DEPT. OF COMMERCE AND CONSUMER AFFAIRS
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HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAI'I

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| In the Matter of<br><br>BOMBARDIER TRANSPORTATION (HOLDINGS) USA INC.,<br><br>Petitioner,<br>vs.<br><br>DIRECTOR, DEPARTMENT OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,<br><br>Respondent.<br><br>and<br><br>ANSALDO HONOLULU JV,<br><br>Intervenor | PCX-2011-4<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, and DECISION<br><br>**Hearing Dates:**<br>July 8 and 19, 2011<br><br>**Hearing Location:**<br>Office of Administrative Hearings<br>Department of Commerce and Consumer Affairs<br>335 Merchant Street, Room 100<br>Honolulu, Hawai'i 96813<br><br>**Hearings Officer:** David H. Karlen |

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

## I. INTRODUCTION

On June 29, 2011, Petitioner Bombardier Transportation (Holdings) USA, Inc. ("Bombardier") filed its Request for Administrative Hearing ("RFAH ") in this matter, which Request was assigned case number PCX-2011-4.

On July 1, 2011, Sumitomo Corporation of America filed a Motion to Intervene in this matter. At the pre-hearing conference on July 8, 2011, the Hearings Officer issued an

oral ruling denying said Motion. A formal written Order denying this motion to intervene was included as part of the Pre-Hearing Order in this matter filed July 8, 2011.

On July 7, 2011, Respondent Director, Department of Budget and Fiscal Services, City and County of Honolulu ("City") filed its Motion for Summary Judgment. On July 13, 2011, Intervenor Ansaldo Honolulu JV ("Ansaldo") filed a Joinder in the City's Motion for Summary Judgment.

On July 7, 2011, Ansaldo filed its Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, Motion for Summary Judgment. On July 14, 2011, the City filed a Joinder in Ansaldo's Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, Motion for Summary Judgment.

On July 7, 2011, Petitioner Bombardier filed its Motion for Summary Judgment.

On July 11, 2011, Bombardier filed an ex parte motion to amend the caption in this matter in order to identify the Respondent as "Director, Department of Budget and Fiscal Services, City and County of Honolulu." The RFAH incorrectly identified the Respondent as an official with the State of Hawaii. The same request was made on page 2 of Bombardier's Memorandum in Opposition to the City's Motion for Summary Judgment, filed July 14, 2011.

Oral argument on all motions was held on July 19, 2011. At the beginning of the hearing, the Hearings Officer orally granted Bombardier's motion to amend the caption. At the conclusion of the hearing, the Hearings Officer orally granted the City's Motion for Summary Judgment, granted Ansaldo's Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, Motion for Summary Judgment, and denied Bombardier's Motion for Summary Judgment. This Decision, based on the record as of the conclusion of oral argument on July

20, 2011, more fully sets forth those rulings and stands as the formal order with respect to all of the aforesaid motions.

As a result of the rulings on the summary judgment motions, all issues in the case wee resolved, and there was no need for an evidentiary hearing.

## II. FINDINGS OF FACT

1. On April 9, 2009, the City issued Part 1 of its Request for Proposal ("RFP") No. RFP-DTS-198413, CT-DTS-1100194), Core Systems Design-Build-Operate-Maintain Contract for the Honolulu High-Capacity Transit Corridor Project ("Project"). The purpose of RFP Part 1 was to select priority-listed offerors deemed qualified to proceed with RFP Part 2.

2. The City determined that there were to be three priority-listed offerors: Ansaldo, Bombardier, and Sumitomo Corporation of America ("Sumitomo"). On August 17, 2009, RFP Part 2 was issued to those three priority-listed offerors.

3. RFP Part 2 incorporated a provision of the General Conditions for Design Build ("GCDB"), identified as GCDB-2.13. addressing the liability of the City under the proposed contract, which read:

> 2.13 Liability. City's payment obligations under this contract shall be limited to the payment or services under this contract. Notwithstanding any other provisions of this contract, in no event shall City be liable regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but not limited to, lost profits, arising out of or in connection with this contract or the services performed in connection with this contract.

