

On October 14, 2011, Petitioner Soderholm Sales and Leasing, Inc. (“Soderholm”) filed its Motion for Summary Judgment in this matter. On October 14, 2011, Respondent City and County of Honolulu (“City”) filed its Motion for Summary Judgment. On October 18, 2011, Intervenor National Bus Sales & Leasing, Inc. (“National” filed its Joinder in the City’s Motion for Summary Judgment.

Oral argument on these motions was held on October 21, 2011. During the course of the argument, Soderholm withdrew certain claims, the Hearings Officer orally granted portions of the City’s Motion, and the Hearings Officer took under advisement Soderholm’s Motion and the remainder of the City’s Motion. On October 27, 2011, the Hearings Officer filed an Order Granting in Part and Denying in Part Soderholm Sales and Leasing, Inc.’s Motion for Summary Judgment; Order Granting in Part and Denying in Part City and County of Honolulu, Department of Budget and Fiscal Services’ Motion for Summary Judgment, a copy of which is attached hereto as Exhibit “A.”

On October 21, 2011, National filed its own Motion for Summary Judgment.

The matter then came on for further hearing on November 28, 2011. Thereafter, on December 1, 2011, the Hearings Officer filed an Order Granting in Part City and County of Honolulu Department of Budget and Fiscal Services’ Motion for Summary Judgment; Order Granting in Part National Bus Sales & Leasing, Inc.’s Motion for Summary Judgment; Order Denying in Part Soderholm Sales and Leasing, Inc.’s Motion for Summary Judgment, a copy of which is attached hereto as Exhibit “B.”

The hearing on November 28, 2011, was also an evidentiary hearing on two Soderholm Bid Protest Claims that had not been fully resolved in the two summary judgment orders, Exhibits “A” and “B” hereto.

At the hearing on November 28, 2011, Soderholm's Exhibits 1 through 17 were admitted without objection, Soderholm's Exhibits 18 through 20 were admitted over the objection of the City, and Soderholm's Exhibit 21 (created during the hearing at the request of the Hearings Officer) was admitted over the objection of the City. In addition, the City's Exhibits 1 through 22 were admitted without objection.

At the hearing on November 28, 2011, Soderholm called R. Erik Soderholm, Stanley Torres, and Troy Wong as witnesses. The City called Troy Wong as a witness.

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.

All Findings of Fact in the Order filed October 27, 2011, Exhibit "A" hereto, are incorporated by reference herein.

All Findings of Fact in the Order filed December 1, 2011, Exhibit "B" hereto, are incorporated by reference herein.

a. Soderholm Bid Protest Claim No. 9 –National's Weight Analysis is Deficient

1. In National's Theoretical Weight Analysis Worksheet, part of Soderholm's Exhibit 3, National used 150 pounds as an occupant's weight. The total weight of 13 occupants was then calculated by National to be $13 \times 150 \text{ pounds} = 2,350 \text{ pounds}$.

2. If National had used an occupant weight of 200 pounds as required by the specifications (See the Order filed October 27, 2011, Exhibit "A"), the total weight of the occupants would be $13 \times 200 \text{ pounds} = 2,860 \text{ pounds}$. This is an increase of 510 pounds over the weight National used in its theoretical Weight Analysis Worksheet.

3. Adding 510 pounds to National's stated Total Adjusted 4 Corner Weight of 12,275.50 pounds yields a new total weight of 12,785.5 pounds. This is less than the GVWR of 14,500 pounds.

4. Based on Mr. Soderholm's testimony, the critical figure in the calculation of total weight in this situation is the occupant's weight. Using an incorrect weight for a wheelchair occupant does not play a part in the relevant weight calculation. Because the vehicle's maximum number of occupants is less if occupants are in wheelchairs, it turns out that the maximum weight calculation assuming thirteen occupants is, in total, greater than the maximum weight calculation assuming wheelchair occupants.

5. Soderholm presented no evidence that the assignment of weight figures to the front axle or the rear axle in National's Theoretical Weight Analysis Worksheet was an inaccurate weight distribution.

Soderholm Bid Protest Claim No. 14 –National Specified the Wrong Wheelchair Lift Model

6. The Braun Millennium model wheelchair lift has a power roll stop while the Braun Century model wheelchair lift has a manually operated roll stop.

7. The Millennium model deploys even if it is not being used on a level surface. If the Century model is deployed where there are no sidewalks and/or the surface is uneven, its roll stop will not deploy unless it is manually deployed by holding it down. Otherwise, the Handi-van must move to another location where the surface is level before it can deploy the Century model.

8. In terms of operational purpose, the Millennium model is a better working wheelchair lift than the Century model.

9. A Millennium model wheelchair lift costs a few hundred dollars apiece more than a Century model wheelchair.

10. By means of the procurement in question in this proceeding, the City sought to purchase thirty-eight (38) vehicles, with one wheelchair lift per vehicle.

c. **The City's Award Letter of June 30, 2011**

12. The City's award letter dated June 30, 2011, Soderholm Exhibit 12, speaks of a "conditional award" to National in the following terms.

This is to notify you that the subject conditional award is being made to you in the contract amount of \$3,528,320.90 for the Furnishing and Delivery of Paratransit Vehicles to the Department of Transportation Services, City and County of Honolulu, Honolulu, Hawaii. This award is conditioned upon further administrative review.

Do not proceed with any part of the contract until you receive the final notice of the award, the contract documents for your execution and return, and finally, notification by the City agency to proceed.

13. Mr. Troy Wong is a procurement and specification specialist for the City. He has been in that position for three and one-half years. Mr. Wong was the author of the "conditional award" letter, Soderholm Exhibit 12.

14. The City uses a conditional award to encumber funds for the award of the contract.

15. The "further administrative review" referred in Soderholm Exhibit 12 was needed to make sure all compliance documents, such as insurance documents or Hawaii Compliance Express ("HCE") documents, were submitted by National. These are all responsibility documents.

16. There is nothing in the Hawaii Administrative Rules or in the specifications for this procurement that the City relies upon as defining or authorizing a "conditional award." A "conditional award" encumbered funds for the project in question.

17. Mr. Wong speculated, and only after prompting from an attorney questioning him, that his superiors in the City's procurement office might have other things to say about the National bid, but this speculation was at odds with Mr. Wong's testimony on direct examination by the City's attorney that "further administrative review" meant only submission of the necessary compliance documents. The Hearings Officer does not accord any weight to the subsequent speculative testimony by Mr. Wong about some unspecified action his superiors might or might not take.

III. CONCLUSIONS OF LAW

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

All Conclusions of Law in the Order filed October 27, 2011, Exhibit "A" hereto, are incorporated by reference herein.

All Conclusions of Law in the Order filed December 1, 2011, Exhibit "B" hereto, are incorporated by reference herein.

a. Soderholm Bid Protest Claim No. 9 –National's Weight Analysis is Deficient

1. Soderholm's Bid Protest Claim No. 9 is an amalgamation of several elements. Soderholm asserts in its bid protest letter of June 30, 2011 that:

(a) National's weight analysis shows a 14,050 GVWR when the specifications call for a 14,500 GVWR.

(b) National's weight analysis is deficient because it shows 150 pounds per person/driver when the specifications call for 200 pounds per person/driver, and it

shows 200 pounds per wheelchair when the specifications call for 400 pounds per wheelchair.

(c) National's submittal shows a 158" wheelbase when the specifications call for a 186" wheelbase. (This portion of Soderholm's bid protest was withdrawn. See the Order filed October 27, 2011, Exhibit "A" hereto.)

2. The Order of October 27, 2011, Exhibit "A" hereto, dismissed Soderholm's claim insofar as it pertained to the use of a 14,050 GVWR instead of a 14,500 GVWR. At the hearing on November 27, 2011, Mr. Soderholm asserted without sufficient explanation that the difference between these two figures was not a typographical error and that National's use of the 14,050 pound figure made their bid nonconforming. However, this issue had already been decided against Soderholm in the Order of October 27, 2011 (and Soderholm did not request reconsideration of the ruling on this issue).

3. While National did not use the correct amount for a passenger's weight in its Theoretical Weight Analysis Worksheet, use of the correct weight for a passenger did not result in an increase in total vehicle weight such that the newly calculated total weight exceeded the maximum GVWR set by the specifications.

4. While National's bid did not conform to the specifications when it utilized the incorrect weight for passengers in its Theoretical Weight Analysis, this nonconformity was not material and did not render National's bid nonresponsive.

Soderholm Bid Protest Claim No. 14 –National Specified the Wrong Wheelchair Lift Model

5. Soderholm correctly points out that National's bid was ambiguous on this issue. On the one hand, it stated the wheelchair lift would be supplied "as specified," and a

Braun Millennium model was specified. On the other hand, its bid materials stated it would supply a different product, a Braun Century model, that was not specified and was not an approved equal. Under Southern Foods Group, L.P. v. State, 89 Haw. 443, 457, 974 P.2d 1033, 1047 (1999), an ambiguous bid does not conform to the requirements of the specifications.

6. The evidence at the hearing established that the difference between the two Braun models was significant in terms of quality and price.

7. The difference between the two Braun models establishes a material nonconformity as defined by the Southern Foods Group case and renders National's bid nonresponsive.

c. The City's Award Letter of June 30, 2011

8. Hawaii Administrative Rule ("HAR") §3-126-1 defines award as "the written notification of the [City's] acceptance of a bid or proposal, or the presentation of a contract to the selected offeror."

