary W.B. Chang



GARY W. B. CHANG
JUDGE OF THE ABOVE-ENTITLED COURT

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII,

Appellant,

vs.

DEPARTMENT OF COMMERCE AND
CONSUMER AFFAIRS, OFFICE OF
ADMINISTRATIVE HEARINGS; RODNEY
K.F. CHING, HEARINGS OFFICER; and
SITA INFORMATION NETWORKING
COMPUTING USA, INC.,

Appellees.

CIVIL NO. 1CCV-21-0000270 (GWBC)

Agency Docket/Case No. PDH-2021-0001

JUDGMENT

Oral Argument: March 30, 2021
Time: 10:30 a.m.
Judge: The Honorable
GARY W. B. CHANG

JUDGMENT

In accordance with Rule 58 of the Hawaii Rules of Civil Procedure and pursuant to the Order Affirming Hearings Officer's Findings of Fact, Conclusions of Law and Decision Filed on February 25, 2021 in PCH-2021-01, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i, Judgment is hereby entered in favor of Appellees SITA INFORMATION NETWORKING COMPUTING USA, INC. ("SITA"),

PLEASE NOTE CHANGES

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, OFFICE OF ADMINISTRATIVE HEARINGS and RODNEY K.F. CHING, HEARINGS OFFICER, and against the Department of Transportation, State of Hawaii (“DOT”). The Hearings Officer’s Findings of Fact, Conclusions of Law and Decision filed on February 25, 2021 in PCH-2021-001, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai‘i, is hereby affirmed in all respects.

Any and all remaining claims, if any, are dismissed with prejudice.

DATED: Honolulu, Hawai‘i, April 5, 2021.

/s/ Gary W. B. Chang



GARY W. B. CHANG
JUDGE OF THE ABOVE-ENTITLED COURT

PLEASE NOTE CHANGES

JUDGMENT; Department of Transportation, State of Hawaii vs. Department Of Commerce And Consumer Affairs, Office of Administrative Hearings, et al., Civil No. 1CCV-21-0000270 (GWBC); First Circuit, State of Hawai‘i