4. On November 4, 2009, a Request for Information ("RFI") was received by the City from Bombardier that requested changes to GCDB-2.13. On January 25, 2010 and again on February 10, 2010 and February 25, 2010, similar RFIs were received by the City from

Sumitomo. As a result of these RFIs, the City issued Addendum No. 26 to the RFP on April 14, 2010. Addendum No. 26 contained the original Bombardier question in its RFI of November 4, 2009, and a response thereto:

> QUESTION #2
> Part 3, GCBD, Section 2.13, Liability: The exclusion of liability for consequential and special damages should be reciprocal. The CSC [Core System Contractor] cannot accept liability for consequential, indirect or incidental damages. Further, the Contract should include a reasonable limitation of overall liability on the part of the CSC. Please include these necessary provisions in the SP section.
>
> RESPONSE #2
> GCDB Section 2.13 will be revised in a subsequent addendum by being deleted in its entirety and replaced with SP-2.13, which will provide as follows:
>
> (a) The City's obligations under this Contract shall be limited to the payment for services under this Contract.
>
> (b) The CSC's liability to the City for damages arising out of Work performed under the Design-build component of the Contract shall be limited to the total Contract Value of the Design-build component of the Contract, provided that excluded from the limitation of liability will be any liability, including defense costs, for any type of damage or loss to the extent it is covered by proceeds of insurance required under this Contract. Further, this limitation of liability shall not apply with regard to fraud, criminal conduct, bad faith, gross negligence, intentional misconduct, recklessness on the part of the CSC, its subcontractor at any tier, and CSC's agents; the CSC's obligations to pay liquidated damages under the Contract; the CSC's indemnities set forth in this Contract, including but not limited to SP-2.14; or losses arising out of the CSC's release of hazardous material. Further, this limitation of liability shall not apply if the required insurance requirements set forth in the Contract Documents are not in place and effective during the term of this Contract.

5. This change was then formally incorporated into RFP Part 2 by means of Addendum No. 31 to the RFP issued on May 6, 2010. There were only slight differences (which are not relevant here) between the wording of paragraph (b) of SP-2.13 in Addendum No. 26 and the language of SP-2.13 in Addendum No. 31.

6. On June 7, 2010, Bombardier submitted its RFP Part 2 Proposal to the City. Bombardier's RFP Part 2 proposal contained the following language:

> 2. Clarification: Reference SP 2.13(b)
>
> Bombardier assumes that the City has inadvertently excluded Contractor's indemnities from the overall cap on liability of total Contract Value set forth in SP 2.13(b). As expressed in the RFP, such exclusion would defeat the purpose of the provision as it would mean effectively that there was no overall cap on liability. Bombardier is basing its proposal on the assumption that the following language in SP 2.13(b) is deleted: "*Contractor's indemnities set forth in the Contract, including but not limited to SP 2.14*", and that the balance of the language in SP 13 [sic] remains as is. (Italics in original)

7. During its evaluation of the proposals submitted in response to RFP Part 2, the City's Evaluation Committee made the determination to conduct discussions and issued a call for best and final offers ("BAFOs").

8. At a September 22, 2010 informational meeting with the City, in which Bombardier participated, the issue of indemnification and the cap on liability was discussed. Bombardier argued that it believed the City should amend the language of SP-2.13 to eliminate the exception for indemnification liability and instead have a complete cap on potential liability.

9. During a teleconference between the City and Bombardier on October 27, 2010, the City warned Bombardier that a conditional proposal could be deemed non-responsive and unacceptable.

10. On November 4, 2010, the City issued a call for a first BAFO and also issued Addendum No. 41, which replaced SP-2.13(b) as follows:

**SP-2.13 LIABILITY**

**Chapter 2, Section 2.13 of the GCDB is amended by deleting the section in its entirety and substituting in lieu thereof the following:**

(a) The City's obligations under this Contract shall be limited to the payment for services under this Contract.

(b) The Core System Contractor's liability to the City for damages arising out of Work performed under the Design-Build component of the Contract shall be limited to the total Contract Value of the Design-Build component of the Contract provided that excluded from the cap limit will be any liability, including defense costs, for any type of damage or loss in excess of the Design-Build component Contract Amount to the extent it is covered by proceeds of insurance required under this Contract. This limitation of liability shall not apply with regard to fraud, criminal conduct, bad faith, gross negligence, intentional misconduct, or recklessness on the part of the Core System Contractor, its subcontractors at any tier, and the Core System Contractor's agents; the Core System Contractor's obligations to pay liquidated damages under this Contract, the Core System Contractor's indemnities set forth in this Contract, including but not limited to SP-2.14; or losses arising out of the Core System Contractor's release of hazardous materials. Furthermore, this limitation of liability shall not apply if the insurance requirements set forth in the Contract Documents are not in place and effective during the term of this Contract.