9. HRS §103D-310(c) on "Responsibility of Offerors" provides in relevant part that offerors "upon award of contract, shall comply with all laws governing entities doing business in the State ... [and] shall produce" documentation demonstrating such compliance. However, the fact that the successful offeror has certain duties, which are mandatory, after award of the contract does not diminish the fact that there has been an "award," i.e. an written notice of acceptance of the offeror's proposal. HRS §103D-310(c) specifically states that it applies to competitive sealed bidding pursuant to HRS §103D-302.

10. HAR §3-122-112 provides for the submission of specifically named documents in order for an awardee to demonstrate compliance with HRS §103D-310(c). The

fact that this occurs after award again does not change the fact that an award has been made. There is nothing inherently contradictory in requiring a winning bidder or offeror to accomplish certain actions after an award has been made.

11. The “conditional” phrasing in the City’s letter of June 30, 2011, Soderholm’s Exhibit 12, refers to conditions that must be met subsequent to an award.

12. The City’s letter of June 30, 2011, Soderholm’s Exhibit 12, was an “award” within the meaning of HAR §3-126-1.

IV. REMEDY

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. HRS §103D-709(f). In the present case, the Hearings Officer has determined that the determinations of the City’s designated procurement official are not in accord with the statutes, regulations, and terms and conditions of the solicitation.

Accordingly, the Hearings Officer must determine an appropriate remedy.

A. The Hearings Officer Will Not Affirm the Contract in the “Best Interests” of the City

Where the Hearings Officer determines that the procurement was deficient with respect to the standards set forth in HRS §103D-709 (f), HRS §103D-707 provides that “where that determination is made after an award, the contract may be ratified or terminated.” Carl Corporation v. State of Hawaii, Department of Education, 85 Haw. 431,

455, 946 P.2d 1, 25 (1997). In this case, National urges that ratification or affirmance of the contract would be “in the best interests of the [City].” HRS §103D-707(1)(a). For purposes of this section of the Decision, the Hearings Officer will assume that HRS §103D-707 defines the applicable remedies.

Under the Carl Corporation decision, the factors enumerated in HAR §3-126-38(4) are among those considered when making a “best interests” determination. 85 Haw. at 19, 946 P.2d at 20. Those factors are:

- A. The costs to the [City] in terminating and resoliciting
- B. The possibility of returning goods delivered under the contract [not pertinent here since no vehicles have been delivered]
- C. Progress made toward performing the whole contract [not pertinent here because there was no evidence of any contract performance prior to the filing of the protest]; and
- D. The possibility of obtaining a more advantageous contract by resoliciting

The above factors are not exclusive. “[C]onsideration must also be given to the State’s interest in achieving the purposes of the procurement code, which are revealed by its legislative history.” Id., 85 Haw. at 25, 946 P.2d at 455. Those purposes are to provide for the fair and equitable treatment of all persons dealing with the government procurement system, foster competition among vendors while ensuring accountability, fiscal responsibility, and efficiency, and increase public confidence in the integrity of the procurement system. 85 Haw. at 25-26, 946 P.2d at 455-456.

National asserts the following reasons support its contention that the award to National should be ratified: (1) National promised to provide vehicles “AS SPECIFIED” for almost \$430,000.00 less than Soderholm’s bid; and (2) the City will lose federal funds if National’s contract is terminated.

As determined in the October 21, 2011 Order, Exhibit “A” hereto, as well as the additional Findings of Fact and Conclusions of Law herein relating to Soderholm Bid Protest Claim No. 14, National’s bid did not unequivocally promise to supply vehicles “AS SPECIFIED.” Instead, it could be read as committing to supply vehicles of a lesser quality than specified by the City with increased performance and/or safety problems. Ratification of such a contract would not be in the City’s best interest.

To avoid this conclusion, National says that it will supply conforming vehicles despite any statements to the contrary in its bid materials. National is thus, in essence, creating a version of a conditional bid, reserving to itself the right to offer to supply nonconforming vehicles, discover at bid opening the dollar amount of other bids, and then determine whether it wanted to supply conforming vehicles at its original bid price. This is very similar to the conditional proposal situation found unacceptable in In the Matter of Bombardier Transportation (Holding) USA, Inc. v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, PCX-2011-4 (August 5, 2011) at pages 14-15. Proceeding as National advocates here would compromise the integrity of the public bidding process and would not be in the public’s best interest.

National claims Finding of Fact No. 9 in the October 27, 2011 Order, Exhibit “A” hereto, “indicates” the City will lose federal funds if it must terminate the contract award to National. However, there was no such “indication” in that finding. Finding of Fact No. 9 merely reported that the potential loss of federal funds was the City’s stated reason for asking Soderholm to withdraw its first bid protest of June 20, 2011. There was no finding that the City’s stated reason was in fact accurate, and there was no evidence introduced in this proceeding regarding the current status of potential federal funding. Further, the City did not

mention potential loss of federal funding as a basis for any remedy it proposed in its Brief Regarding Applicable Remedies filed November 21, 2011.

Finally, the potential for the City paying more than National bid is not in itself a deciding factor in determining whether ratifying the contract is in the best interests of the City. If that factor alone were considered critical, all or virtually all post-award bid protests would result in ratification of the contract because to eliminate the lowest bid would almost always result in a higher price being paid.

The Carl Corp. decision noted that the further performance has proceeded, the more likely ratification may be appropriate (85 Haw. at 449, 496 P.2d at 19), but there has been no performance on the contract.

Therefore, assuming for purposes of discussion that HRS §103D-707 is applicable to this proceeding, for the reasons stated above the Hearings Officer finds and concludes that the contract with National should not be ratified or affirmed.

B. The Hearings Officer Declines to Remand the Procurement to the City

Soderholm asserts that HRS §103D-706, which refers to a “proposed award,” not HRS §103D-707, which refers to an “award,” applies and further advocates that “the proposed award” to National be cancelled but that the solicitation itself not be cancelled. In Soderholm’s view, this would result in a remand to the City for award to the responsive low bidder, which, in Soderholm’s view, is Soderholm.

The City also asserts that HRS §103D-706 applies but does not agree with Soderholm that the matter should be remanded in order to make an award to Soderholm. Instead, the City requests a remand so it can make a determination as to whether the solicitation should be cancelled or whether the remaining bid, i.e., Soderholm’s, should be evaluated.

Assuming for discussion purposes that HRS §103D-706 does apply, the Hearings Officer must determine if the solicitation or proposed award should be cancelled or whether the matter should be remanded to the City. HRS §103D-706 refers to pre-award remedies and states:

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

The decision in Arakaki v. State of Hawaii, 87 Haw. 147, 952 P.2d 1210 (1998) interpreted the term “revise” to include remand by the hearings officer to the procuring agency for reconsideration and an opportunity to correct errors in the bid where appropriate within the context of the legislative objective in the Procurement Code of providing fair and equitable treatment. In addition, by its citation to dicta in the Carl Corp. case, the Arakaki decision included within the term “revise” the ability to order the disqualification or elimination of a proposal resulting upon remand to the procuring agency in an award of the contract to another bidder or offeror.

The Hearings Officer concludes that in the present situation it would not be appropriate to order a “revision” of the solicitation by remanding the matter to the City for further consideration. Soderholm was the only other bidder, and the City has already determined Soderholm’s bid to be deficient. Soderholm’s bid did not provide the required four-corner weight analysis. City’s Responsive Statement, filed October 11, 2011, at page 19

and Exhibit J thereto. There is no evidence in the record that Soderholm ever protested this determination.¹

It was apparent from the testimony of Mr. Soderholm that the vehicle's gross weight and the distribution of that weight were important factors in this procurement. It was also apparent from his testimony that a four-corner weight analysis was not a mere pro-forma exercise.

Under the standards of the Arakaki decision, the remand order must be made in a context where the objectives of the Procurement Code can be met. In the specific situation under consideration in that case, a contractor with the lowest bid had neglected to submit a list of the bidder's qualifications and experience in the installation of swimming pool chemical treatment systems. The hearings officer in that case concluded that this was a matter of responsibility where contractors can normally present the necessary documentation after opening of the bids and would have remanded the matter to the procuring agency for a determination of responsibility but for the hearings officer's belief [determined to be mistaken by the Supreme Court] that this was not an available pre-award remedy.

The situation here is different. The stated defect in Soderholm's bid is a matter of responsiveness, not responsibility. As all parties have recognized throughout this proceeding, responsiveness is determined at the time of bid opening and defects in terms of responsiveness normally cannot be remedied at a later date. It would be contrary to the purposes and objectives of the Procurement Code to order a remand here to allow consideration of a bid already determined to be deficient on its face.

¹ Soderholm's Brief Regarding Applicable Remedies, filed November 21, 2011, did not include any discussion of a possible award of bid preparation costs. In addition, Soderholm has not demonstrated that it "should have been awarded the contract" and thus does not qualify for an award of such costs under HRS §103D-701(g).

In addition, National points out that the solicitation awkwardly combined elements of a request for proposals with a request for sealed bids, while the City itself asserts that its own solicitation document was ambiguous.

Assuming that HRS §103D-706 does apply to these proceedings, the Hearings Officer finds and concludes that the remedy of a remand to the City for consideration of Soderholm's bid would not be appropriate and the Hearings Officer declines to order any such remand.