11. In issuing Addendum No. 41, the City reaffirmed that the language in SP-2.13 excluding indemnification claims from the liability cap in that provision was not inadvertent, but rather was the intention of the City.

12. On November 15, 2010, Bombardier submitted confidential comments on the RFP to the City, including comments with respect to SP-2.13(b). As to SP-2.13(b), Bombardier again criticized the provision and again requested that language it objected to be deleted, explaining that such language could not be accepted by Bombardier:

<u>CONFIDENTIAL COMMENT</u>

It is noted that in addition to many other 'carve-outs' from the 100% total Contract Value for overall liability, including insurance proceeds and LDs, the Core System Contractor's indemnities set forth in the Contract are carved out. Carving out the Core System Contractors' indemnities from

the overall cap would be unprecedented in our significant experience of global contracting in the rail industry. In the circumstances, it is requested that this wording be revised to delete reference to the Core System Contractor's indemnities from the carve-out, as this language could not be accepted. Note that, practically speaking, the indemnities that the City is probably concerned with are in any event covered by the mandatory insurance the Contractor will have in place, and the proceeds of insurance are carved out from the overall cap on liability, which achieves the City's result without introducing wording that the Contractor could not accept.

13. In its confidential comments to the City submitted by Bombardier on November 15, 2010, Bombardier had the following additional criticism of SP 2-13:

> CONFIDENTIAL COMMENT
>
> The language in the latter part of this sub-clause provides for very wide-ranging indemnification requirements including liability for every conceivable type of damage caused to a wide-ranging group of indemnities. Carved out of this wide-ranging indemnity is responsibility proximately caused by the City. While the Contractor is willing to provide an indemnity for damages caused by the Contractor, the clause does not take account of the fact that damage could well be caused by neither the Contractor nor the City, but by a third party. On the current wording of Clause SP 2.14(a), the Contractor would ostensibly be taking responsibility for such third-party negligence, which is not reasonable. Accordingly, please revise the wording to state that the Core-Systems Contractor shall be responsible for such damages "to the extent caused" by the Core Systems Contractor.

14. The City declined to respond to Bombardier's November 15, 2010 submission of confidential comments and informed Bombardier that no response to confidential requests for clarifications would be forthcoming.

15. Instead, on December 8, 2010, the City issued Addendum No. 44 to the RFP which contained the following response to questions regarding Sections SP-2.13 and 2.14.

> QUESTION #67
>
> SP-2.13
>
> The existence of a liability cap in SP-2.13(b) demonstrates it was not the City's intent to impose unlimited liability for ordinary Contract claims, except for specified exceptions (including under SP-2.14). However, SP-

2.14 does not state that its application is limited to third party claims against the City, nor does it state that it is not intended to be used for ordinary contract claims by the City. Since this has a material impact on pricing, please confirm or clarify that in connection with the above:

- The City does not intend to render the liability cap meaningless and provide a way to circumvent SP-2.13's limitation on liability for ordinary City contracts claims.
- The CSC indemnification obligation covers third party claims against the City, but SP-2.13(b)'s liability cap will apply to ordinary contract claims made by the City under the Contract, except where specifically excluded, such as those arising from fraud, gross negligence, or that are payable from insurance proceeds, all of which are subject to indemnification by the CSC.

We ask the City to consider changing "including without limitation, damages from personal injury, bodily injury...." in SP-2.14(a) to "for damages from personal injury, bodily injury ...." in order to address this issue more equitably and to be consistent with industry standard practice regarding indemnification.

**RESPONSE#67**

**No change will be made.**

* * *

QUESTION #70

GCDB Section 2.13

With respect to the issue of consequential damages, we have difficulty in providing the most advantageous pricing to the City because we have no means of determining what type of consequential damages the City may incur at some future date, and we do not foresee any of these damages at this time. Accordingly, we propose that both parties agree to waive these types of damages with a reciprocal waiver such as:

"Both parties to the contract hereby agree to waive any consequential or special damages arising out of the Contract."