C. The Remedy Ordered Herein Would Essentially be the Same Whether Made Pursuant to HRS §103D-706 or HRS §103D-707

The parties herein have directly opposite views of the appropriate statute to apply when remedies are considered. This situation reflects the divergence of viewpoints within members of the legal profession who are involved in procurement protests as well as possible divergences of published opinions from different hearings officers in the Office of Administrative Hearings over the years. In the present case, there is no need to resolve the issue because the outcome would essentially be the same no matter which statutory provision is applied.

Assuming HRS §103D-707 is applicable, the Hearings Officer orders that the contract is terminated. Alternatively, assuming HRS §103D-706 is applicable, the Hearings Officer orders that the solicitation and/or proposed award is cancelled.

V. DECISION

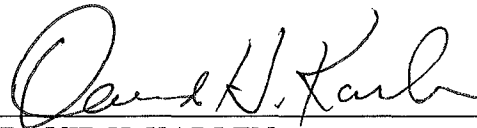
Based upon the foregoing Findings of Fact, Conclusions of Law, and discussion of remedies, as well as the Orders attached hereto as Exhibit "A" and "B," the Hearings Officer concludes and decides as follows:

1. The City's denial of Soderholm's procurement protest, in the City's letter of September 29, 2011, is vacated. Soderholm's procurement protest is sustained.

2. The contract awarded to National is terminated. Alternatively, the solicitation and the proposed award to National are cancelled.

3. All parties are to bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawai'i, DEC 28 2011.



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



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2011 OCT 27 P 3: 55

HEARINGS OFFICE

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

In the Matter of)	PCH-2011-10
)	
SODERHOLM SALES AND LEASING, INC.)	ORDER GRANTING IN PART AND DENYING IN PART SODERHOLM SALES AND LEASING, INC.'S MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING IN PART AND DENYING IN PART CITY AND COUNTY OF HONOLULU, DEPARTMENT OF BUDGET AND FISCAL SERVICES' MOTION FOR SUMMARY JUDGMENT
)	
Petitioner,)	
)	
vs.)	
)	
CITY AND COUNTY OF HONOLULU, DEPARTMENT OF BUDGET AND FISCAL SERVICES,)	
)	
)	Hearing Date: October 21, 2011
Respondent.)	
)	
and)	Senior Hearings Officer: David H. Karlen
)	
NATIONAL BUS SALES & LEASING, INC.)	
)	
)	
Intervenor)	
)	
)	

**ORDER GRANTING IN PART AND DENYING IN PART SODERHOLM SALES
AND LEASING, INC.'S MOTION FOR SUMMARY JUDGMENT; ORDER
GRANTING IN PART AND DENYING IN PARTY CITY AND COUNT OF
HONOLULU, DEPARTMENT OF BUDGET AND FISCAL SERVICES' MOTION
FOR SUMMARY JUDGMENT**

I. INTRODUCTION

On October 14, 2011, Petitioner Soderholm Sales and Leasing, Inc. ("Soderholm") filed its Motion for Summary Judgment in this matter. On October 14, 2011, Respondent

EXHIBIT A

City and County of Honolulu (“City”) filed its Motion for Summary Judgment. On October 18, 2011, Intervenor National Bus Sales & Leasing, Inc. (“National”) filed its Joinder in the City’s Motion for Summary Judgment.

Oral argument on these motions was held on October 21, 2011. During the course of the argument, Soderholm withdrew certain claims, the Hearings Officer orally granted portions of the City’s Motion, and the Hearings Officer took under advisement Soderholm’s Motion and the remainder of the City’s Motion. This Order, based on the record at the conclusion of oral argument on October 21, 2011, more fully sets forth the prior rulings and also sets forth the Hearings Officer’s rulings on the issues taken under advisement and stands as the formal order with respect to all of the aforesaid motions.

II. FINDINGS OF FACT

1. On or about April 28, 2011, the City issued a request for bids titled RFB No. RFB-DTS-386814 (the “RFB”) For the Furnishing and Delivery of Paratransit Vehicles to the City. City Exhibit B.

2. The RFB provided that the solicitation and resulting contract would be funded in part with federal assistance from the Federal Transit Administration (“FTA”).

3. As part of the solicitation process, all written questions from interested bidders were provided a response in written addenda.

4. On or about May 11, 2011, Soderholm submitted a letter to the City containing multiples requests for “questions, clarifications, suggestions, changes and approved equals.” Soderholm Exhibit 1. Items 2 and 3 of this letter concerned issues pertaining to licensing under HRS Chapter 437.

5. The City responded to this letter by issuing Addendum No. 6 to the RFB on or about June 6, 2011. This Addendum is part of the City's Exhibit B.

6. The City received National's bid on June 17, 2011. Soderholm Exhibit 10; City Exhibit D.

7. Bid opening occurred on June 20, 2011. At that time, the City determined that National was the apparent low bidder but intended to conduct an evaluation of the bid before making an award. City Exhibit C.

8. On June 20, 2011, and before a conditional award was made by the City, Soderholm submitted a written bid protest to the City. Soderholm Exhibit 2.

9. In response to this June 20, 2011 bid protest, the City requested that Soderholm withdraw its protest because it prevented the City from evaluating the National bid and the delay caused thereby would cause the City to lose federal funds necessary to pay for the procurement. As an accommodation to the City, Soderholm withdrew its June 20, 2011 bid protest on June 21, 2011. Soderholm Exhibit 11.

10. On June 22, 2011, by letter, the City notified National that it was rejecting the National bid because it failed to meet the minimum technical specification requirements in several areas. Soderholm Exhibit 3.

11. On June 23, 2011, National responded to the City's rejection letter of June 22, 2011. Soderholm Exhibit 4.

12. On June 28, 2011, the City responded to National's June 23, 2011 letter and stated that it would be maintaining its decision to reject National's bid. This letter accepted some of National's explanations of some items the City had earlier objected to, maintained the City's objections to some items, and added some new objections. Soderholm Exhibit 5.

13. On June 29, 2011, National submitted a written bid protest based on the City's June 28, 2011 letter maintaining its decision to reject the National bid. Soderholm Exhibit 6.

14. On June 30, 2011, the City reversed its decision to reject the National bid and notified National that the City was making a conditional award of the subject contract to National. Soderholm Exhibit 7; City Exhibit H.

15. Thereafter, but also on June 30, 2011, Soderholm submitted a written bid protest to the City protesting the June 30, 2011 conditional award to National. Soderholm Exhibit 8.

16. On September 29, 2011, the City provided Soderholm with its written response to Soderholm's bid protest of June 30, 2011, in which the City denied the bid protest. Soderholm Exhibit 9.

17. Soderholm appealed the City's denial of its bid protest and filed its Request for Administrative Hearing with the Office of Administrative Hearings, State of Hawaii Department of Commerce and Consumer Affairs on October 5, 2011.

Further Findings of Fact pertaining to specific issues in this bid protest will be set forth in those portions of the following section, "Conclusions of Law," discussing those specific issues.

III. CONCLUSIONS OF LAW

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

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving parties are 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).

Soderholm's protest letter of June 30, 2011, contained fifteen (15) claims. Those claims will be considered in the order of presentation in that letter.

1. Bid Protest Claim No. 1 – National Was Not a Licensed Dealer in Hawaii

Soderholm contends that National was required to be licensed as an out of state dealer pursuant to HRS §437-2(a) in order to bid on the RFB.

RFB Special Provision 6 stated in part:

The provisions of the State of Hawaii's Motor Vehicle Licensing Act shall be preempted by Section 3025 of SAFETEA-LU [a federal statute].

By letter dated May 11, 2011, to the City, Soderholm requested "questions, clarifications, suggestions, changes and approved equals" concerning several items in the RFB. Soderholm took issue with this portion of the Special Provisions and stated that the "City should clearly state in this bid that bidders are required to be licensed under HRS 437, just as do other counties in the State in their bus bids." Soderholm Exhibit 1, page 2. Soderholm's letter did not state that it was a procurement protest.

On page 2 of Addendum No. 6 to the RFB, dated June 8, 2011, the City responded at length to the above request by Soderholm, stating that federal law pre-empted Hawaii licensing law and concluding: "the City is not requiring a State license under HRS Chapter 437 as Federal grant rules mandate that restrictive State licensing requirements not be

included in the solicitation.” Soderholm did not challenge this until its first bid protest was submitted on June 20, 2011.

Soderholm’s Bid Protest Claim No. 1 is a challenge to the language and terms of the RFB. Soderholm first protested this language in its letter of June 20, 2011, entitled “Protest.” The City’s Motion asserted that this was not a timely protest.

In response to this claim of untimeliness, Soderholm asserts that its protest was indeed timely because it submitted its letter of May 11, 2011. Soderholm Opposition to City’s Motion, filed October 20, 2011, at page 2.

The federal pre-emption issue was reserved for a subsequent hearing in this proceeding to take place on November 8, 2011. At the hearing on October 21, 2011, the Hearings Officer asked Soderholm’s counsel if Soderholm would have any additional evidence to present on the timeliness issue if argument on that issue was held on November 8, 2011. Soderholm’s counsel replied that there would not be any documentation additional to the May 11, 2011 letter that is already in the record. Accordingly, the Hearings Officer concluded that the City’s untimeliness claim should be considered at the October 21, 2011 hearing.

Under HRS §103D-701(a) a protest as to the content of the solicitation had to be submitted within five working days of when Soderholm knew or should have known of this claim, and, in any event, it must be “submitted in writing prior to the date set for the receipt of offers.”

Since the RFB was advertised on April 28, 2011, Soderholm’s protest should have been filed within five working days, i.e., May 5, 2011. Its letter of May 11, 2011 cannot be considered a protest. The minimum requirements for a written procurement protest filed

prior to receipt of offers include, first, an attempt at an informal resolution and then a formal protest specifically identified as such. HAR §3-126-3. Here, the May 11, 2011 letter was, at most, the initial attempt at an informal resolution. However, even if it is considered a protest, it was not timely.

In addition, if the May 11, 2011 letter is considered a protest, Addendum No. 6 issued June 8, 2011 should be considered a denial of that protest. Assuming that Addendum No. 6, dated June 8, 2011, was the triggering point for submission of a protest because the City there stated unequivocally that it was not going to require a Hawaii license under HRS Chapter 437, the protest should have been submitted within five working days, i.e., June 16, 2011. In addition, the outside time limit for submitting a protest here was the date prior to bid submission, i.e., June 19, 2011. Soderholm's protest submitted June 20, 2011, was therefore not timely.

Accordingly, the City's motion for summary judgment is granted with respect to Soderholm's Bid Protest Claim No. 1.¹ Soderholm's summary judgment motion on this issue is denied.

2. Soderholm Bid Protest Claim No. 2 –Champion Bus, Inc., Did Not Have a Hawaii Motor Vehicle Manufacturer's License

Under HRS §437-2(a), motor vehicle manufacturers doing business in Hawaii must be licensed. Soderholm's Bid Protest Claim No. 2 alleges that the manufacturer identified in National's bid, namely Champion Bus, Inc., did not have a Hawaii license.

¹ The granting of the City's motion for summary judgment on this basis makes it unnecessary to consider the City's claim that federal law preempts HRS Chapter 437's licensing requirements or National's argument that the "best interests" of the City should not disqualify National's bid because of National's failure to have a Hawaii license. The Hearings Officer makes no statement or ruling, one way or the other, on these two arguments.

In its letter of inquiry dated May 11, 2011, Soderholm stated at page 2 that: “the City should also add that any bus manufacturers that a bidder is bidding must also be licensed under H.R.S. 437 at the time of the bid opening.” Soderholm Exhibit 1, page 2. As determined above, Soderholm’s letter was not a timely procurement protest.

On page 2 of Addendum No. 6 to the RFB, dated June 8, 2011, the City responded to the above request by Soderholm, by stating “Refer to the response given in Question No. 2.” Question No. 2, and its response, refer to Soderholm’s Bid Protest Claim No. 1 that National needed to have a Hawaii license. With respect to the bus manufacturer, therefore, Addendum No. 6 clearly states that the bus manufacturer did not have to have a Hawaii license for the same reason that bidders did not have to have a Hawaii license.

Soderholm’s Bid Protest Claim No. 2 is a challenge to the language and terms of the RFB. Soderholm first protested this language in its letter of June 20, 2011, entitled “Protest.”

Under HRS §103D-701(a) a protest as to the content of the solicitation had to be submitted within five working days of when Soderholm knew or should have known of this claim and, in any event, it must be “submitted in writing prior to the date set for the receipt of offers.”

For the same reasons that the City’s summary judgment motion was granted with respect to Soderholm’s Bid Protest Claim No. 1, the City’s motion for summary judgment is granted with respect to Soderholm’s Bid Protest Claim No. 2.² Soderholm’s summary judgment motion on this issue is denied.

² The granting of the City’s motion for summary judgment on this basis makes it unnecessary to consider the City’s claim that federal law preempts HRS Chapter 437’s licensing requirements or National’s argument that the award to National should be ratified because it is in the “best interests” of the City even if there is no federal preemption. The Hearings Officer makes no statement or ruling, one way or the other, on these two arguments.

3. **Soderholm Bid Protest Claim No. 3 – National is Not the Franchise Holder of Champion Bus, Inc., for Hawaii**

In this claim, Soderholm asserts that National is not the franchise holder, i.e., dealer, for Champion Bus, Inc., in Hawaii, and is thus in violation of HRS Chapter 437. As part of this claim, Soderholm asserts that National is therefore not authorized to provide service, parts or warranty support for Champion busses in Hawaii. This claim can be found at page 2 of Soderholm's bid protest letter of June 30, 2011. It does not refer to any specific provision of the RFB and appears to rely upon facts outside of National's bid submission.

The City asserts at page 27 of its motion that this assertion by Soderholm is factually incorrect. The City points to its Exhibit AA as demonstrating that National was in fact the franchise holder (dealer) for Champion Bus. Exhibit AA is a letter from National to the City dated July 30, 2011 to which is attached, among other things, a Champion Bus, Inc. Dealer Data sheet amending the Retail Sales and Service Agreement between Champion and National. It was signed by Champion on June 10, 2011, and signed by National on June 16, 2011. By its terms, it became effective July 1, 2011.

In its motion for summary judgment filed October 21, 2011, after the hearing on Soderholm's and the City's motions had concluded, National asserts that Soderholm has waived this claim because it failed to assert it in its Request for Administrative Hearing filed October 5, 2011. This issue should be decided before a decision on the merits of Bid Protest Claim No. 3 is reached. There would appear to be no need to render a decision on this claim in the protest letter if Soderholm did not make this claim part of its Request for Administrative Hearing. Accordingly, the City's Motion with respect to Soderholm Bid Protest Claim No. 3 remains under advisement.

4. Soderholm Bid Protest Claim No. 4 – Failure to Register with the DCCA

Soderholm asserts in Bid Protest Claim No. 4 that National was not registered with the Department of Commerce and Consumer Affairs (“DCAA”) when it submitted its bid. Soderholm further asserts that this is a requirement of Hawaii law that “can’t be cured later.” The City asserts that this is, in actuality, a challenge to the terms of the RFP because Section 5 of the General Instructions to Bidders allows the successful bidder to submit its DCCA registration at the time of the award of the contract.

In its opposition to the City’s Motion, at page 3, Soderholm asserts that the issue is not one of the contents of the solicitation but one of misrepresentation: “Instead, SSL’s protest is made on the ground that National was not registered with the DCCA on June 17, 2011 when it submitted its bid, yet attested in the Proposal section of its bid that it was a ‘Compliant Non-Hawaii business, etc.’” This argument is amplified in a section entitled “National Misrepresented its DCCA Registration Status” on pages 16-17 of Soderholm’s opposition to the City’s summary judgment motion.

Soderholm also makes this misrepresentation claim part of its own summary judgment motion. The City argues in opposition that since this is a responsibility issue where compliance was not required until the time of contract award, marking an “x” in the box for “Compliant Non-Hawaii Business” in its bid submittal was not a misrepresentation by National because that status could be, and was, reached by the time of contract award.

The City further asserts in its summary judgment motion that this misrepresentation issue is a new issue not raised in Soderholm’s bid protest letter. Soderholm asserts at pages 3-4 of its opposition to the City’s motion that Bid Protest Claim No. 4 in its letter of June 30, 2011 adequately stated this issue.

In its motion for summary judgment filed October 21, 2011, after the hearing on Soderholm's and the City's motions had concluded, National asserts that Soderholm has waived this claim because it failed to assert it in its Request for Administrative Hearing filed October 5, 2011. This issue should be decided before a decision on the other challenges to Bid Protest Claim No. 4 are reached. There would appear to be no need to render decisions related to this claim in the protest letter, if it is indeed adequately stated in the protest letter, if Soderholm did not make this claim part of its Request for Administrative Hearing. Accordingly, the City's Motion and Soderholm's Motion with respect to Soderholm Bid Protest Claim No. 4 remains under advisement.

4. Soderholm Bid Protest Claim No. 5 – National Does Not Have a Proper Service Center in Hawaii

In response to the requirements of Section X, subsection (1) of the specifications, entitled "Service and Repair Facility," National listed Honolulu Ford and Sonny's Service and Repair and their addresses. Soderholm contended in its bid protest that Sonny's Service and Repair cannot do the required repairs at the listed address and does not have a proper license. The City contends that these objections go only to the question of responsibility and that a post-bid investigation determined that Sonny's Service & Repair was in fact properly licensed and could do the necessary repairs.

In its motion for summary judgment filed October 21, 2011, after the hearing on Soderholm's and the City's motions had concluded, National asserts that Soderholm has waived this claim because it failed to assert it in its Request for Administrative Hearing filed October 5, 2011. This issue should be decided before a decision on the merits of Bid Protest Claim No. 5 is reached. There would appear to be no need to render a decision on this claim

in the protest letter if Soderholm did not make this claim part of its Request for Administrative Hearing. Accordingly, the City's Motion with respect to Soderholm Bid Protest Claim No. 5 remains under advisement.

5. Soderholm Bid Protest Claim No. 6 – National Failed to Include a Corporate Resolution With Its Bid

Soderholm protested that National did not include a corporate resolution with its bid. The City first contends that Soderholm is really challenging the content of the solicitation by complaining that it should have, but did not, require a corporate resolution to accompany the bid. If so, then Soderholm's protest on this item is untimely because it should have filed a protest, at the latest, prior to the submission of its bid. The City also contends that Section 3 of the General Instructions to Bidders, entitled "Preparation of Bids," requires a corporate resolution only when the contract is being executed.