**RESPONSE #70**

**GCDB Section 2.13 has been deleted in its entirety and replaced with SP-2.13. No change will be made.** (Underlining and bolding in original)

16. On January 18, 2011, the three priority offerors submitted their responses to the City's first request for BAFOs ("BAFO #1"). The City proceeded to review the technical responses before opening the price proposal portions of the BAFOs. Before reviewing those

price proposal portions of the responses to the first request for BAFOs, the City decided to call for another BAFO ("BAFO # 2").

17. On February 9, 2011, the City issued Addendum No. 46 to the RFP which included a second call for BAFOs.

18. On February 24, 2011, Bombardier's BAFO #2 was received by the City. The Price Proposal portion of Bombardier's BAFO #2 contained the following language.

> 2. Clarification: Reference SP 2.13(b)
> We note that the City has excluded Contractor's indemnities from the overall cap on liability of total Contract Value set forth in SP 2.13(b). As expressed in Addendum #44, Question/Response #67, such exclusion would serve to defeat the purpose of the provision as it would mean effectively that there was no overall cap on liability. Bombardier is basing its proposal on the assumption that the following language in SP 13(b) is deleted: "Contractor's indemnities set forth in the Contract, including but not limited to SP 2.14", and that the balance of the language in SP 13 remains as is.

19. Bombardier's BAFO #1 price proposal contained the same language, but that part of Bombardier's BAFO #1 was not reviewed by the City's Evaluation Committee.

20. On March 14, 2011, the City's Evaluation Committee recommended that the award be made to Ansaldo.

21. Section 2.5, COMPLIANT PROPOSAL, of the Instructions to Priority-Limited Offerors, incorporated into the RFP, states in relevant part:

> The Priority-Listed Offeror shall submit a Proposal that provides all the information required by the Call for BAFOs. If the Proposal does not fully comply with the instructions and rules contained in the Call for BAFOs, it may be considered non-responsive.
>
> . . .
>
> Proposals may be considered non-responsive and may be rejected for, but not limited to, any of the following reasons:

> A) If the Proposal is submitted in a format other than that furnished or specified under the Call for BAFOs; if it is not properly signed; if Exhibit 2 is altered except as contemplated herein; or if any part thereof is deleted from the Proposal.
>
> . . .
>
> B) If the Proposal is illegible or contains any omission, erasures, alterations, or items not called for in the Call for BAFOs or contains unauthorized additions, conditional Proposals, or other unacceptable irregularities;
>
> . . .
>
> F) Any other reason the City determines the Proposal to be non-responsive.

22. On March 21, 2011, Bombardier was advised by the City that its BAFO #2 proposal was rejected. Because of Bombardier's deletion of language from SP-2.13, Bombardier was not a responsive offeror because Bombardier's BAFO #2 did not conform in all material respects to the RFP and because its BAFO #2 was a conditional proposal not authorized by the Hawaii Administrative Rules and the terms of the RFP.

23. On March 21, 2011, the City awarded the Contract to Ansaldo.

24. By letter to the City dated April 11, 2011, Bombardier protested the award to Ansaldo. In that letter, at page 26, Bombardier stated:

> Under these circumstances, Bombardier reasonably relied upon the representations by City officials that the City intended to afford a contract cap on liability. If that was and remains the City's intention, Bombardier's BAFO #2 did not assert a condition that differed from the contract contemplated in the RFP. Consequently, <u>Bombardier's assumption that the City would correct the indemnification clause terms to accurately and clearly state the intended cap is neither material nor confidential</u>. (Emphasis supplied)
>
> Bombardier recognizes the City's authority to refine, clarify and restate its requirements through the procurement process. However, the City must define with certainty the terms it intends to apply in the contract. If it intends to cap liability in the indemnification clause as City officials

informed Bombardier, then the City had no valid legal basis to reject Bombardier's BAFO #2.

In the debriefing, City officials confirmed that the RFP indemnification clause accurately expresses the City's intended contract clause. If that is true, the City failed to engage in meaningful discussions for the reasons already stated. However, if further information is developed in the course of this protest to show the City does intend to provide a cap on liability, Bombardier will supplement this protest to show disqualification of Bombardier's BAFO #2 was improper because the statement of a language change to establish the intended cap is not a condition on the offer.

25. In its RFAH filed June 29, 2011, at page 6, Bombardier alleges:

The City was fully aware that Bombardier did not consider its proposal to be conditioned by its efforts to harmonize Sections SP 2.13 and SP 2.14. The City was also aware that Bombardier's concerns focused solely on ensuring the contract terms accurately reflected the intent of the City's own officials expressed as to the creation of structured limitations on liability.

Under the circumstances, the City knew throughout the solicitation process that Bombardier's questions were not intended as a condition on contract award, and were instead intended to ensure that the ultimate contract stated what the City said it intended the Contract terms to be.

26. In its RFAH filed June 29, 2011, at page 10, Bombardier seeks a ruling in this proceeding that it be allowed to revise its BAFO #2 with regard to the part containing the disqualifying conditional proposal and thereafter have the City complete evaluation of Bombardier's BAFO #2

## III. 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.

## A. BOMBARDIER'S PROTEST OF THE LANGUAGE IN SP-2.13 IS UNTIMELY UNDER HRS §103D-701(a)

2. Part of Bombardier's protest herein is a protest of the language used in SP-2.13 of the RFP. Bombardier is asserting that Bombardier's alternate version of SP-2.13 should be used because it allegedly reflects the City's actual intent, or what should be the City's actual intent, concerning a cap on liability. To that end, Bombardier's protest letter advocated that the City "correct the indemnification clause terms."

3. Under the terms of HRS §103D-701(a), Bombardier's protest of the language used in SP-2.13 was required to be submitted within five working days after Bombardier knew or should have known of the alleged problems with that language and in any event no later than the date set for the submission of BAFO #2.

4. The terms of SP 2-13 were finalized no later than the issuance of Addendum No. 44 on December 8, 2010. Bombardier submitted its BAFO #1 on January 18, 2011 and its BAFO #2 on February 24, 2011. To the extent that Bombardier's protest concerns the language to be used to accurately reflect what Bombardier asserts is, or should be, the City's actual intent, by any measure Bombardier's protest submitted on April 11, 2011 was untimely under HRS §103D-701(a).

## B. THE CITY PROPERLY REJECTED BOMBARDIER'S PROPOSAL BECAUSE IT WAS A CONDITIONAL PROPOSAL

5. A conditional response to an RFP is defined as "any offer which is conditioned upon receiving a contract other than as provided for in the solicitation." HAR §3-122-6. That regulation further requires that conditional offers must not be accepted: "[a conditional offer] shall be deemed nonresponsive and not acceptable."

6. Bombardier asserts that the concept of responsiveness as automatically disqualifying an offeror is not pertinent to this RFP because this is not a situation involving competitive bids. As set forth in more detail in the Order Granting in Part and Denying in Part Department of Transportation's Motion to Dismiss Petitioners' Request for Hearing, Exhibit "A" to the Decision of In the Matter of Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-2; In the Matter of Goodfellow Bros., Inc. v. Department of Transportation, State of Hawaii, PCX-2011-3 (Consolidated), a responsiveness requirement does not automatically apply to a procurement through competitive sealed proposals. Instead, proposals from responsible offerors are selected on the basis of price and the evaluation criteria in the RFP. Nevertheless, as that Order further sets forth, the evaluation criteria in the RFP can themselves apply the concept of responsiveness or non-responsiveness as an evaluative factor in the procurement.[1]

7. The concept of responsiveness is applicable to this RFP in the manner set forth in Section 2.5, entitled "Compliant Proposal" of the Instructions to Priority-Listed Offerors that are part of the RFP. Under that provision, the concept of responsiveness is incorporated into the RFP's evaluation criteria. Among other things, it provides that a conditional proposal may be considered non-responsive and may be rejected by the City.

8. The definition of a conditional response in HAR §3-122-6 does not depend upon responsiveness being an automatic disqualification as discussed in another part that regulation.

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[1] The Hearings Officer notes that Bombardier itself heavily relies an alleged duty of the City to "assure full understanding of and responsiveness to, the solicitation requirements." See HRS 103D-303(f). (Emphasis in original). Bombardier's Memorandum in Opposition to the City's Motion at page 22.

9. Bombardier's BAFO #2 offered to accept a contract on terms not in the RFP and did not offer to accept a contract on the terms in the RFP. It was a conditional response. It was also a conditional proposal within the meaning of Section 2.5 of the Instructions to Priority-Listed Offerors.