In its motion for summary judgment filed October 21, 2011, after the hearing on Soderholm's and the City's motions had concluded, National asserts that Soderholm has waived this claim because it failed to assert it in its Request for Administrative Hearing filed October 5, 2011. This issue should be decided before a decision on the merits of Bid Protest Claim No. 6 is reached. There would appear to be no need to render a decision on this claim in the protest letter if Soderholm did not make this claim part of its Request for Administrative Hearing. Accordingly, the City's Motion with respect to Soderholm Bid Protest Claim No. 6 remains under advisement.

6. Soderholm Bid Protest Claim No. 7 – National Did Not List a GET Tax Number

At the hearing on October 21, 2011, Soderholm withdrew this claim. Accordingly, the City's summary judgment motion with respect to this claim is moot.

8, Soderholm Bid Protest Claim No. 8 – National Misrepresented Its Bid Price Showing a “Sales Tax” and “MFEE fee” on The Bid

At the hearing on October 21, 2011, Soderholm withdrew this claim. Accordingly, the City’s summary judgment motion with respect to this claim is moot.

9. Soderholm Bid Protest Claim No. 9 –National’s Weight Analysis is Deficient

Soderholm’s Bid Protest Claim No. 9 is an amalgamation of several elements. Soderholm asserts in its bid protest letter of June 30, 2011 that:

- (a) National’s weight analysis shows a 14,050 GVWR when the specifications call for a 14,500 GVWR.
- (b) National’s weight analysis is deficient because it shows 150 pounds per person/driver when the specifications call for 200 pounds per person/driver, and it shows 200 pounds per wheelchair when the specifications call for 400 pounds per wheelchair.
- (c) National’s submittal shows a 158” wheelbase when the specifications call for a 186” wheelbase.

The City relies upon National’s responses to the Questionnaire included in the RFB. The Questionnaire for Technical Specifications in the RFB listed several components of the vehicles to be furnished and stated that a bidder’s response “as specified” meant that the bidder’s product would meet or exceed the bid specifications. The bidder was bound to meet those specifications, and any delivered product that did not meet those specifications would mean the bidder would be responsible for all costs relating to the corrective action necessary to make the vehicle compliant with the bid specifications. Outside of a few exceptions not

relevant here, National's response to the items in the Questionnaire was uniformly "AS SPECIFIED." The City, and National, argue that this response means that National's bid was responsive.

In making this argument, the City specifically disavows reliance upon any new information submitted by National after the bids were opened. While the parties look at National's post-bid submissions from different perspectives, they do presently agree that anything in those submissions that was not originally included with National's bid is not relevant to the determination of responsiveness. "Responsiveness is determined by reference to when [the bids] are opened..." Okada Trucking Co. v. Board of Water Supply, 101 Haw. 68, 75, 62 P.3d 631, 638 (Haw. App. 2002).

(a) Total GVWR of 14,050 pounds versus 14,500 pounds

In addition to responding to the Questionnaire, Item 4 of the Bidder Checklist required submittal of "Verification of the GVWR of the paratransit vehicle." Item 16 of the Bidder Checklist, furthermore, required submission of a weight analysis: "A four-corner weight analysis shall also be included, demonstrating that the finished paratransit vehicle shall not exceed any axle rating or the total GVWR of the chassis." In terms of the weight of the vehicle, therefore, bidders could not rely solely on stating "AS SPECIFIED" in response to items on the Questionnaire. Soderholm correctly interprets this type of specification as creating additional requirements over and above the Questionnaire. It should also be noted that the City agreed with this legal analysis in its letters of June 22, 2011 and June 28, 2011.

In its letter of June 22, 2011, the City initially rejected National's bid as nonresponsive (not meeting the minimum technical specification requirements) because, among other things, per Section 1, Bus Requirements and General Dimensions, in the

specifications, the vehicles were supposed to have a GVWR of 14,500 pounds and National's bid used a GVWR of 14,050 pounds. The City subsequently reversed itself on this point in its letter of June 28, 2011 when it accepted National's contention that the "14,050" figure was a typographical error.

Soderholm asserts that this was not a mere typographical error. Soderholm asserts that changing the GVWR in the weight analysis will alter the result of the analysis.

National's weight analysis sheet is Exhibit J to the City's Responsive Statement. The sheet shows two components of GVWR (from the front and rear axles). The "OEM FRT GAWR" is 5,000 pounds and the "OEM RR GAWR" is 9,500 pounds, so the total of the two components is 14,500 pounds. In reversing itself on this point, the City relied only upon documentation submitted with National's bid.

A typographical error is a waiveable mistake under HAR 3-122-31(c)(1)(B)(i) if the mistake is a minor informality that does not affect price, quantity, quality, delivery, or contractual conditions." The rule allows documentation to be submitted to demonstrate that a mistake was made, and in this case the documentation was part of the actual bid submittal itself.

The City has therefore sustained its initial burden on summary judgment of demonstrating that there was a mistake in National's bid that was waiveable and that correction of the typographical error rendered National's bid responsive on this point.

Soderholm has not effectively created any disputed issue of material fact on this portion of its bid protest. It asserts in a conclusory manner that changing the total weight from 14,050 pounds to 14,500 pounds will change the weight analysis, but it has not supported this assertion with any factual evidence and/or expert's opinion demonstrating that

this would in fact be the case. In addition, it has not submitted any factual evidence and/or an expert's opinion that any alleged change in the weight analysis under these circumstances would result in a material nonconformity in National's bid.

Accordingly, the City's motion for summary judgment with respect to Soderholm's claim of nonresponsiveness based upon the GVWR in National's bid being 14,050 pounds is granted, and Soderholm's summary judgment motion with respect to this claim is denied.

(b) Per person/driver and per wheelchair weights

The parties are not in dispute over what weights National used. The figures are stated on its weight analysis, Exhibit J to the City's Responsive Statement, and admitted in National's letter of June 29, 2011. As noted above, Item 16 of the Bidder's Checklist required submission of a weight analysis, a requirement that cannot be ignored even if National uniformly responded to the Questionnaire with "AS SPECIFIED."

The City first asserts at page 18 of its Responsive Statement and pages 32 and 33 of its summary judgment motion that the weight analysis specification did not specifically require using the figures of 220 pounds per person and 400 pounds per wheelchair.. It claims that National used "theoretical rates" which are the same as standard FTA rates.

The City admits that Section 20 (c) of the Special Provisions, entitled "Definitions," defines "SL (Seated Load)" load as 220 pounds for every passenger seating position and for the driver and 400 pounds for each wheelchair (or mobility aid securement location." The City asserts at page 33 of its motion that this definition is, however, irrelevant and did not specifically require these weights to be used in the weight analysis.

However, the City ignores Section 20(d) of the Special Provisions that defines "Gross Load" with the same figures: "200 lbs. for every passenger seating position and for the driver

and 400 lbs. for each wheelchair or mobility aid securement location provided.” In addition, Section 20(h) defines “GVWR” as: “(Gross Vehicle Weight Rated). Curb Weight plus Seated Load plus driver.”

Per the Bidder’s Checklist, bidders had to verify the GVWR and provide a weight analysis demonstrating that the vehicle did not exceed the GVWR of the chassis. A major component of GVWR is, by definition from Section 20 of the Special Provisions, “Seated Load,” and “Seated Load” is, by definition from Section 20 of the Special Provisions, calculated on the basis of 200 lbs. per passenger/driver and 400 lbs. per wheelchair. The RFB thus unequivocally requires use of the 200 lbs. and 400 lbs. figures in the weight analysis. The City certainly interpreted the specifications in this manner when it stated at page 3 of its June 28, 2011 letter that: “As specified in the Special Provisions, seating loads shall be 220 lbs. per seated passenger including driver and the 400 lbs. per wheelchair or mobility aid.”

National did not use these figures in its weight analysis, and its bid therefore did not conform to the RFB specifications.

On page 33 of its motion, the City backs away from an unequivocal statement that these weights were not required and instead asserts that they were not “clearly” required and that the solicitation is ambiguous. It then relies on a 1998 procurement decision to the effect that an ambiguous solicitation should be interpreted against the party drafting the solicitation.

While the general rule is that ambiguities in a government contract or solicitation are normally construed against the drafter, more recently the Hawaii Supreme Court has set forth an important exception to that general rule. In Foundation International, Inc. v. E.T. Ige Construction, Inc., 102 Haw. 487, 498-499, 78 P.3d 23, 34-35 (2003), the Court held that a

patent ambiguity on the face of the solicitation imposes a duty on the contractor to inquire and seek clarification before the contractor submits a bid.

In this case, if there is an ambiguity, as asserted by the City, it is a patent ambiguity on the face of the contract.³ National was under a duty of inquiry regarding that ambiguity and should have inquired prior to submitting its bid. Its failure to do so means that the ambiguity should be construed against National and not against the City (and the City should not be able to waive this principle of law in order to save National's bid). Construing the ambiguity against National is appropriate because Soderholm's interpretation of the RFB, although contrary to National's preferred interpretation, is reasonable and was actually adopted at one time by the City.

The City next asserts at page 18 of its Responsive Statement that if National had used the weights set forth in the specifications that the resulting GVWR would have been 13,585 pounds, and National would still meet the 14,500 pound maximum figure. There is no documentary explanation of these calculations and no showing that they are based on the floor plan submitted by National with its bid as compared to the revised floor plan submitted by National after the bids were opened. The lack of factual evidence supporting this assertion in the City's Responsive Statement is compounded by the City's failure to set forth this argument in either its motion for summary judgment or its opposition to Soderholm's motion.

On the other hand, Soderholm has not demonstrated in its motion that National's nonconformity on this point is a material nonconformity. It asserts that such is the case but

³ The Hearings Officer concludes that there is no ambiguity here. The discussion of ambiguity that follows is made solely as a basis for purposes of discussing the City's argument.

has not submitted any factual documentation demonstrating its assertion is correct. The City's letter of June 28, 2011 should be interpreted as saying that the nonconformity was material, but the letter contains no factual discussion demonstrating that such is the case.

It points out the nonconformity, but it does not specifically say why the nonconformity was material.

Based upon the above, the Hearings Officer concludes that the City's motion for summary judgment on this bid protest claim is denied. The Hearings Officer further concludes that Soderholm's motion for summary judgment has demonstrated National's bid did not conform to the RFB specifications on this issue. However, Soderholm's motion for summary judgment is, in the end, denied because it did not establish that this nonconformity was material. The issue of materiality will need to be determined at the evidentiary hearing presently scheduled for November 28, 2011.

c. Wheelbase

Soderholm's bid protest letter of June 30, 2011, at page 3 asserts that "building the bus on 158" wheelbase chassis will have too much overhang with too much weight on the rear axle. This will make the bus overweight on the rear axle in violation of FMVSS"

At the hearing on October 21, 2011, Soderholm withdrew this claim. Accordingly, the City's summary judgment motion with respect to this claim is moot.

d. National's bid listed specifications for nine different models

This claim is set forth on page 8 of Soderholm's Request for Administrative Hearing where it is asserted together with claims 9(a) through 9(c) discussed immediately above. At the hearing on October 21, 2011, Soderholm withdrew this claim. Accordingly, the City's summary judgment motion with respect to this claim is moot.

e. **National's bid specifies fixed regular straight back seats**

This claim is also set forth on page 8 of Soderholm's Request for Administrative Hearing where it is also asserted together with claims 9(a) through 9(c). At the hearing on October 21, 2011, Soderholm withdrew this claim. Accordingly, the City's summary judgment motion with respect to this claim is moot.

10. **Soderholm Bid Protest Claim No. 10 – National Improperly Took Exception to the Corrosion Resistant (Rustproofing/Undercoating) Requirement**

At the hearing on October 21, 2011, Soderholm withdrew this claim. Accordingly, the City's summary judgment motion with respect to this claim is moot.

11. **Soderholm Bid Protest Claim No. 11 – National Improperly took Exception to the Wheel Painting Requirement**

At the hearing on October 21, 2011, Soderholm withdrew this claim. Accordingly, the City's summary judgment motion with respect to this claim is moot.

12. **Soderholm Bid Protest Claim No. 12 – National Submitted a Floor Plan with a Rear Wheelchair Lift Instead of the Specified Forward Wheelchair Door**

The RFB's Technical Specifications, II. VEHICLE STRUCTURE, d. Wheelchair Lift-Equipped Entryway, state that the entryway for the wheelchair lift "shall be located aft of the cab area on the curbside of the vehicle." National's floor plan submitted with its bid locates the entry for the wheelchair lift at the rear of the bus. Items 5 and 15 of the Bidder Checklist required National to submit a proposed floor plan with detailed information. As with the weight analysis, this floor plan must be considered part of the bid and is not made extraneous by responding "AS SPECIFIED" to the Questionnaire.

Soderholm interprets “aft of the cab area” to be aft of the driver’s cab and at the front of the passenger area. The City initially agreed with this interpretation and its letter of June 22, 2011 notified National that National’s location at the rear of the bus made its bid nonresponsive.

National’s letter of June 23, 2011 acknowledged that its floor plan did not have a front lift location but claimed that there was no cost difference between that location and National’s rear lift location. In its letter of June 28, 2011, the City repeated its rejection of National’s bid and stated that changing the wheelchair entry location on National’s submittal would be a major structural change and that it was unclear if this change would pass the STURRA test.⁴

National subsequently submitted a revised floor plan that relocated the wheelchair lift entry to the front of the passenger area. Such post-bid modifications are precluded by Section 9, entitled Modifications, as set forth in Addendum No. 7 of the RFB. In its summary judgment motion, the City does not rely on this post-bid modification. Instead, the City reversed course from its previous letters and now claims that National’s initial location of the wheelchair lift entryway met the requirements of the specification because it was literally “aft of the cab area”

In the context of these specifications, the term “aft of the cab area” means rearward of or after the cab area. It does not mean the back, or “aft,” of the vehicle, because that is not what the specification says. Soderholm’s interpretation of the term to mean just after the cab area is a logical and reasonable interpretation. Initially, the City twice agreed with Soderholm’s interpretation.

⁴ STURRA is the federal Surface Transportation and Uniform Relocation Assistance Act.

The City now maintains, however, that “aft of the cab area” does not define how far after the cab area “aft” can be. Soderholm countered with undisputed evidence that the standard interpretation of “aft of the cab area” in the business or industry supplying paratransit vehicles means directly behind the cab area. The City counters that the RFB did not say this and that industry standards cannot be imported into the RFB, citing the recent decision of Sumitomo Corporation of America v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, PCX-2011-5 (August 13, 2011) at p. 41, ¶ 7.

The portion of the Sumitomo opinion cited by the City pertains to a claim that past performance should have been part of a larger price realism or price reasonableness analysis. In the RFP in question in that case, past performance was not listed as an evaluation criterion for scoring either price realism or price reasonableness. Id. at p. 41, ¶ 4. In essence, the protestor in that case was asserting that this criterion should have been included in the terms of the RFP relating to evaluation criteria for price realism and price reasonableness.

Here, in contrast, Soderholm is not challenging use of the term “aft of the cab area” or alleging that some other term should have been used. Instead, it is advocating an interpretation of a contract term (indeed, an interpretation previously adopted by the City). As the Sumitomo decision held, advocacy of an interpretation of a contract term does not require a bid protestor to file its claim prior to the submittal date of the bids or offers. See the Sumitomo decision at page 45, ¶¶26-27, 29-30

The City has now essentially asserted that the provisions of the RFB at issue here are ambiguous on their face.⁵ This has two consequences. First, it allows the undisputed evidence of industry standards to be utilized in interpreting the ambiguous terms. Second,

⁵ The Hearings Officer does not agree that such is the case but will assume for discussion purposes only.

due to the absence of a pre-bid inquiry by National on the ambiguous terms, the ambiguity is to be construed against National. Soderholm has set forth a reasonable interpretation, one that at one time was accepted by the City.

The Hearings Officer concludes that National's bid did not conform to the specifications on this issue.

Bids that do not conform in all material respects with the RFB specifications are nonresponsive. A material nonconformity is one that affects price, quantity, or quality. It goes to the substance of the bid or works an injustice on other bidders. Southern Foods Group L.P. v. State, 89 Haw. 443, 934 P.2d 1033 (1999).

The Declaration of R. Erik Soderholm submitted with Soderholm's summary judgment motion establishes at Paragraphs 9 and 10 that all Handi-Vans have a forward wheelchair entry due to the frequency of use of the entry. A rear wheelchair entry as such as National's is too time consuming, critically interferes with scheduling of paratransit vehicle services, and is much less safe. Soderholm has therefore established that the nonconformity here is material.

Accordingly, Soderholm's motion for summary judgment on this bid protest claim is granted, and the City's motion for summary judgment on this bid protest claim is denied.

13. Soderholm Bid Protest Claim No. 13 – National Submitted Plans for a Rear Door That is Not Specified or Wanted

National's bid included a vehicle layout and schematic drawing that depict a third ambulatory door in the rear of the vehicle. Items 5 and 15 of the Bidder Checklist required National to submit a proposed floor plan with detailed information. As with the weight

analysis, this floor plan must be considered part of the bid and is not made extraneous by responding “AS SPECIFIED” to the Questionnaire. The City’s letter of June 22, 2011 stated that the provision of a rear door was materially nonresponsive because specification Section II. Vehicle Structure. E. Ambulatory Entrances required two ambulatory entrances, neither of which were in the rear of the vehicle.

In response, National submitted a floor plan with its letter of June 23, 2011 that showed two entrances, none of which were in the back. The City’s letter of June 28, 2011 accepted this “clarification.” In addition, the City relied on this “further confirmation” from National when denying Soderholm’s bid protest. City’s letter of September 29, 2011 at page 9.

In its summary judgment motion, Soderholm challenges the City’s reliance on the post-bid floor plan submitted by National. In its motion for summary judgment, the City does not rely on this floor plan—its argument at pages 21-22 of its motion is that National’s bid met the specifications because the specifications did not say that “only” two doors were required. In its opposition to Soderholm’s motion, at pages 8-9, the City claims its evaluation of responsiveness was not based upon revised drawings received after bid opening and claims that it is relying solely on the language of the RFB.

While the record indicates that the City impermissibly relied in part on the post-bid National drawing in rejecting Soderholm’s bid protest, it now relies solely on the language of the RFB. The motions for summary judgment will be evaluated on that basis.

The RFB specifications stated: “There are two ambulatory entrances on each vehicle: a driver’s entrance and a passenger entrance.” This is a clear statement that there are only two entrances. “There are two ...entrances” means there are two. The phrase cannot be read

as saying “there are a minimum of two entrances.” This interpretation is bolstered by the last portion of the specification that defines the two entrances. When “there are” two entrances and those two entrances are defined, it is unreasonable to read the specification as saying there “could be” an additional entrance of an unspecified type. Contract or solicitation terms are normally interpreted according to their plain, ordinary, and accepted sense in common speech. This principle of interpretation applied here means the RFB required two entrances and did not allow bidders the freedom to add in an additional entrance.