10. Under the terms of the aforesaid Section 2.5, the City was authorized to reject Bombardier's proposal because it was a conditional proposal and because Bombardier's proposal deleted a portion of the RFP. The City did not have to further justify rejecting this proposal on the basis of nonresponsiveness.

11. Bombardier cannot claim that its proposal provided the best value to the City of all three proposals because Bombardier's proposal was not made on the same terms as the other two proposals.[2] Facing a potentially higher indemnification liability than Bombardier was willing to accept, the other offerors took that potentially greater liability into account in the total price of their respective proposals. Since, as Bombardier asserts, the absence of a cap on indemnification liability is a major consideration, Bombardier's proposal based on a cap on liability naturally leads to a conclusion that Bombardier could submit a lower price than the other offerors who were not proceeding under such an assumption. Under Bombardier's theory of the case, Bombardier could submit a conditional proposal, find out the prices of the other offerors, and then decide if it wanted to waive its objection to the language in SP 2.13, or negotiate a change in that language as it advocated, in order to obtain the award. This type of manipulation of the system would impermissibly and detrimentally

[2] Bombardier's BAFO #2 was not scored. The Hearings Officer can therefor not accept Bombardier's assumption that a full evaluation and scoring of Bombardier's BAFO #2 would result in a superior technical ranking as compared to the other proposals.

impact the other offerors who submitted unconditional proposals and undermine the integrity of the procurement process.

12. Whether or not Bombardier's protest is a challenge to the language of the RFP, Bombardier's proposal was a non-responsive conditional proposal. The City's decision to reject Bombardier's proposal was not clearly erroneous, arbitrary, capricious, or contrary to law.

### C. THE CITY DID NOT FAIL IN ANY DUTY TO CONDUCT MEANINGFUL DISCUSSIONS WITH BOMBARDIER

13. The Hearing Officer does not agree with any implication in Bombardier's argument that HAR 3-122-97(b), in and of itself, required the City to give Bombardier an opportunity to revise its BAFO #2.

14. In its initial response to RFP Part 2, Bombardier submitted a conditional proposal. Whether or not the City was required to provide Bombardier with an opportunity to revise that proposal is a moot question. Bombardier thereafter had a substantial amount of time in which to make another proposal that omitted the condition contained in its response to RFP Part 2.

15. Any duty to engage in meaningful discussions does not mean that the purchasing agency must describe all deficiencies in minute detail. The question is whether the agency imparted sufficient information to the offeror to afford the offeror a fair and reasonable opportunity, in the context of the procurement, to identify and correct the deficiencies in its proposal. Pauli & Griffin, B-234191, 1989 WL 240786 (Comp. Gen.) (May 17, 1989).

16. In connection with any duty of the procuring agency to engage in meaningful discussions, the agency can satisfy that duty if an addendum or amendment to the RFP leads the offeror into those areas of its proposal requiring correction. Pauli & Griffin, supra; Carahsoft v. U.S., 86 Fed. Cl. 325, 342-43 (Ct. Fed. Cl. 2009).

17. If discussions demonstrate a need for any substantial clarification or change in the RFP, the RFP must be amended by an addendum to incorporate the clarification or change. HAR §3-122-53(d)(2). As a result of the discussions with Bombardier that took place after Bombardier's first proposal in response to RFP Part 2 and before its BAFO #1, the City refused to make the changes to SP-2.13 that Bombardier privately advocated and instead issued Addenda Nos. 41 and 44 unequivocally stating there would be no change to SP-2.13, contrary to Bombardier's desires. The City thereby clearly stated to all offerors that it saw no need for any clarification or change in the language of SP-2.13.

18. Bombardier claims that a City representative stated in a discussion held September 22, 2010, that there appeared to have been a mistake in the language of SP-2.13. Even if that statement was made, it is of no moment because the City subsequently issued Addendum No. 44. That Addendum made it clear that there was no mistake in the language of SP-2.13. Further, the terms of its BAFO #1 and BAFO #2 taking exception to SP-2.13 show that at those points Bombardier knew there was no mistake in the language of SP-2.13. In its BAFO #1 and BAFO #2, Bombardier failed to assert there was an error or mistake in the language as it had asserted in its earlier response to RFP Part 2.