In addition, Soderholm is not challenging the contents of the solicitation such that it was required to file a protest no later than the day prior to submission of its bid. It is raising a protest to the interpretation of contract terms which, as noted above, does not require a pre-bid protest.

The provision of a third door in the rear of the vehicle is a material nonconformity and National’s bid was nonresponsive on this portion of the solicitation.

Accordingly, the City’s Motion for Summary Judgment on this issue is denied and Soderholm’s Motion for Summary Judgment on this issue is granted.

14. Soderholm Bid Protest Claim No. 14 –National Specified the Wrong Wheelchair Lift Model

Soderholm devotes one paragraph on page 14 of its summary judgment motion (at the end of its discussion of Bid Protest Claim No. 12) to claiming that National’s bid was nonresponsive because it failed to specify the correct wheelchair lift. The City’s opposition to Soderholm’s motion at pages 7-8 devotes almost two full pages to discussion of this claim. Accordingly, Soderholm provided adequate notice that this claim was part of its summary judgment motion.

Soderholm points out that in Section 24 of the specifications, as set forth in Addendum No. 6, a Braun Millennium or approved equal wheelchair lift was required.

In addition, Item 2 of the Bidder Checklist required National to submit manufacturer's detailed specifications of the vehicles and components being offered. As with the weight analysis, this lift specification must be considered part of the bid and is not made extraneous by responding "AS SPECIFIED" to the Questionnaire. While National stated "AS SPECIFIED" in the pertinent section of the Questionnaire and made no request for an approved equal, its bid technical specifications list a Braun Century 403-404 lift package.

At page 7 of its opposition to Soderholm's motion, the City admits that National attached a "tranche" of general specifications and promotional material with its bid, including a document indicating a lower model Braun wheelchair lift. The City asserts that it is not obligated to "sift through" all the attachments to a bid if the bid itself clearly establishes responsiveness. The City asserts that form should not be elevated over substance and cites Starcom Builders, Inc. v. Board of Water Supply, PCH-2003-18 (October 13, 2003) in support of its position.⁶

In the Starcom case, the hearings officer held that failure to make a pre-bid site visit, despite requirements in the specifications to do so, did not render the bid nonresponsive because the bidder was still obligated to perform the construction contract exactly as required by the contract. Here, however, part of National's bid is asserting that it will not perform the contract as required. The specification of the lift is included in a list of "Challenger Standards" and National was going to supply the "Champion Challenger" model from Champion Bus, Inc. The document in question, isolated as the City's Exhibit G, was part of

⁶ A similar position, with less explanation, is set forth at pages 24-25 of the City's summary judgment motion.

National's bid submittal (the City's Exhibit D), and is not mere surplusage. It cannot be denigrated, as the City attempts to do, as just a bunch of promotional materials to be sifted through.

Ironically, the City specifically relied on this Exhibit G at page 20 of its Response to the Request for Administrative Hearing. There, the document was used to show that National specified the bus model it was offering, countering Soderholm's charge that National was ambiguously offering up to nine different models. The City is hard pressed to assert the document was important in that context but is suddenly unimportant when the document demonstrates that National's bid is nonresponsive in another context. This is a critical document raising a question of responsiveness, not a question of form over substance.

Soderholm correctly points out that National's bid was ambiguous on this issue. On the one hand, it stated the wheelchair lift would be supplied "as specified." On the other hand, its bid materials stated it would supply a different product that was not specified and was not an approved equal. Under Southern Foods Group, L.P. v. State, 89 Haw. 443, 457, 974 P.2d 1033, 1047 (1999), an ambiguous bid does not conform to the requirements of the specifications.

The record, however, does not permit a determination as to whether or not this nonconformance was material. The City's admission that this was a "lower model" from the same manufacturer as specified is not enough to establish the materiality of the differences between the two models. Without more information, the Hearings Officer cannot determine if the difference in models establishes a material nonconformity as defined by the Southern Foods Group case.

Accordingly, the Hearings Officer concludes that the City's motion for summary judgment on this issue is denied. The Hearings Officer further concludes that while Soderholm established that National's bid did not comply with the RFB specifications, it failed on this motion to establish that the nonconformity was material and therefore its motion on this issue should also be denied. An evidentiary hearing on the issue of materiality will be necessary.

15. Soderholm Bid Protest Claim No. 15 – National Specified the Wrong Type of Radio.

In its response to the RFB specifications for the Radio Handset and Control System, National's bid stated only that it was providing a "Radio Two Way Prep," "Voice and Data Antenna and Installation," "Data Equipment Slide Tray," and "Harris Data Equipment." On page 2 of its letter of June 22, 2011, the City informed National that National's bid submittal did not contain enough information to enable the City to evaluate whether the specified radio and control systems met the contract specifications, including the need to be compatible with the City's Transitmaster system. In its July 28, 2011 letter, the City withdrew this objection. Soderholm contends that a subsequent exchange of correspondence could not cure this nonresponsiveness and in fact demonstrated that as of the middle of July 2011 National was still not clear on the equipment involved or its supplier.

Unlike some of its other bid protest claims, Soderholm does not claim here that National's materials were at odds with what was specified. Instead, the claim is that the submittal was incomplete and that National did not have a contract with an authorized supplier after the submission of the bid, indicating that even then National did not know what it was supposed to supply. However, on this aspect of the procurement, National

unambiguously agreed to supply “AS SPECIFIED,” so its bid was responsive when submitted. Problems with supply contracts after contract award are not responsiveness matters but contract performance matters which are outside the scope of this procurement protest.

Accordingly, Soderholm’s motion for summary judgment on this issue is denied and the City’s motion for summary judgment on this issue is granted.

Additional National Bid Protest Claim – National’s Fire Suppression System Did Not Meet the City’s Specifications

At page 11 of Soderholm’s Request for Administrative Hearing, Soderholm alleged that the fire suppression system specified in National’s bid did not meet the RFB specifications. However, this issue was not set forth in Soderholm’s bid protest letter of June 30, 2011.

In its motion for summary judgment, the City pointed out Soderholm’s omission. Soderholm’s failure to first present this claim to the City means that there is no jurisdiction under HRS §103D-709(a) to hear this claim in the present proceeding. Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-2 and PCX-2011-3 (Consolidated Cases) (June 6, 2011) at pages 38-39.

Accordingly, Soderholm’s motion for summary judgment on this issue is denied and the City’s motion for summary judgment on this issue is granted.

IV. DECISION

For the reasons stated herein, it is hereby ordered as follows:

A. Soderholm's Motion for Summary Judgment is granted in part and denied in part.

1. Soderholm's motion with respect to Soderholm Bid Protest Claims Nos. 1, 2, 15, and the claim that National's fire suppression system did not meet the City's specifications is denied.

2. Soderholm's motion with respect to Soderholm Bid Protest Claim No. 4 remains under advisement.

3. Soderholm's motion with respect to Soderholm Bid Protest Claim No. 9(a) (Total GVWR of 14,050 pounds versus 14,500 pounds) is denied.

4. Soderholm's motion with respect to Soderholm Bid Protest claim No. 9(b) (Per person/driver and per wheelchair weights) established that National's bid did not conform to the RFB specification but did not establish that this nonconformity was material. Accordingly, the motion is denied, and the issue of materiality will need to be determined at the evidentiary hearing presently scheduled for November 28, 2011.

5. Soderholm's motion with respect to Soderholm Bid Protest Claims Nos. 12 and 13 is granted.

6. Soderholm's motion with respect to Soderholm Bid Protest Claim No. 14 established that National's bid did not conform to the RFB specifications but did not establish that this nonconformity was material. Accordingly, the motion is denied, and the issue of materiality will need to be determined at the evidentiary hearing presently scheduled for November 28, 2011.

B. The City's Motion for Summary Judgment is granted in part and denied in part.

1. The City's motion with respect to Soderholm Bid Protest Claims Nos. 1, 2, and 15 is granted, and those claims are dismissed.

2. The City's motion with respect to Soderholm's claim that the fire suppression system set forth in National's bid did not meet the specifications in the RFB is granted, and that claim is dismissed.

3. The City's motion with respect to Soderholm's Bid Protest Claims Nos. 3, 4, 5, and 6 remains under advisement.

4. The City's motion with respect to Soderholm's Bid Protest Claim No. 9(a) (Total GVWR of 14,050 pounds versus 14,500 pounds) is granted, and that claim is dismissed.

5. The City's motion with respect to Soderholm's Bid Protest Claim No. 9(b) (Per person/driver and per wheelchair weights) is denied.

6. The City's motion with respect to Soderholm's Bid Protest Claims No. 12, 13, and 14 is denied.

C. Soderholm has withdrawn the following claims and those claims are hereby dismissed:

1. Soderholm Bid Protest Claims Nos. 7, 8, 10, and 11.

2. Soderholm's claim that the wheelbase of the vehicles set forth in National's bid did not meet the specifications in the RFB.

3. Soderholm's claim that National's bid listed specifications for nine different models.

4. Soderholm's claim that National's bid specifies fixed regular straight back seats.

OCT 27 2011

DATED: Honolulu, Hawai'i, _____.