19. In the context of this procurement (see Pauli & Griffin, supra), the issuance of written Addenda Nos. 26, 31, 41, and 44 by the City was more than sufficient to put

Bombardier on notice that any conditions with regard to the language SP-2.13 would be a deficiency in any future Bombardier proposals.

20. Bombardier has not cited any authority wherein a large sophisticated business entity holding itself out as capable of understanding and responding to a technically complex RFP deliberately and repeatedly submitted proposals that knowingly and admittedly failed to comply with specifically identified material provisions of the RFP and then successfully claimed that the procuring agency had a duty to save the offeror's proposal from the offeror's own knowing and deliberate noncompliance with the RFP. Under the circumstances of this case, after the issuance of Addendum No. 44 there was no duty under Hawaii law on the part of the City to conduct further discussions on Bombardier's refusal to accept the language of SP-2.13.

21. 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 Bombardier. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

22. At the hearing on the motions referred to herein, there was a disagreement between the parties as to what was specifically said during the teleconference between the City and Bombardier on October 27, 2010.

23. Exhibit J to Bombardier's Memorandum in Opposition to the motions by the City and Ansaldo is asserted by means of the Declaration of Bombardier Vice-President

Andrew S. Robbins to be a true and correct copy of the transcript of a tape recording of that teleconference. At page 4 of Exhibit J, the transcript recites that the City states "your [referring to Bombardier] offer which is conditioned upon receiving a contract other than as provided for in the solicitation could be deemed non-responsive and not acceptable per HAR 3 122 6. In other words, if you qualify your proposal it could be deemed as non-responsive and not acceptable." Despite the absence of "SP-2.13" in that language, that is a specific reference to the Bombardier condition in its proposal pertaining to SP-2.13 since no party has alleged and identified any other condition in that proposal. Bombardier's attempt to explain this reference away at page 12 of its Memorandum in Opposition is unconvincing.

24. At the close of argument on July 20, 2011, counsel for Bombardier asserted for the first time that Exhibit J was not an accurate transcription and that another transcript had a different version of these words. According to Bombardier's counsel, the reference on page 4 of Exhibit J was more generic, referring to "any offer which is conditioned" rather than "your [Bombardier] offer which is conditioned." Hearing transcript, July 20, 2011, page 82, lines 12-21. Counsel for the City, on the other hand, asserted that Exhibit J was indeed accurate.

25. Although the second transcript was in Bombardier's possession prior to the hearing, Bombardier neither provided a copy of this second transcript nor sought a continuance to provide that transcript.

26. In any event, any issue of disputed fact regarding the statement at the teleconference of October 27, 2010 is not material and does not preclude an award of summary judgment to the City and Ansaldo. Even under Bombardier's undocumented version of the City's statement, there was a clear warning that any future conditional proposal

could be deemed as non-responsive and not acceptable. Even assuming for argument purposes that the City was under a duty to provide a meaningful discussion in which it tried to inform Bombardier to not repeatedly submit conditional offers because of the potential adverse consequences of such conditional offers, the generic version of the teleconference statement advocated by Bombardier plus the subsequently issued Addendum No. 44 were more than sufficient to let a sophisticated contractor such as Bombardier know that the RFP meant what it said about the risks of submitting conditional offers in the face of the City's refusal to change the language of SP 2.13.

## IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds:

a. Bombardier's motion to amend the caption in this matter in order to identify the Respondent as "Director, Department of Budget and Fiscal Services, City and County of Honolulu" is granted.

b. The City and County of Honolulu's Motion for Summary Judgment is granted.

c. Ansaldo Honolulu JV's Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, Motion for Summary Judgment is granted.

d. Bombardier Transportation (Holdings) USA Inc.'s Motion for Summary Judgment is denied.

e. To the extent that Bombardier advocates a change in the terms of SP-2.13 in its protest letter, Bombardier's procurement protest was not timely under HRS §103D-701(a) and the City's dismissal of its procurement protest is affirmed.

f. In addition, as set forth in detail above, Sumitomo has failed to prove by a preponderance of the evidence that the City's denial of Sumitomo's procurement protest was improper and not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation. Accordingly, the City's denial of Sumitomo's procurement protests is affirmed.

g. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

h. The cash or protest bond of Bombardier shall be deposited into the general fund.

DATED: Honolulu, Hawai`i, AUG - 5 2011.

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