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



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2011 DEC -1 A 9:42

HEARINGS OFFICE

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

In the Matter of)	PCH-2011-10
)	
SODERHOLM SALES AND LEASING, INC.)	ORDER GRANTING IN PART CITY AND COUNTY OF HONOLULU, DEPARTMENT OF BUDGET AND FISCAL SERVICES' MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING IN PART NATIONAL BUS SALES & LEASING, INC.'S MOTION FOR SUMMARY JUDGMENT; ORDER DENYING IN PART SODERHOLM SALES AND LEASING, INC.'S MOTION FOR SUMMARY JUDGMENT
)	
Petitioner,)	
)	
vs.)	
)	
CITY AND COUNTY OF HONOLULU, DEPARTMENT OF BUDGET AND FISCAL SERVICES,)	
)	
Respondent.)	
)	
and)	Hearing Date: November 28, 2011
)	
NATIONAL BUS SALES & LEASING, INC.)	Senior Hearings Officer: David H. Karlen
)	
Intervenor)	
)	
)	

**ORDER GRANTING IN PART CITY AND COUNTY OF HONOLULU,
DEPARTMENT OF BUDGET AND FISCAL SERVICES' MOTION FOR
SUMMARY JUDGMENT; ORDER GRANTING IN PART NATIONAL BUS SALES
& LEASING, INC.'S MOTION FOR SUMMARY JUDGMENT; ORDER DENYING
IN PART SODERHOLM SALES AND LEASING, INC.'S MOTION FOR SUMMARY
JUDGMENT**

EXHIBIT B

I. INTRODUCTION

On October 14, 2011, Petitioner Soderholm Sales and Leasing, Inc. (“Soderholm”) filed its Motion for Summary Judgment in this matter. On October 14, 2011, Respondent City and County of Honolulu (“City”) filed its Motion for Summary Judgment. On October 18, 2011, Intervenor National Bus Sales & Leasing, Inc. (“National”) filed its Joinder in the City’s Motion for Summary Judgment. In addition, on October 21, 2011, National filed its own Motion for Summary Judgment.

Oral argument on Soderholm’s and the City’s motions was held on October 21, 2011. National’s Motion was not argued at that time. During the course of the argument, Soderholm withdrew certain claims, the Hearings Officer orally granted portions of the City’s Motion, and the Hearings Officer took under advisement Soderholm’s Motion and the remainder of the City’s Motion. A written Order Granting in Part and Denying in Part Soderholm Sales and Leasing, Inc.’s Motion for Summary Judgment; Order Granting in Part and Denying in Part City and County of Honolulu, Department of Budget and Fiscal Services’ Motion for Summary Judgment was filed on October 27, 2011.

The Order of October 27, 2011 took the City’ Motion with respect to Soderholm Bid Protest Claims Nos. 3, 5, and 6 under advisement. The Order of October 27, 2011 also took the City’s Motion and Soderholm’s Motion with respect to Soderholm Bid Protest Claim No. 4 under advisement.

Soderholm filed its opposition to National’s Motion for Summary Judgment on November 4, 2011. The matter then came on for further hearing on National’s Motion and on the issues taken under advisement on November 28, 2011.

II. SODERHOLM WITHDRAWS BID PROTEST CLAIMS NOS. 3, 5, AND 6

In its opposition memorandum filed on November 4, 2011, Soderholm withdrew its Bid Protest Claims Nos. 3, 5, and 6. Accordingly, the City's Motion for Summary Judgment and National's Motion for Summary Judgment with respect to these three (3) claims are moot.

III. FINDINGS OF FACT

1. In its protest letter of June 30, 2011, at page 2, Soderholm asserted as its Bid Protest Item No. 4:

National is not registered with the DCAA by the State as required by the bid and State law. In fact they are delinquent. If the bid was so important to National, the least they could have done was get registered properly with the DCCA. This can't be cured later.

2. The City's response of September 29, 2011 to Soderholm's protest letter stated that compliance documents (such as a Certificate of Good Standing from the DCCA) were required to be submitted upon award, not at the time of bid submittal. The City then had two responses to Soderholm's Bid Protest Item No. 4: (a) Any challenge to the contents of the solicitation based on a claim that the solicitation should have required submittal of the compliance document at the time of bid submittal was untimely under HRS Section 103D-701(a); and (2) submittal of compliance documents at the time of bid submittal was not required--they were to be produced at the time of award (and National had done so on June 30, 2011).

3. Soderholm's Request for Hearing filed October 5, 2011 asserted at page 12 that National had made a material misrepresentation in response to that portion of the Proposal calling for bidders to represent that they were either a Hawaii business or a non-

Hawaii business registered to do business in the State of Hawaii. National asserted that it had the latter status but in fact did not obtain that status until three days after its bid was submitted. Soderholm asserted that National's bid was therefore "not in material conformity with the requirements of the RFB at the time it submitted its bid." This was the first time Soderholm identified this page of the Proposal as the basis for its protest and the first time it asserted it was claiming nonresponsiveness (i.e., "not in material conformity with the requirements of the RFB").

4. On page 3 of the Proposal, bidders had to mark one of two boxes after the statement "The undersigned represents: (Mark one box only)"

- A **Hawaii business** incorporated or organized under the laws of the State of Hawaii;

OR

- A Compliant **Non-Hawaii business** not incorporated or organized under the laws of the State of Hawaii, but registered at the State of Hawaii Department of Commerce and Consumer Affairs Business Registration Division to do business in the State of Hawaii. (Emphasis in original)

5. National marked the box for non-Hawaii businesses.

6. Contrary to the statement for which National marked the box, it was not registered at the State of Hawaii Department of Commerce and Consumer Affairs Business Registration Division to do business in the State of Hawaii at the time National's bid was submitted.

IV. CONCLUSIONS OF LAW

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

2. Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving parties are 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).

3. The City asserts that the misrepresentation issue raised in Soderholm's Request for Hearing is not the same as Soderholm's Bid Protest Item No. 4 that Soderholm asserted in its bid protest letter of June 30, 2011.

4. Pursuant to HRS §103D-709(h), this hearing is limited to decisions about the determinations of the City and County's chief procurement officer, and the chief procurement officer can only make determinations about complaints brought before that officer.

5. The minimum requirements for a written procurement protest include a statement of reasons for the protest. HAR §§3-126-3(d) and 3-126-4(a). Pursuant to these regulations, the statement of reasons should put the procuring agency on sufficient notice of the reasons for the protest.

6. Soderholm's Bid Protest Item No. 4 did not put the City on notice that Soderholm was claiming there was a misrepresentation when a box was incorrectly checked on page 3 of the Proposal. Its protest letter of June 30, 2011 did not mention the Proposal, any specific page of the Proposal, or putting check marks in any of the boxes. In addition, its protest letter did not indicate that an issue of nonresponsiveness ("not in material conformity with the requirements of the RFB" as was stated later in the Request for Hearing) was involved.

7. The City reasonably interpreted Soderholm's Bid Protest Item No. 4 in its bid protest letter of June 30, 2011 to be a complaint about the lack of registration with the DCAA and reasonably responded to such a claim by, among other things, stating that it was a matter of responsibility that could (and was) satisfied after the bids were opened.

8. The City was not required to read through all of the project bidding documents and discover or discern that Soderholm's bid protest letter of June 30, 2011 was actually referring to page 3 of National's proposal, especially when Soderholm could have easily pointed out or specifically referred to that page in its bid protest letter.

9. Soderholm's bid protest letter of June 30, 2011 cannot be reasonably read to raise an issue of nonresponsiveness with respect to Soderholm's Bid Protest Item No. 4.

10. With respect to Bid Protest Item No. 4, Soderholm has failed to properly exhaust its administrative remedies, and there is no jurisdiction to consider Bid Protest Item No. 4 in these proceedings.

11. In its motion for summary judgment filed October 21, 2011, after the hearing on Soderholm's and the City's motions had concluded, National joined in the City's motion. National also asserted at page 23 of its Motion that Soderholm had waived its original Bid

Protest Item No. 4 because it failed to assert it in its Request for Administrative Hearing filed October 5, 2011. National is referring here to Soderholm's Bid Protest Claim No. 4 as asserted in its bid protest letter of June 30, 2011. National is correct in that the claim as stated in the letter of June 30, 2011 is not repeated in Soderholm's request for hearing. Since the original version of Bid Protest Claim No. 4 is not being advocated in the present proceeding, National makes a point here which supports the discussion above concerning failure to exhaust administrative remedies, but it is not a separate argument for summary judgment against Soderholm's present version of Bid Protest Claim No. 4.

IV. DECISION

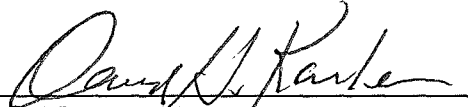
Soderholm has withdrawn the following claims and those claims are hereby dismissed: Soderholm Bid Protest Claims Nos. 3, 5, and 6.

For the reasons set forth herein, it is hereby ordered that the City and County's Motion for Summary Judgment with respect to Soderholm's Bid Protest Item No. 4 is granted.

It is further ordered that National's Motion for Summary Judgment with respect to Soderholm's Bid Protest Item No. 4 is granted.

It is further ordered that Soderholm's Motion for Summary Judgment with respect to Soderholm's Bid Protest Item No. 4 is denied.

DATED: Honolulu, Hawai'i, DEC - 2 2011.


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